IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

PAUL J. MANAFORT, JR.,

Defendant.

No. 17-cr-201-1 (ABJ)

GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Regulations and Administrative Materials

Other Authorities

INTRODUCTION

The United States of America, by and through Special Counsel Robert S. Mueller, III, files this response to defendant Paul J. Manafort, Jr.'s motion (Doc. 235) to dismiss the superseding indictment. Manafort challenges the validity of the Acting Attorney General's order appointing the Special Counsel and defining the Special Counsel's jurisdiction (Office of the Deputy Att'y Gen., Order No. 3915-2017, *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters*, May 17, 2017) ("Appointment Order") (Attachment A); further argues that this prosecution falls outside the scope of the Special Counsel's jurisdiction even if the Appointment Order is valid; and finally claims that the remedy for these purported defects is to dismiss the indictment for the Court's asserted lack of jurisdiction and for the government's asserted violation of the Federal Rules of Criminal Procedure. Manafort's contentions lack merit.

The central thesis of Manafort's motion is that the Acting Attorney General's appointment of the Special Counsel violates the Department of Justice's Special Counsel regulations by failing to confine the scope of the Special Counsel's jurisdiction. The result, Manafort asserts, is a lack of political accountability for this prosecution. But the Appointment Order validly defines the Special Counsel's jurisdiction, and the indictment in this case falls well within the Special Counsel's authority. The Acting Attorney General has specifically confirmed to the Special Counsel in an August 2, 2017 memorandum that allegations that Manafort committed a "crime or crimes arising out of payments [Manafort] received from the Ukrainian government before and during the tenure of President Viktor Yanukovych * * * were within the scope of the [Special Counsel's] Investigation at the time of [his] Appointment and are within the scope of the [Appointment] Order." *See* pp. 8-9, *infra*. Those allegations supply the basis of the Superseding Indictment: Manafort is charged with conspiracy against the United States, money-laundering

conspiracy, acting as an unregistered foreign agent, and false-statements violations all stemming from his receipt of payments from the Ukrainian government based on his work for former President Yanukovych, Yanukovych's political party, and Ukraine itself. No political-accountability question exists here—as the Acting Attorney General has confirmed, he "know[s] what [the Special Counsel]'s doing"; is "properly exercising [his] oversight responsibilities"; and can provide "assur[ance] * * * that the special counsel is conducting himself consistently with [the Acting Attorney General's] understanding of the scope of his investigation." Testimony of Deputy Attorney General Rod J. Rosenstein, H. Comm. on the Judic., *Hearing on the Justice Department's Investigation of Russia's Interference in the 2016 Presidential Election,* at 28 (Dec. 13, 2017) (Attachment B) ("*Rosenstein Testimony*").

Manafort's specific objections to the Appointment Order and the Special Counsel's actions under it are equally unsound. The Special Counsel regulations do not forbid the Acting Attorney General from authorizing the Special Counsel to investigate matters that "arose or may arise directly from the investigation." Appointment Order ¶ (b)(ii). That provision affords the Special Counsel limited flexibility, while preserving the Acting Attorney General's authority to clarify the Special Counsel's jurisdiction during regular consultation (*see* 28 C.F.R. §§ 600.6, 600.8(b)), which has occurred here, or to add additional jurisdiction where "necessary in order to fully investigate and resolve the matters assigned." 28 C.F.R. § 600.4(b). And beyond his failure to show any error, Manafort has not shown that he has rights to enforce in the Special Counsel regulations, 28 C.F.R. Part 600. The internal allocation of prosecutorial power within the Department of Justice under the Special Counsel regulations provides no basis for a defendant to seek dismissal of an indictment. The regulations unequivocally state that they "are not intended to, do not, and may not be relied upon to create any [enforceable] rights" in any criminal

proceeding. 28 C.F.R. § 600.10. That provision accords with many internal Department of Justice policies that provide a framework for internal departmental governance, but provide no basis for judicial review.

Finally, Manafort's remedial arguments lack merit. The Acting Attorney General had, and exercised, statutory authority to appoint a Special Counsel here, *see* 28 U.S.C. §§ 509, 510, 515, and the Special Counsel accordingly has authority to represent the United States in this prosecution. None of the authorities Manafort cites justifies dismissing an indictment signed by a duly appointed Department of Justice prosecutor based on an asserted regulatory violation, and none calls into question the jurisdiction of this Court.

BACKGROUND

A. The FBI's Russian-Interference Investigation And The Appointment Of The Special Counsel

On March 20, 2017, then-FBI Director James B. Comey testified before the House Permanent Select Committee on Intelligence about the FBI's investigation into Russian interference with the 2016 presidential election. In open session, Comey stated:

> I have been authorized by the Department of Justice to confirm that the FBI, as part of our counterintelligence mission, is investigating the Russian government's efforts to interfere in the 2016 presidential election, and that includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts.

Statement of FBI Director James B. Comey, H. Perm. Select Comm. on Intelligence, *Hearing on Russian Active Measures Investigation* (Mar. 20, 2017), *available at* https://www.fbi.gov/news/testimony/hpsci-hearing-titled-russian-active-measures-investigation. Comey added that "[a]s with any counterintelligence investigation, this will also include an assessment of whether any crimes were committed." *Id.* He could not "say more about what [the FBI is] doing and whose conduct [it is] examining" because "it is an open, ongoing investigation, and is classified." *Id.*

On May 17, 2017, Acting Attorney General Rod J. Rosenstein issued an order appointing Robert S. Mueller, III, as Special Counsel "to investigate Russian interference with the 2016 presidential election and related matters." Appointment Order (capitalization omitted).[1] Relying on "the authority vested" in the Acting Attorney General, "including 28 U.S.C. §§ 509, 510, and 515," the Acting Attorney General ordered the appointment of a Special Counsel "in order to discharge [the Acting Attorney General's] responsibility to provide supervision and management of the Department of Justice, and to ensure a full and thorough investigation of the Russian government's efforts to interfere in the 2016 presidential election." Appointment Order (introduction). "The Special Counsel," the Order stated, "is authorized to conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017," including:

(i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and

(ii) any matters that arose or may arise directly from the investigation; and

(iii) any other matters within the scope of 28 C.F.R. § 600.4(a).

Id. ¶ (b). "If the Special Counsel believes it is necessary and appropriate," the Order provided, "the Special Counsel is authorized to prosecute federal crimes arising from the investigation of these matters." *Id.* ¶ (c). Finally, the Acting Attorney General made applicable "Sections 600.4 through 600.10 of Title 28 of the Code of Federal Regulations." *Id.* ¶ (d).

[1] Deputy Attorney General Rosenstein was and is serving as Acting Attorney General for the Russia investigation because, on March 2, 2017, the Attorney General recused himself "from any existing or future investigations of any matters related in any way to the campaigns for President of the United States." Press Release, U.S. Dep't of Justice, *Attorney General Sessions Statement on Recusal* (Mar. 2, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal). As the Attorney General noted, *id.*, the Deputy Attorney General in those circumstances exercises the authority of the Attorney General. *See* 28 U.S.C. § 508; 28 C.F.R. § 0.15(a).

B. The Statutory Framework And Special Counsel Regulations

1. *Governing statutes and regulations.* The Attorney General is the head of the Department of Justice ("DOJ") and has exclusive authority (except as otherwise provided by law) to direct "the conduct [of] litigation" on behalf of the United States. 28 U.S.C. §§ 503, 516. The statutes invoked by the Acting Attorney General in the Appointment Order "vest[]" in the Attorney General "[a]ll functions of other officers of the Department of Justice" (28 U.S.C. § 509); empower the Attorney General to authorize other officials of the Department of Justice to perform his functions (28 U.S.C. § 510); and provide that "any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal * * * which United States attorneys are authorized by law to conduct" (28 U.S.C. § 515). These statutes—Section 515 in particular—authorize the Attorney General to appoint a Special Counsel and to define the Special Counsel's duties. In doing so, the Attorney General is not required to invoke the Special Counsel regulations (28 C.F.R. Part 600). And historically, Attorney Generals have often drawn on Section 515 to appoint such subordinate officers, without applying any internal regulations to govern their actions.[2]

[2] As the Congressional Research Service ("CRS") has explained:

> The Attorney General retains the general authority to designate or name individuals as "special counsels" to conduct investigations or prosecutions of particular matters or individuals on behalf of the United States. Under regulations issued by the Attorney General in 1999, the Attorney General may appoint a "special counsel" from outside of the Department of Justice who acts as a special employee of the Department of Justice under the direction of the Attorney General. The Attorney General, however, may also appoint an individual as a special counsel, and may invest that individual with a greater degree of independence and autonomy to conduct investigations and prosecutions, regardless of any "special counsel" regulations, as Attorneys General did in 1973, 1994, and 2003.

See CRS, *Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress* Summary (June 20, 2013). In addition, Attorney General William Barr appointed three Special

The Attorney General's discretionary decision to apply the Special Counsel regulations when making a Section 515 appointment does not change the character of a Special Counsel as a subordinate officer within the Department of Justice. The regulations can simply provide a helpful framework for the Attorney General to use in establishing the Special Counsel's role. 28 C.F.R. §§ 600.1-600.10; *see also Office of Special Counsel*, 64 Fed. Reg. 37,038 (July 9, 1999). The Department's Special Counsel procedures "replace[d]" the independent counsel regime formerly provided in Title IV of the Ethics in Government Act, 28 U.S.C. §§ 591-599 (expired) (Independent Counsel Act or Act); *see Morrison v. Olson*, 487 U.S. 654 (1988). The regulations sought "to strike a balance between independence and accountability in certain sensitive investigations." 64 Fed. Reg. 37,038. Under the regulations, a Special Counsel may be appointed when either a conflict of interest or "other extraordinary circumstances" make it "in the public interest" to have a Special Counsel assume responsibility for criminal investigation of a person or matter. 28 C.F.R. § 600.1. Such a Special Counsel is to have "day-to-day independence," but the regulations contemplate "that ultimate responsibility for the matter and how it is handled will continue to rest with the Attorney General (or the Acting Attorney General if the Attorney General is personally recused in the matter)." 64 Fed. Reg. at 37,038.

To achieve those ends, once a Special Counsel is entrusted with particular jurisdiction, *see* 28 C.F.R. § 600.4(a), he has the full power of a United States Attorney to investigate and prosecute cases within that jurisdiction (28 C.F.R. § 600.6) and "shall not be subject to the day-to-day supervision of any official of the Department" (28 C.F.R. § 600.7(b)). To ensure that a Special

---

Counsels from outside the Department of Justice during his 14-month tenure, without relying on any regulation: Nicholas Bua to investigate the matter known as the "Inslaw Affair"; Malcolm Wilkey to pursue allegations involving the House Bank; and Frederick Lacey to conduct a preliminary investigation of loans to Iraq. *See* CRS, *Independent Counsel Law Expiration and the Appointment of "Special Counsels"* 3-4 (Jan. 15, 2002).

Counsel functions within the supervision of the Attorney General, the Special Counsel "will be provided with a specific factual statement of the matter to be investigated" (28 C.F.R. § 600.4(a)); is required to consult with the Attorney General when the Special Counsel concludes that additional jurisdiction is necessary, with the Attorney General "determin[ing] whether to include the additional matters within the Special Counsel's jurisdiction or assign them elsewhere" (28 C.F.R. § 600.4(b)); and "shall notify the Attorney General of events in the course of his or her investigation in conformity with the Departmental guidelines with respect to Urgent Reports" (28 C.F.R. § 600.8(b)); *see also* United States Attorneys' Manual (USAM) § 1-13.100 (requiring "Urgent Reports" to Department leadership on "major developments in significant investigations and litigation"), *available at* https://www.justice.gov/usam/usam-1-13000-urgent-reports. Because Urgent Reports generally must be submitted in advance of a major development such as the filing of criminal charges (*id.* § 1-13.120), the notification requirement guarantees a "resulting opportunity for consultation" between the Attorney General and the Special Counsel about the anticipated action, which "is a critical part of the mechanism through which the Attorney General can discharge his or her responsibilities with respect to the investigation." 64 Fed. Reg. at 37,040.

In addition to those opportunities for consultation, the Attorney General may ask for "an explanation for any investigative or prosecutorial step" (28 C.F.R. § 600.7(b)); may countermand the step if it is sufficiently "inappropriate or unwarranted under established Departmental practices" (*id.*), and may remove the Special Counsel, but only for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies" (28 C.F.R. § 600.7(d)).

2. *Definition of the Special Counsel's jurisdiction.* The relationship between the Acting Attorney General and the Special Counsel has unfolded in this case as contemplated by the Special

Counsel regulations. Initially, the Acting Attorney General set forth the "scope of the [Special Counsel's] original jurisdiction" in the public order. *Rosenstein Testimony* at 29. "[T]he specific matters" assigned to the Special Counsel, however, "are not identified in that order." *Id.* Recognizing the need for confidentiality about the subjects of a criminal investigation, *id.* at 30, the Acting Attorney General "discussed that with [the Special Counsel] when he started" and has continued to have "ongoing discussion about exactly what is within the scope of his investigation," *id.* at 29. To the extent that the Special Counsel has uncovered evidence of other crimes beyond the original scope, the decision on how to allocate responsibility for further investigation has been "worked out with[in] the [D]epartment." *Id.* at 40. The Acting Attorney General has confirmed that he is "accountable" and "responsible for" the scope of the Special Counsel's investigation, and "know[s] what [the Special Counsel] is investigating." *Id.* at 30-31. Specifically, the Acting Attorney General has testified that he is "properly exercising [his] oversight responsibilities," with the resulting assurance "that the [S]pecial [C]ounsel is conducting himself consistently with [the Acting Attorney General's] understanding about the scope of his investigation," *id.* at 28. The Acting Attorney General has further testified that if he believed that the Special Counsel "was doing something inappropriate," the Acting Attorney General "would take action." *Id.* at 33.

The process of defining the Special Counsel's jurisdiction has also included non-public dialogue between the Acting Attorney General and the Special Counsel. In particular, on August 2, 2017, the Acting Attorney General issued a memorandum about "[t]he Scope of Investigation and Definition of Authority" conferred on the Special Counsel. Memorandum from Rod J. Rosenstein

to Robert S. Mueller, III (Aug. 2, 2017) ("*August 2 Scope Memorandum*") (Attachment C).[3] That memorandum noted that the May 17, 2017 Appointment Order "was worded categorically in order to permit its public release without confirming specific investigations involving specific individuals." *Id.* at 1. The memorandum "provide[d] a more specific description" of the Special Counsel's authority. *Id.* As relevant here, the memorandum specified that the following allegations against Manafort "were within the scope of [the Special Counsel's] investigation at the time of [his] appointment and are within the scope of the [Appointment] Order":

- Allegations that Paul Manafort:
    - Committed a crime or crimes by colluding with Russian government officials with respect to the Russian government's efforts to interfere with the 2016 election for President of the United States, in violation of United States law;
    - Committed a crime or crimes arising out of payments he received from the Ukrainian government before and during the tenure of President Viktor Yanukovych.

Id. at 2. The *August 2 Scope Memorandum* concluded by stating that the Special Counsel had "authority to continue and complete the investigation of those matters," and it directed that further consultation should occur about the scope of the Special Counsel's investigation with respect to matters that arose or may directly arise from the investigation. *Id.* at 3.[4]

[3] The *August 2 Scope Memorandum* is classified and contains confidential and sensitive law enforcement information that cannot be publicly disclosed. The portions of the memorandum quoted in the text are not classified. A copy of the memorandum, redacted to protect against the disclosure of classified and sensitive law enforcement information, is contained in Attachment C. Manafort has not previously been provided with a copy of this memorandum.

[4] Specifically, the *August 2 Scope Memorandum* stated (at 3): "For additional matters that otherwise may have arisen or may arise directly from the Investigation, you should consult my office for a determination of whether such matters should be within the scope of your authority. If you determine that additional jurisdiction is necessary in order to fully investigate and resolve the matters assigned, or to investigate new matters that come to light in the course of your investigation, you should follow the procedures set forth in 28 C.F.R. § 600.4(b)."

C. The Present Prosecution And The Motion To Dismiss

On October 27, 2017, the grand jury returned a 12-count indictment alleging that Manafort and a co-defendant committed crimes in connection with work that they performed for Russia-backed political entities in Ukraine. On February 23, 2018, a substantially similar five-count superseding indictment, which no longer charged the co-defendant or included certain charges, was unsealed. Doc. 202 ("Indictment"). As Manafort has noted, the Indictment "focuses on [his] consulting work in Ukraine." Doc. 235 at 9; *see also id.* at 13 (noting that a superseding indictment filed against him in the Eastern District of Virginia "focuses (once again) on [his] consulting efforts involving Ukraine") (citing Superseding Indictment, *United States v. Manafort*, No. 1:18-cr-83-TSE-1 (E.D. Va. Feb. 22, 2018), Doc. 9). The Indictment alleges that between 2006 and 2015, Manafort generated tens of millions of dollars from his Ukraine work; schemed to hide the funds from U.S. authorities while enjoying the use of the money; concealed from the government his work as a foreign agent; participated in a campaign to lobby U.S. officials on behalf of his Russia-backed Ukrainian clients; and made false and misleading statements to the government when inquiries were made about his activities. Indictment, Doc. 202 ¶¶ 1-6. The Indictment charges Manafort with conspiracy to defraud the United States and to commit offenses against the United States, in violation of 18 U.S.C. § 371 (Count 1); money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Count 2); acting as an unregistered agent of a foreign principal, in violation of 22 U.S.C. §§ 612 and 618(a)(1) (Count 3); making false and misleading statements in a document furnished to the Attorney General under the Foreign Agents Registration Act, in violation of 22 U.S.C. §§ 612 and 618(a)(2) (Count 4); and making false statements in a matter within the jurisdiction of the executive branch of the United States, in violation of 18 U.S.C. § 1001(a) (Count 5). The superseding indictment also seeks forfeiture of property if Manafort is convicted on Counts 1-4. Indictment, Doc. 202 ¶¶ 48-50.

On March 14, 2018, Manafort moved to dismiss the Indictment pursuant to Federal Rules of Criminal Procedure 12(b)(2) and (b)(3), which authorize, respectively, a "motion [to dismiss asserting] that the court lacks jurisdiction" and a motion to dismiss asserting "a defect in instituting the prosecution." Doc. 235 at 13-14. Manafort contends that dismissal is warranted because, in his view, authority to prosecute him must stem from paragraph (b)(ii) of the Appointment Order, which provides jurisdiction to investigate "matters that may arise directly" from the investigation, and that provision exceeds the scope of the Acting Attorney General's authority under the Special Counsel regulations. *Id.* at 17-21. Manafort alternatively argues that, even if paragraph (b)(ii) is valid, the Indictment exceeds the Special Counsel's authority. *Id.* at 31-36. Based on those claims, Manafort contends that the Special Counsel lacked authority to bring this prosecution and that this Court consequently lacks jurisdiction. *Id.* at 21-27, 37. He also asserts that the Indictment was obtained and issued in violation of the Federal Rules of Criminal Procedure. *Id.* at 27-31, 36-37.[5]

LEGAL STANDARD

Federal Rule of Criminal Procedure 12 permits a motion to dismiss the indictment on the ground that "the court lacks jurisdiction" or based on "a defect in instituting the prosecution." Fed. R. Crim. P. 12(b)(2), (3)(A). In ruling on a motion to dismiss the indictment, the court assumes the truth of its factual allegations. *United States v. Knowles*, 197 F. Supp. 3d 143, 149 (D.D.C. 2016).

[5] Manafort had previously filed a civil action seeking declaratory and injunctive relief against the Department of Justice, Acting Attorney General Rosenstein, and Special Counsel Mueller based on identical underlying theories. *Manafort v. U.S. Department of Justice*, No. 17-cv-011-ABJ (D.D.C. filed Jan. 3, 2018). The United States has filed a motion to dismiss the civil complaint on the ground that "[t][he merits of [its] claims * * * are not properly before the Court" in the civil case, but instead should be raised here. Doc. 16-1, at 11. On March 27, 2018, Manafort also filed a substantially similar motion to dismiss the superseding indictment in the Eastern District of Virginia, *United States v. Manafort*, No. 1:18-cr-83-TSE, Doc. 30.

ARGUMENT

THE SPECIAL COUNSEL HAS AUTHORITY TO PROSECUTE MANAFORT FOR THE CRIMES CHARGED IN THE INDICTMENT

Manafort contends that the Court should dismiss the indictment to vindicate the principle of "political accountability." Doc. 235 at 1-4, 17, 21. But at every step, this prosecution satisfies that principle. The Acting Attorney General appointed the Special Counsel, defined his jurisdiction, understands the scope of his investigation, and has specifically confirmed that the allegations that form the basis of this prosecution—*i.e.*, that Manafort committed crimes "arising out of payments he received from the Ukrainian government before and during the tenure of President Viktor Yanukovych" (*August 2 Scope Memorandum* at 2)—are within the Special Counsel's jurisdiction. In these circumstances, no serious question of political accountability can be raised.

Manafort's motion to dismiss the Indictment should be rejected for four reasons. First, the Acting Attorney General and the Special Counsel have acted fully in accordance with the relevant statutes and regulations. The Acting Attorney General properly established the Special Counsel's jurisdiction at the outset and clarified its scope as the investigation proceeded. The Acting Attorney General and Special Counsel have engaged in the consultation envisioned by the regulations, and the Special Counsel has ensured that the Acting Attorney General was aware of and approved the Special Counsel's investigatory and prosecutorial steps. Second, Manafort's contrary reading of the regulations—implying rigid limits and artificial boundaries on the Acting Attorney General's actions—misunderstands the purpose, framework, and operation of the regulations. Properly understood, the regulations provide guidance for an intra-Executive Branch determination, within the Department of Justice, of how to allocate investigatory and prosecutorial authority. They provide the foundation for an effective and independent Special Counsel

investigation, while ensuring that major actions and jurisdictional issues come to the Acting Attorney General's attention, thus permitting him to fulfill his supervisory role. Accountability exists for all phases of the Special Counsel's actions. Third, that understanding of the regulatory scheme demonstrates why the Special Counsel regulations create no judicially enforceable rights. Unlike the former statutory scheme that authorized court-appointed independent counsels, the definition of the Special Counsel's authority remains within the Executive Branch and is subject to ongoing dialogue based on sensitive prosecutorial considerations. A defendant cannot challenge the internal allocation of prosecutorial authority under Department of Justice regulations. Finally, Manafort's remedial claims fail for many of the same reasons: the Special Counsel has a valid statutory appointment; this Court's jurisdiction is secure; no violation of the Federal Rules of Criminal Procedure occurred; and any rule-based violation was harmless.

A. The Acting Attorney General's Order Appointing The Special Counsel Is Valid And The Special Counsel Has Operated Within His Authorized Jurisdiction

1. The Special Counsel regulations structure the definition of a Special Counsel's jurisdiction. After appointing a Special Counsel to investigate a person or matter, 28 C.F.R. § 600.1, the Attorney General "establishe[s]" the Special Counsel's "jurisdiction," 28 C.F.R. § 600.4(a). "The Special Counsel will be provided with a specific factual statement of the matter to be investigated." *Id.* The regulations do not provide that the factual statement must be in an appointment order or otherwise made public. If the Special Counsel concludes that "additional jurisdiction beyond that specified in his or her original jurisdiction is necessary in order to fully investigate and resolve the matters assigned, or to investigate new matters that come to light in the course of his or her investigation, he or she shall consult with the Attorney General, who will determine whether to include the additional matters within the Special Counsel's jurisdiction or

assign them elsewhere." 28 C.F.R. § 600.4(b). [6]

The Special Counsel has an explicit notification obligation to the Attorney General: he "shall notify the Attorney General of events in the course of his or her investigation in conformity with the Departmental guidelines with respect to Urgent Reports." 28 C.F.R. § 600.8(b). Those reports cover "[m]ajor developments in significant investigations and litigation," which may include commencing an investigation; filing criminal charges; executing a search warrant; interviewing an important witness; and arresting a defendant. USAM § 1-13.120. Those guidelines ensure a flow of information to the Attorney General, with a "resulting opportunity for consultation"—"a critical part of the mechanism through which the Attorney General can discharge his or her responsibilities with respect to the investigation." 64 Fed. Reg. at 37,040. That process also allows the Attorney General to confer with the Special Counsel about whether a particular investigative step falls within or outside original jurisdiction, and it provides the Attorney General with the opportunity to evaluate, if the matter is beyond the scope of the Special Counsel's existing jurisdiction, whether to include it within his purview as an additional matter. Here, the Acting Attorney General has further required consultation about "additional matters that otherwise may have arisen or may arise directly from the investigation" so that the Acting Attorney General can determine "whether such matters should be within the scope of [the Special Counsel's] authority." *See* note 4, *supra*. That framework ensures that ongoing criminal investigations are not hampered by treating every pursuit of an investigative step as the occasion for determining whether to grant the Special Counsel additional jurisdiction, while preserving the Special

[6] The Special Counsel also has "the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses" and has the authority "to conduct appeals arising out of the matter being investigated and/or prosecuted." 28 C.F.R. § 600.4(a). Those authorities are not at issue here.

Counsel's accountability for his actions.

The Special Counsel regulations also provide numerous safeguards to keep the investigation within the Special Counsel's jurisdiction. Initially, the Special Counsel must "be a lawyer with a reputation for integrity and impartial decisionmaking, and with the appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies." 28 C.F.R. § 600.3(a). The Special Counsel must then "comply with the rules, regulations, procedures, practices and policies of the Department of Justice." 28 C.F.R. § 600.7(a). A Special Counsel selected under those circumstances and guided by Departmental regulations can be presumed to carry out his responsibilities and confer with the Attorney General if he encounters the need for "additional jurisdiction beyond that specified in his or her original jurisdiction." 28 C.F.R. § 600.4(b); *see United States v. Armstrong*, 517 U.S. 456, 464 (1996) (prosecutorial decisions are supported by a "presumption of regularity" and, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties") (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)); *accord United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016).

Furthermore, "the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued." 28 C.F.R. § 600.7(b). And the Attorney General may remove a Special Counsel "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies." 28 C.F.R. § 600.7(d). Those provisions afford

safeguards in the unlikely event that a Special Counsel disregards the limitations on his authorized jurisdiction.

2. The circumstances of this case confirm the validity of the Appointment Order and underscore the flaw in Manafort's claim that the Indictment falls outside of the Special Counsel's jurisdiction.

a. The Acting Attorney General has publicly testified about his definition of the Special Counsel's jurisdiction and his process for ensuring that the Special Counsel acts within that jurisdiction. *Rosenstein Testimony* at 28-35, 39-40. The Acting Attorney General explained that, while the public Appointment Order describes the general contours of the investigation, "the specific matters are not identified in that order," *id.* at 29, consistent with the Department's general practice of maintaining confidentiality about the subjects of an investigation, *see id.* at 30. To provide the Special Counsel with a more detailed understanding of the scope of his jurisdiction, the Acting Attorney General "discussed [specific matters] with [the Special Counsel] when he started" and has continued to have "ongoing discussion about exactly what is within the scope of his investigation." *Id.* at 29. If the Special Counsel were to encounter unanticipated criminal activity by a subject of the current investigation, the Acting Attorney General has made clear that the decision on how to allocate responsibility for further investigation is "worked out with[in] the [D]epartment." *Id.* at 40.

The Acting Attorney General has affirmed that he is "accountable" and "responsible for" the scope of the Special Counsel's investigation, and "know[s] what [the Special Counsel] is investigating." *Id.* at 30-31. He testified that he is "properly exercising [his] oversight responsibilities" and could confirm that "the [S]pecial [C]ounsel is conducting himself consistently with [the Department's] understanding about the scope of his investigation," *id.* at 28.

b. The oversight that the Acting Attorney General publicly described necessarily includes non-public dialogue between the Acting Attorney General and the Special Counsel on the scope and subjects of the investigation. Manafort in particular has been a subject of that dialogue. In the *August 2 Scope Memorandum* issued to the Special Counsel, the Acting Attorney General left no doubt that the conduct that forms the basis for the Indictment is within the Special Counsel's jurisdiction. The memorandum specifically confirmed that the Appointment Order "was worded categorically in order to permit its public release" and that certain "allegations were within the scope of the Investigation at the time of [the Special Counsel's] Appointment—including any "crimes arising out of payments [Manafort] received from the Ukrainian government before and during the tenure of President Viktor Yanukovych." *Id.* at 1-2.[7]

Manafort's charged conduct is clearly included within the Special Counsel's jurisdiction, as the Acting Attorney General has described it. As Manafort acknowledges, the conduct charged in the Indictment relates to "consulting work for the Ukrainian government, a Ukrainian political party, and a Ukrainian politician between 2006 to 2014." Doc. 235 at 9. The payments that Manafort received from the Ukrainian government funded his work as a foreign agent, were hidden from the United States to avoid the payment of taxes, and were laundered in the promotion of

[7] The *August 2 Scope Memorandum* is precisely the type of material that has previously been considered in evaluating a Special Counsel's jurisdiction. *United States v. Libby*, 429 F. Supp. 2d 27 (D.D.C. 2006), involved a statutory and constitutional challenge to the authority of a Special Counsel who was appointed outside the framework of 28 C.F.R. Part 600. In rejecting that challenge, Judge Walton considered similar materials that defined the scope of the Special Counsel's authority. *See id.* at 28-29, 31-32, 39 (considering the Acting Attorney General's letter of appointment and clarification of jurisdiction as "concrete evidence * * * that delineates the Special Counsel's authority," and "conclud[ing] that the Special Counsel's delegated authority is described within the four corners of the December 30, 2003 and February 6, 2004 letters"). The *August 2 Scope Memorandum* has the same legal significance as the original Appointment Order on the question of scope. Both documents record the Acting Attorney General's determination on the scope of the Special Counsel's jurisdiction. Nothing in the regulations restricts the Acting Attorney General's authority to issue such clarifications.

registration and tax violations and in efforts at concealment. The crimes of conspiracy against the United States, money-laundering conspiracy, foreign-agent violations, and the making of false and misleading statements, *see* Doc. 202, all arose out of the payments Manafort received from the Ukrainian government.

Given the Acting Attorney General's specific direction and supervision, no serious question can arise that the Special Counsel has been "provided with a specific factual statement of the matter to be investigated," 28 C.F.R. § 600.4(a), and that its scope has been addressed through consultation with the Acting Attorney General, as required by the regulations, *see* 28 C.F.R. §§ 600.4(b), 600.7, 600.8(b). Nor can any serious dispute exist that the charges in the Indictment were within the areas of investigation assigned to the Special Counsel.

c. The Appointment Order itself readily encompasses Manafort's charged conduct. First, his conduct falls within the scope of paragraph (b)(i) of the Appointment Order, which authorizes investigation of "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump." The basis for coverage of Manafort's crimes under that authority is readily apparent. Manafort joined the Trump campaign as convention manager in March 2016 and served as campaign chairman from May 2016 until his resignation in August 2016, after reports surfaced of his financial activities in Ukraine. He thus constituted an "individual associated with the campaign of President Donald Trump." Appointment Order ¶ (b) and (b)(i). He was, in addition, an individual with long ties to a Russia-backed Ukrainian politician. *See* Indictment, Doc. 202, ¶¶ 1-6, 9 (noting that between 2006 and 2015, Manafort acted as an unregistered agent of Ukraine, its former President, Victor Yanukovych—who fled to Russia after popular protests—and Yanukovych's political party). Open-source reporting also has described business arrangements between Manafort and "a Russian

oligarch, Oleg Deripaska, a close ally of President Vladimir V. Putin."[8]

An investigation of possible "links and/or coordination" between the Russian government in its political-interference campaign and "individuals associated with the campaign of President Donald Trump" would naturally cover ties that a former Trump campaign manager had to Russian-associated political operatives, Russian-backed politicians, and Russian oligarchs. It would also naturally look into any interactions they may have had before and during the campaign to plumb motives and opportunities to coordinate and to expose possible channels for surreptitious communications. And prosecutors would naturally follow the money trail from Manafort's Ukrainian consulting activities. Because investigation of those matters was authorized, so was prosecution. The Appointment Order authorized the Special Counsel, if he "believes it is necessary and appropriate, * * * to prosecute federal crimes arising from the investigation of these matters." Appointment Order ¶ (c).

Second, even assuming that paragraph (b)(i) does not cover all of the conduct charged in the Indictment—and, in the government's view, it does—the conduct would fall within the scope of a matter that "arose or may arise directly from the investigation." Appointment Order ¶ (b)(ii). When a Special Counsel is investigating particular criminal activity by an individual, assigning to the same prosecutor the investigation of related crimes that grow out of and are factually linked to the initial investigation ensures that the investigation is thorough, complete, and effective. Dividing responsibilities among different prosecutors for factually related investigations of a single individual can impede a full and thorough investigation. For example, it can lead different

[8] Andrew Kramer, Mike McIntire, & Barry Meier, *Secret Ledger in Ukraine Lists Cash for Donald Trump's Campaign Chief*, N.Y. Times, Aug. 14, 2016, *available at* https://www.nytimes.com/2016/08/15/us/politics/paul-manafort-ukraine-donald-trump.html.

prosecutors to miss the significance of interrelated evidence because of each prosecutor's partial understanding of the facts. Crimes can therefore "arise directly" from an investigation when the original investigation leads naturally to the discovery of factually related conduct that should be explored to develop a full picture of the individual's activities.

Manafort's reliance on cases decided in far-removed settings to construe the phrase "arises directly from" in the Appointment Order is misplaced. *See* Doc. 235 at 32 (citing Federal Tort Claims Act authority). The Appointment Order is not a statute, but an instrument for providing public notice of the general nature of a Special Counsel's investigation and a framework for consultation between the Acting Attorney General and the Special Counsel. Given that Manafort's receipt of payments from the Ukrainian government has factual links to Russian persons and Russian-associated political actors, and that exploration of those activities furthers a complete and thorough investigation of the Russian government's efforts to interfere in the 2016 election and any links and/or coordination with the President's campaign, the conduct charged in the Indictment comes within the Special Counsel's authority to investigate "any matter that arose or may arise directly from the investigation." Appointment Order ¶ (b)(ii).

B. Manafort's Interpretation Of The Special Counsel Regulations And The Appointment Order Is Mistaken

Manafort relies on two provisions of the Special Counsel regulations to assert that Appointment Order ¶ (b)(ii) is impermissible. First, he focuses on the provision stating that "[t]he Special Counsel will be provided with a specific factual statement of the matter to be investigated." 28 C.F.R. § 600.4(a). Second, he points to the provision for granting "additional jurisdiction" to the Special Counsel for matters that go beyond the original jurisdiction only after consultation with and approval by the Attorney General. 28 C.F.R. § 600.4(b). From these provisions, he infers that any authority beyond that enumerated in the factual statement cannot be granted to the Special

Counsel without complying with the "additional jurisdiction" procedures and that paragraph (b)(ii) has that effect. Doc. 235 at 15-18. He contends, more broadly, that paragraph (b)(ii) thus infringes on political-accountability principles. *E.g. id.* at 3-4, 17, 18, 21. Manafort's interpretation of the regulations and the language and effect of the Appointment Order is unsound.

1. In arguing that his charged conduct falls outside of the Appointment Order, Manafort assumes that the Order contains the full and complete "factual statement" provided to the Special Counsel upon his appointment. Doc. 235 at 17 ("The '[o]riginal jurisdiction' conveyed in the Appointment Order includes language that resembles a 'specific factual statement of the matter to be investigated.'") (quoting 28 C.F.R. § 600.4(a)). But nothing in the regulations requires that the "specific factual statement" be provided publicly, or in the order appointing the Special Counsel. *Cf. Cyan, Inc. v. Beaver County Employees Retirement Fund,* No. 15-1439, 2018 WL 1384564, at *3 (S. Ct. Mar. 20, 2018) ("The [regulation] says what it says—or perhaps better put here, does not say what it does not say."). And the Acting Attorney General has explained that he transmitted the facts to the Special Counsel non-publicly here. *Rosenstein Testimony* at 29-30; *August 2 Scope Memorandum* at 1. Sound reasons support that approach: law enforcement investigations can easily be compromised by premature disclosure of the persons and crimes under investigation, and fairness to individuals who are under investigation (but who may never be charged) counsels against any general practice of naming them or their suspected crimes in a public appointment order. And in this case, the classified nature of certain investigatory material made full public disclosure impossible. Given those considerations, Manafort cannot draw any inferences about the scope of the investigation as it pertains to him from the face of the Appointment Order.

Nor can Manafort base any challenge to the Special Counsel's authority on the theory that his Ukraine-based crimes could not have "aris[en]" from the investigation because his Ukraine

activities preceded the 2016 election, do not relate to the Trump campaign, and do not involve coordination between that campaign and the Russian government in its effort to interfere in the election. Doc. 235 at 20, 26. As discussed above, a matter can "arise directly" from an investigation when the original investigation leads naturally to the discovery of factually related conduct that should be explored to develop a full picture of the individual's activities. The Acting Attorney General's assignment of such matters to the Special Counsel in order for the Special Counsel to achieve the core investigatory mission is logical and confined in scope.

2. Manafort's effort to draw inferences from the "additional jurisdiction" provision is also unsound. That provision regulates the situation in which a Special Counsel concludes that he needs additional jurisdiction, beyond that originally conferred, "to fully investigate and resolve the matters assigned," or to address "new matters that come to light in the course of his or her investigation." 28 C.F.R. § 600.4(b). But nothing in the regulations compels drawing a boundary line between original jurisdiction and additional jurisdiction as if it were a plat line on a map. An effective investigation must have some latitude to extend beyond the known facts at the time of a Special Counsel's appointment or the Special Counsel would not be free of "day-to-day"—or indeed minute-to-minute—"supervision [by] any official of the Department." 28 C.F.R. § 600.7(b). Although a criminal investigation may start with a specific set of facts, the point of investigation is to explore those facts, develop new ones, and continually reassess the direction of the inquiry. *See United States v. Dionisio*, 410 U.S. 1, 13 n.12 (1973) (in grand jury proceedings, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning"). While a Special Counsel's jurisdiction is defined at the outset, not every incremental action by a Special Counsel's investigation constitutes an expansion. And placing rigid constraints on the Special Counsel's

zone of inquiry would defeat the objective of leaving the Special Counsel "free to structure the investigation as he or she wishes." 64 Fed. Reg. at 37,038.

Paragraph (b)(ii) of the Appointment Order provides a permissible way of implementing those considerations. The provision does not confer unlimited and unreviewable discretion on the Special Counsel to investigate and prosecute any matters he encounters. The paragraph's coverage of matters that "arose" from the investigation is necessarily retrospective: it refers to matters already identified as sufficiently connected to the underlying, pre-existing investigation as to come within the Order's scope. The paragraph's coverage of matters that "may directly arise from the investigation" addresses matters that are determined, as the investigation proceeds, to be so logically or practically connected to it as to follow naturally from the original grant. Looking to the structure of the regulations as a whole, the forward-looking aspect of (b)(ii) occupies space between the generalized understanding of the scope of an investigation that exists at the outset—and whose specific contours will inevitably become clearer over time—and the "additional jurisdiction" that must form the basis for consultation with the Attorney General, and his determination about assignment, provided for in 28 C.F.R. § 600.4(b). And here, the Acting Attorney General has required that the Special Counsel consult about matters that "may arise directly from the investigation for a determination of whether such matters should be within the scope of [the Special Counsel's] authority." *See* note 4, *supra*.

Contrary to Manafort's contention, "[a]rising directly from" jurisdiction does not amount to a "blank check" or "*carte blanche*" for the Special Counsel to investigate whatever he may uncover in the course of the investigation. Doc. 235 at 2, 20. Initially, Manafort ignores the requirement that the matter must arise "directly" from the investigation—a clear signal that the Special Counsel's discovery of criminal conduct that is incidental to or disconnected from the core

mandate will not be automatically covered. *Black's Law Dictionary* 557 (10th ed. 2014) (directly means "[i]n a straightforward manner," "[i]n a straight line or course," "[i]mmediately"). But more fundamentally, Manafort overlooks the procedural framework that governs the actions of the Special Counsel and his relationship to the Attorney General. As described above, a variety of reporting requirements and supervisory powers guarantee that the Attorney General will be aware of the course and direction of the Special Counsel's investigation and be in a position to limit it—or expressly add to the Special Counsel's jurisdiction, if appropriate. In light of that framework, any ambiguity over a Special Counsel's jurisdiction to pursue matters that "may arise directly from the investigation" will be addressed and resolved through ongoing reporting and consultation. And experience has borne out that the Special Counsel and Acting Attorney General have had no difficulty operating in that environment. *See Rosenstein Testimony* at 31 ("I'm responsible for and I know what [the Special Counsel] is investigating.").

3. The rigid approach that Manafort would take to the Appointment Order and Special Counsel regulations stems from his fundamental misunderstanding of the way in which this regime differs from the former Independent Counsel Act. Doc. 235 at 32-33. Under the Independent Counsel Act, constitutional concerns mandated limitations on the judiciary's ability to assign prosecutorial jurisdiction. In the wholly Executive-Branch regime created by the Special Counsel regulations, those constitutional concerns do not exist.

a. In the now-expired Independent Counsel Act, Congress provided for a court-appointed "independent counsel" to investigate and, if appropriate, criminally prosecute certain high-level government officials. In *Morrison v. Olson*, the Supreme Court sustained the constitutionality of the Act against claims that it violated the Constitution's Appointments Clause, U.S. Const. Art II, § 2, cl. 2; imposed impermissible duties on judges, in violation of Article III; and impermissibly

undermined the President's powers, in violation of the constitutionally required separation of powers. 487 U.S. at 659-660. A central feature of the Act was its authorization, upon application of the Attorney General, for a Special Division of the D.C. Circuit to appoint an independent counsel and for the court to "define that independent counsel's prosecutorial jurisdiction." *Id.* at 661 (quoting former 28 U.S.C. § 593(b)). The Supreme Court held that granting the Special Division power to appoint an Independent Counsel was consistent with the Constitution's Appointments Clause, *id*. at 670-677, but that the power to define the Independent Counsel's jurisdiction was valid only insofar as it was "incidental" to the appointment authority, *id*. at 679. "Congress," the Court stated, could not "give the Division *unlimited* discretion to determine the Independent Counsel's jurisdiction." *Id.* To ensure that the court's jurisdiction-defining power remained "truly 'incidental'" to its constitutional justification, the Court held that "the jurisdiction that the court decides upon must be *demonstrably related* to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case." *Id.* (emphasis added). The same limitation applied to the court's power "to expand the jurisdiction" of the Independent Counsel. *Id.* at 679 n.17.

Consistent with that analysis, in *In re Espy*, 80 F.3d 501 (D.C. Cir., Spec. Div. 1996) (*per curiam*), the Special Division concluded that its authority to refer a matter to an independent counsel on his request was limited to matters that met the *Morrison* test: the matters must be "demonstrably related" to the underlying factual circumstances that prompted the Attorney General's request for the appointment. *Id.* at 507. "In referring a related matter," the court explained, "this court is interpreting, but not expanding, the independent counsel's original prosecutorial jurisdiction, thus permitting the court to make explicit the independent counsel's jurisdiction over a matter that was implicitly included in the original grant of prosecutorial

jurisdiction." *Id.*; *accord In re Espy*, 145 F.3d 1365, 1367-1368 (D.C. Cir., Spec. Div. 1998). This approach "avoids the constitutional difficulties * * * that arise when executive duties of a nonjudicial nature are imposed on judges holding office under Article III of the Constitution." 80 F.3d at 507. But the court contrasted that limitation with the Attorney General's "broader" authority to make referrals to the independent counsel: the Attorney General "is not similarly subject to the 'demonstrably related' limitation" because the Attorney General's power "is not constrained by separation of powers concerns." *Id.*; *see also United States v. Tucker*, 78 F.3d 1313, 1321 (8th Cir.), *cert. denied*, 519 U.S. 820 (1996). That is because the Attorney General's referral decision exercises solely executive power and does not threaten to impair Executive Branch functions or impose improper duties on another branch.

b. For those reasons, Manafort's attempt to impose restrictions on the Special Counsel regulations drawn from the Independent Counsel Act is misguided. The Special Counsel regulations were adopted to replace, not replicate, the lapsed Independent Counsel scheme. 64 Fed Reg. at 37,038. By providing a process that remains wholly within the Department of Justice, the Special Counsel regulations could afford the Special Counsel a great degree of "free[dom] to structure the investigation" while preserving the Special Counsel's accountability to the Attorney General. *Id*. In stark contrast to the absence of active supervision of an independent counsel under the former Act by either the Attorney General or the Special Division, *see Morrison*, 487 U.S. at 695, 696, the Special Counsel regulations provide an array of Department of Justice supervisory mechanisms. *See, e.g.*, 28 C.F.R. §§ 600.7, 600.8. These "[r]eview and approval procedures" ensure that a Special Counsel operates under "relevant controls" and "Departmental guidance in the most sensitive situations." 64 Fed. Reg. at 37,039. A Special Counsel may bypass those review and approval procedures in "extraordinary circumstances" and consult directly with the Attorney

General, 28 C.F.R. § 600.7(a), but that option only "enhance[s]" the Special Counsel's accountability to the Attorney General. 64 Fed. Reg. at 37,040.

It is true that the Special Counsel has discretion to decide when to invoke 28 C.F.R. § 600.4(b) to seek "additional jurisdiction" through consultation with the Attorney General. It is also true that jurisdiction to investigate matters that "may arise directly from the investigation," Appointment Order ¶ (b)(ii), involves matters that were not necessarily known or fully understood at the time of the original appointment. But in deciding when additional jurisdiction is needed, the Special Counsel can draw guidance from the Department's discussion accompanying the issuance of the Special Counsel regulations. That discussion illustrated the type of "adjustments to jurisdiction" that fall within Section 600.4(b). "For example," the discussion stated, "a Special Counsel assigned responsibility for an alleged false statement about a government program may request additional jurisdiction to investigate allegations of misconduct with respect to the administration of that program; [or] a Special Counsel may conclude that investigating otherwise unrelated allegations against a central witness in the matter is necessary to obtain cooperation." 64 Fed. Reg. at 37,039. "Rather than leaving the issue to argument and misunderstanding as to whether the new matters are included within a vague category of 'related matters,' the regulations clarify that the decision as to which component would handle such new matters would be made by the Attorney General." *Id.*[9] In interpreting his jurisdiction over matters that "may arise directly from the investigation," the Special Counsel can be expected to apply that guidance and to

[9] The allusion to "related matters" refers to the Independent Counsel Act's provision that the independent counsel's jurisdiction shall include "all matters related to" the subject of the appointment (28 U.S.C. § 593(b)(3)), which prompted the D.C. Circuit to observe that "the scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders." *United States v. Wilson*, 26 F.3d 142, 148 (D.C. Cir.), *cert. denied*, 514 U.S. 1051 (1995).

appropriately bring matters to the Attorney General's attention that deserve clarification or treatment under the procedures of Section 600.4(b). *See Armstrong*, 517 U.S. at 464 (noting that "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties"). And, as discussed, the regular reporting requirements imposed on the Special Counsel, 28 C.F.R. § 600.8(b), ensure that borderline questions of jurisdiction do not fall between the cracks.

All of this leads to the conclusion that the political-accountability concerns that Manafort raises have no relevance here. The Special Counsel regulations are promulgated by the Attorney General, not imposed by Congress; they leave the decision whether to appoint a Special Counsel under the regulations to the Attorney General's discretion, rather than being governed by a legislatively defined test; they provide for the Attorney General, rather than a court, to select the Special Counsel; and they lodge the jurisdiction-defining and supervision roles in the same executive official, rather than removing the jurisdiction-defining power from the Executive Branch and restricting the Attorney General's post-appointment supervision to a court-reviewed "good cause" removal power. *See Morrison*, 487 U.S. at 696. Under this regime, a runaway Special Counsel is an impossibility. Indeed, the Acting Attorney General has specifically remarked that the Special Counsel's authority differs from that of an "independent counsel" and allows issues arising from the Special Counsel's discovery of new and unanticipated crimes to be "worked out with[in] the Department." *Rosenstein Testimony* at 40.

No justification exists to impose categorical limitations on an internal Department of Justice regulatory process that raises no constitutional concerns. Manafort has not raised any statutory or constitutional claims—and no such claims would have merit. The Acting Attorney General possessed full statutory authority to appoint a Special Counsel under 28 U.S.C. §§ 509,

510, and 515, and no plausible constitutional objections could be advanced. *See In re Sealed Case*, 829 F.2d 50, 55-57 (D.C. Cir. 1987) (rejecting statutory and Appointments Clause challenges to Iran-Contra prosecutor appointed under the same statutes); *United States v. Libby*, 429 F. Supp. 2d 27, 28-29 (D.D.C. 2006) (rejecting same challenges to a Special Counsel's investigation of unauthorized disclosures of classified information, who was appointed under the same statutes). It is especially notable that Manafort, while relying on principles of political accountability, does not invoke the Appointments Clause as a basis for his challenge, despite the Clause's "design[] to preserve political accountability relative to important Government assignments." *Edmond v. United States*, 520 U.S. 651, 663 (1997). In sum, Manafort's challenges to the Appointment Order and Special Counsel's actions have no merit.

C. The Special Counsel Regulations Do Not Give Rise To Judicially Enforceable Rights

In any event, no basis exists for the Court to adjudicate Manafort's regulation-based objection. The Special Counsel regulations were not intended to be, and are not, enforceable by individual defendants in criminal cases. The Special Counsel regulations are explicit on that point:

> **§ 600.10 No creation of rights.**
>
> The regulations in this part are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative.

28 C.F.R. § 600.10. Manafort therefore cannot challenge the Indictment based on a claimed regulatory violation.

1. The intention expressed in Section 600.10 accords with the general precept that internal agency rules, when not required by the Constitution or a statute, are generally not judicially enforceable in a criminal prosecution. *Cf. United States v. Caceres*, 440 U.S. 741, 749-754 (1979) (declining to apply the exclusionary rule to suppress evidence for violations of agency procedures

on consensual monitoring). Here, the Department of Justice "was not required by the Constitution or by statute to adopt any particular procedure or rules" before appointing a Special Counsel and defining his jurisdiction. *See id*. at 749-750. On prior occasions, including after the promulgation of the Special Counsel regulations, the Attorney General or Acting Attorney General has appointed Special Counsels or other specially appointed attorneys to conduct particular investigations, without invoking or relying on a regulation like 28 C.F.R. Part 600. *See, e.g.*, *In re Sealed Case*, 829 F.2d at 52-53, 55 (Iran-Contra investigation); *Libby*, 429 F. Supp. 2d at 28-29 (investigation concerning leak of Valerie Plame's affiliation with the CIA); *see also United States v. Nixon*, 418 U.S. 683, 694 & n.8 (1974) (Watergate Special Prosecutor). The Attorney General's statutory authority to authorize the Special Counsel's investigation here rests on the same footing as those investigations. *See* Appointment Order (citing 28 U.S.C. §§ 509, 510, 515). And the Acting Attorney General's decision to apply 28 C.F.R. §§ 600.4 through 600.10 to the Special Counsel (Appointment Order ¶ (d)) had no effect on Manafort—except to confirm that the regulations are not "enforceable" by him in any civil or criminal case. 28 C.F.R. § 600.10.

The regulations do have an internal effect on the Department of Justice. *See* 64 Fed. Reg. at 37,041 (characterizing the regulations as "matters of agency management or personnel" and treating them at most as "a rule of agency organization, procedure, or practice"). "So long as [the Special Counsel regulation] is extant, it has the force of law" in governing the Attorney General's actions in cases where he has seen fit to invoke it. *Nixon*, 418 U.S. at 695. But the effect of the regulation on the internal governance of the Department of Justice is a far different matter from the effect of the regulation on individuals. Here, the regulation has no external effect—it does not create individual rights or exist for the benefit of individuals. Instead, it allocates prosecutorial authority within the Department of Justice in order to promote public confidence in a criminal

investigation concerning a foreign power's efforts to influence the 2016 presidential election "and related matters." Press Release, U.S. Dep't of Justice, *Press Release on Appointment of Special Counsel* (May 17, 2017), *available at* https://www.justice.gov/opa/pr/appointment-special-counsel. As the Acting Attorney General explained when he appointed the Special Counsel, he "determined that a Special Counsel is necessary in order for the American people to have full confidence in the outcome" of the Russian-interference investigation. *Id.* The American people have a surpassing interest in being assured that the Department of Justice will complete this investigation with independence and integrity. But that public interest does not give an individual defendant enforceable rights.

2. The Special Counsel regulations are on par with many other internal guidance documents promulgated to regulate DOJ procedures. The D.C. Circuit and many other courts of appeals have held that such internal DOJ guidelines—*e.g.*, the United States Attorneys' Manual—do not confer any rights on criminal defendants and are therefore not enforceable. In *United States v. Blackley*, the court of appeals held that "violations of [USAM] policies by DOJ attorneys or other federal prosecutors afford a defendant no enforceable rights" because, among other reasons, "[t]he [USAM] itself says that it 'is not intended to confer any rights, privileges or benefits.'" 167 F.3d 543, 548-549 (D.C. Cir.), *cert. denied*, 528 U.S. 868 (1999). Other courts of appeals have consistently reached the same conclusion with respect to a variety of DOJ policies. *See, e.g.*, *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005) (collecting cases holding that "Department of Justice guidelines and policies do not create enforceable rights for criminal defendants," and denying relief for potential violation of DOJ's *Petite* policy limiting dual prosecution); *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000) (USAM); *United States v. Lee*, 274 F.3d 485, 492-493 (8th Cir.) (DOJ death penalty protocol), *cert. denied*, 537 U.S.

1000 (2002); *United States v. Piervinanzi*, 23 F.3d 670, 682 (2d Cir.) (DOJ policy memorandum requiring consultation before bringing certain charges), *cert. denied*, 513 U.S. 904 (1994); *United States v. Craveiro*, 907 F.2d 260, 263-264 (1st Cir.) (DOJ policy requiring pre-trial notice of intent to seek sentence enhancement), *cert. denied*, 498 U.S. 1015 (1990). Like those policies, the Special Counsel regulations disclaim the creation of individual rights in language that "[f]ederal courts have held * * * to be effective." *Lee*, 274 F.3d at 493; *Blackley*, 167 F.3d at 548-549 (same). Such disclaimers should have particular force in barring judicial review of DOJ prosecutorial policies, given that enforcement of the Nation's criminal laws is "a special province of the Executive," and the government's exercise of prosecutorial discretion is generally not subject to judicial review. *Armstrong*, 517 U.S. at 464 (internal quotation marks omitted).

Several of the reasons supporting the general rule against judicial review of the exercise of prosecutorial discretion have salience here. As the Supreme Court has explained, "[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Here, judicial consideration of the allocation of investigatory and prosecutorial responsibility to the Special Counsel could expose the Department's decisionmaking on the scope and direction of the Special Counsel's investigation to outside inquiry and could, in some cases, undermine the investigation's effectiveness by revealing the specific policy or practical considerations that underlie allocation decisions. Those considerations could include sensitive intelligence leads and classified information. Those factors reinforce the conclusion that Manafort cannot predicate a motion to dismiss the Indictment on a claim that a DOJ appointment order, or the actions of the Special Counsel acting under the Appointment Order,

transgress internal DOJ regulations on the appointment of a Special Counsel.

The allocation of prosecutorial responsibility between the Special Counsel and other officials in the Department of Justice is an especially unlikely candidate for judicial review for an additional reason. As the D.C. Circuit has noted, unlike allocation issues under the former Independent Counsel Act, no issues of constitutional dimension are "at stake in the parceling out of jurisdiction between Main Justice and the various U.S. Attorneys' offices." *United States v. Hubbell*, 167 F.3d 552, 557 (D.C. Cir. 1999), *aff'd*, 530 U.S. 27 (2000). Even under the former Independent Counsel Act, the Eighth Circuit concluded that the Attorney General's decision to refer a matter as "related" to an independent counsel's existing jurisdiction was unreviewable. *Tucker*, 78 F.3d at 1318. The court explained that "[t]he 'relatedness' determination * * * is an exercise of a discretion that only the prosecutor and the Attorney General command, because of their intimate knowledge of the course of the investigation, including witness statements, and of other proceedings that may be ongoing before the grand jury." *Id.* The court saw no reason to conclude that "the Attorney General's referral decision is any more subject to judicial review than the usual prosecutorial decisions." *Id.* at 1317. The same is true here.[10]

3. Manafort resists this conclusion by disavowing that he is asserting any enforceable rights and insisting that he is claiming only that "the Acting Attorney General lacked authority to issue paragraph (b)(ii) of the Appointment Order." Doc. 235 at 25 n.4 (emphasis omitted). For that proposition, he relies on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949),

[10] The Eighth Circuit's holding also reflected "particular legislative history indicating that Congress intended the Attorney General's § 594(e) referrals to be unreviewable," *Hubbell*, 167 F.3d at 557 (citing *Tucker*, 78 F.3d at 1317-1318). But that is fully consistent with a finding of unreviewability here. If *statutes* permitting the Attorney General to make referrals to an independent counsel did not trigger a right to judicial review at the behest of criminal defendants, far less reason exists for a court to create a right to judicial review for the Attorney General's and Special Counsel's action under internal *regulations*.

contending that it stands for the proposition that a court may enjoin executive action "in excess of [] authority or under an authority not validly conferred." *Id.* at 690-691. Manafort's purported distinction of the *Blackley* line of cases precluding review of asserted violations of internal DOJ policies and his reliance on *Larson* are misplaced.

As an initial matter, if regulations create no enforceable rights, it would make little sense for courts to enforce them on the theory that the relevant official "lacked authority" to engage in the challenged conduct. If that were the rule, *Blackley* (and the consistent line of cases that similarly decline to enforce the USAM and related DOJ policies) could be easily circumvented by changing the label on the claim. Manafort provides no reason to think that courts should permit such gamesmanship. And the sound reasons for declining to impose sanctions on the government for failing to adhere to regulations that it adopted as a matter of discretion cut strongly against allowing it. *See Caceres*, 440 U.S. at 755-756 ("[W]e cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.").

Manafort's reliance on *Larson* is equally flawed. *Larson* involved a civil action to enjoin governmental officials from completing a contract to sell coal. 337 U.S. at 684. In upholding a claim of sovereign immunity, the Supreme Court distinguished cases in which "the officer's powers are limited by statute, [and] his actions beyond those limitations are considered individual and not sovereign actions." *Id*. at 689. Such actions by an officer, the Court indicated, are "*ultra vires*" and thus may support a claim for "specific relief." *Id.* That statement cannot assist Manafort. Among other reasons, the statement addressed a clear lack of *statutory* authority, not a claimed violation of internal *regulations*; contemplated a violation of an individual's rights, not simply an absence of an official's authority; and concerned when specific relief might be granted

in a civil action, not when an indictment may be dismissed in a criminal case. The government is aware of no case dismissing an indictment in light of a claim based on *Larson.* Nor should this case be the first. At a minimum, *Larson* requires "an officer's lack of delegated power"; "[a] claim of error in the exercise of that power is therefore not sufficient." 337 U.S. at 690. While Manafort cannot even show error in the Acting Attorney General's or Special Counsel's actions, he surely cannot establish a lack of delegated power. *See* pp. 29-30, *supra;* pp. 35-36, *infra*. In sum, in light of the fundamental principles that bar judicial review of prosecutorial action that does not violate a statute or the Constitution—which the Supreme Court has reaffirmed time and again—*Larson* cannot bear the weight Manafort places on it.

D. Manafort Has No Right To Have The Indictment Dismissed

Finally, Manafort's arguments not only lack merit, but also cannot support the remedy he seeks. Manafort's claims concern assignment of responsibility among Department of Justice attorneys pursuant to the Acting Attorney General's authority under 28 U.S.C. § 515. His regulatory arguments do not implicate the jurisdiction of this Court or establish a violation of the Federal Rules of Criminal Procedure. And any such error would in any event be harmless.

1. Federal criminal proceedings are conducted by "officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516; *see* 28 U.S.C. § 519. The Special Counsel is such an officer. He was appointed under 28 U.S.C. § 515, which allows the Acting Attorney General to "specially retain[]" attorneys, "commissioned as special assistant to the Attorney General or special attorney," and expressly authorizes those attorneys to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings." 28 U.S.C. § 515; *see* Appointment Order (invoking, *inter alia*, 28 U.S.C. § 515). Section 515's grant of authority is alone sufficient to reject any claim that the Special Counsel acted without authority here.

Manafort has not disputed that the Special Counsel has statutory authority under 28 U.S.C.

§ 515 as a Department of Justice attorney. To confer statutory authority, officers need not be given specific authorization to appear in particular criminal cases; "the failure to specify the names of the persons to be investigated or prosecuted [in the appointment is] of no consequence." *United States v. Balistrieri*, 779 F.2d 1191, 1208-1210 (7th Cir.), *cert. denied*, 475 U.S. 1095 (1986), overruled on other grounds, *Fowler v. Butts*, 829 F.3d 788 (7th Cir. 2016); *see also United States v. Morris*, 532 F.2d 436, 439-441 (5th Cir. 1976); *Infelice v. United States*, 528 F.2d 204, 205-208 (7th Cir. 1975); *In re Persico*, 522 F.2d 41, 45-46, 56-66 (2d Cir. 1975). No written authorization is even required. Direction "may be implied" from "writings, guidelines, practices, and oral directions," including those "transmitted through a chain of command." *Persico*, 522 F.2d at 66. Accordingly, even if some error under the regulation occurred in assigning this area of investigation to the Special Counsel, the Special Counsel has statutory authority to represent the government in this prosecution.

2. Manafort asserts (Doc. 235 at 21-27, 37) that any error in assigning these matters to the Special Counsel deprives this Court of jurisdiction. But the errors that Manafort alleges do not call into question the "jurisdiction" of this Court, which, as the Supreme Court has clarified, refers to the limits of "a court's adjudicatory authority." *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam). District courts are vested with "original jurisdiction * * * of all offenses against the laws of the United States," 18 U.S.C. § 3231; the Indictment unquestionably meets that test. *See United States v. Fahnbulleh*, 752 F.3d 470, 476 (D.C. Cir. 2014) ("[I]f an indictment or information alleges the violation of a crime set out in Title 18 or in one of the other statutes defining federal crimes, that is the end of the jurisdictional inquiry.") (quoting *United States v. George*, 676 F.3d 249, 259 (1st Cir. 2012)). And the requirements of the Federal Rules of Criminal Procedure invoked by Manafort do not concern "jurisdiction." *See, e.g.*, *United States v. Easton*, 937 F.2d

160, 162 (5th Cir. 1991) ("requirement of an indictment signature by 'the attorney for the government,' is nonjurisdictional"); *see also In re Lane*, 135 U.S. 443, 449 (1890) (failure to sign indictment not jurisdictional).

Manafort primarily relies on *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), and a series of cases citing that decision. In *Providence Journal*, the question was whether, as a statutory matter, a court-appointed contempt prosecutor could invoke the jurisdiction of the Supreme Court. The Supreme Court initially took jurisdiction over the case "[b]y writ of certiorari granted upon the petition of any party." 28 U.S.C. § 1254; *see* 485 U.S. at 699. But the Court concluded that by statute, only "the Attorney General and the Solicitor General," and persons delegated authority by the Attorney General, may conduct Supreme Court litigation in cases where the government is a party. *Id.* at 699-707 (quoting 28 U.S.C. § 518(a)). Because "a federal statute deprive[d] the special prosecutor of the authority to pursue the litigation in th[e] [Supreme] Court," that prosecutor was "not a party entitled to petition for certiorari under 28 U.S.C. § 1254(1)," and the Supreme Court therefore lacked jurisdiction. *Id.* at 699 & n.5; *see also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90-91, 98 (1994) (because agency lacked "statutory authority," it could not "petition for certiorari," and authorization by Solicitor General after jurisdictional deadline did not cure the lack of jurisdiction). This Court's jurisdiction does not depend on a formal step, such as invoking jurisdiction through a writ of certiorari. But, regardless, the Special Counsel has statutory authority to represent the United States under 28 U.S.C. § 515. And alleged technical deficiencies in how a case was assigned to DOJ officials do not deprive courts of jurisdiction.

The other cases cited by Manafort do not display consistency in their characterization of errors as going to "jurisdiction." *Cf. Eberhart*, 546 U.S. at 18 (courts have been "less than meticulous" in use of the word "jurisdictional"); *United States v. Vanness*, 85 F.3d 661, 663 n.2

(D.C. Cir. 1996) ("'Jurisdiction,' is a word of many, too many, meanings."). But the cases almost uniformly use the word "jurisdictional" to mean a lack of an attorney's statutory authority to represent the government.[11] For example, in *United States v. Rosenthal*, 121 F. 862 (C.C.S.D.N.Y. 1903) (cited at Doc. 235 at 24), the question was whether the Attorney General and his appointed assistants had statutory authority to act before a grand jury. *Id.* at 866-868. The district court held that they did not and that this "departure from the *statutory* allotment of power" argued in favor of dismissing the indictment as a matter of discretion. *Id.* at 873 (emphasis added). In response to that case, Congress passed what is now codified at 28 U.S.C. § 515, to ensure that the Attorney General and appointed assistants had "the same rights, powers and authority" to conduct grand jury proceedings and represent the United States "which the United States Attorneys possessed."

[11] Some of the cited cases appear to have concerned the court's authority to adjudicate the case. *See Mehle v. Am. Mgmt. Sys., Inc.*, 172 F. Supp. 2d 203, 205 (D.D.C. 2001) (civil suit brought by agency officer who lacked statutory authority to "invoke th[e] Court's diversity jurisdiction"); *United States v. Male Juvenile*, 148 F.3d 468, 469-470, 472 (5th Cir. 1998) (jurisdictional certification required by statute to proceed in federal court not signed by official required by statute). Others appear merely to concern whether the attorney representing the government had statutory authority to act, using the term "jurisdictional" without analyzing why that concept applied. *See United States v. Durham*, 941 F.2d 886, 891-892 (9th Cir. 1991) (no statutory authority because state attorney who was made a Special Assistant United States Attorney (SAUSA) by OPM official never delegated authority to do so, but remanding to determine if SAUSA was under "direction and supervision of the United States Attorney"); *United States v. Garcia-Andrade*, No. 13-cr-993, 2013 WL 4027859, at *2, *5-6 & n.2 (S.D. Cal. Aug. 6, 2013) (AUSA not actively licensed to practice law, in violation of statutory requirement to comply with state ethics rules and with "no other attorneys working with [her] on this case"); *United States v. Huston*, 28 F.2d 451, 453-456 (N.D. Ohio 1928) (no statutory authority to act where assistant to Attorney General expressly directed to charge cases in districts other than the one he charged in); *United States v. Cohen*, 273 F. 620, 621 (D. Mass. 1921) (no statutory authority to charge by information where special assistant directed only to conduct grand jury proceedings); *see also In re United States*, 345 F.3d 450, 451-454 (7th Cir. 2003) (mandamus issued where United States dismissed charge and court "appointed a private lawyer" to prosecute that count, in violation of separation of powers); *United States v. Singleton*, 165 F.3d 1297, 1299-1300 (10th Cir.) (dictum about statutory authority to prosecute criminal cases), *cert. denied*, 527 U.S. 1024 (1999). One case concerned an AUSA who signed an indictment when his bar license was suspended but the court found the error harmless because the U.S. Attorney also signed the indictment. *United States v. Bennett*, 464 F. App'x 183, 184-185 (4th Cir. 2012) (unpub.).

Infelice, 528 F.2d at 206; *accord, e.g.*, *Balistrieri*, 779 F.2d at 1208.

3. Manafort argues (Doc. 235 at 28-29, 36-37) that if any aspect of the Appointment Order is inconsistent with the Special Counsel regulations, or if the Special Counsel took steps not plainly authorized by the Appointment Order, he would not be authorized to act as an "attorney for the government" under the Federal Criminal Rules of Procedure and therefore violated Rule 6 and Rule 7. That argument fails in light of the Special Counsel's statutory authority under Section 515.

As relevant here, an "attorney for the government" may be present while the grand jury is in session, Fed. R. Crim. P. 6(d)(1); may not disclose a matter occurring before the grand jury, Fed. R. Crim. P. 6(e)(2)(B)(vi); may receive grand jury information for performing the attorney's duty, Fed. R. Crim. P. 6(e)(3)(A)(i), (B); may disclose grand jury matter to another grand jury and intelligence-related matter to appropriate officials, Fed. R. Crim. P. 6(e)(3)(C), (D); and may sign an indictment, Fed. R. Crim. P. 7(c)(1).

The term "[a]ttorney for the government" is defined in the Federal Rules "in such broad terms as potentially to include virtually every attorney in the Department of Justice." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 426 (1983) (discussing predecessor definitions). This includes "the Attorney General or an authorized assistant," Fed. R. Crim. P. 1(b)(1)(A), and "any other attorney authorized by law to conduct proceedings under these rules as a prosecutor," Fed. R. Crim. P. 1(b)(1)(D). Because the Special Counsel was appointed under Section 515 "as special assistant to the Attorney General" and is authorized by that statute to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings," 28 U.S.C. § 515, the Special Counsel satisfies both definitions. *See Balistrieri*, 779 F.2d at 1207-1210; *Infelice*, 528 F.2d at 205-208; *Little v. United States*, 524 F.2d 335, 335 (8th Cir.), *cert. denied*, 424 U.S. 920 (1976); *United States v. Wrigley*, 520 F.2d 362, 363-370 (8th Cir. 1975); *see also* 1944 Adv. Comm. Notes to Predecessor

Rule 54(c) (referring to predecessor to Section 515); *cf.* 28 C.F.R. § 77.2(a) (defining the term "attorney for the government" for purposes of 28 U.S.C. § 530B as including "any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515").

Manafort's contrary arguments (Doc. 235, at 28-29, 36-37) disregard the significance of the Special Counsel's statutory authority under Section 515 and the Acting Attorney General's specific authorization to conduct these proceedings. Manafort's position also leads to untenable consequences. It would mean, for example, that if an attorney in one section of the Criminal Division handled a case that should have been handled by another section, the attorney would not be an "attorney for the government" under the Federal Rules. Manafort's argument would lead to the further anomalous result that the Department of Justice attorneys who conducted these grand jury proceedings with full statutory authority and approval from the Acting Attorney General are not "attorneys for the government" and therefore not bound by other applicable rules, including the obligation of grand jury secrecy, *see* Fed. R. Crim. P. 6(e)(2)(B)(vi). The Court should not adopt such a strained interpretation.

The cases that Manafort cites only underscore the significance of statutory authority to represent the Department of Justice.[12] For example, in *United States v. Fowlie*, 24 F.3d 1059 (9th Cir. 1994) (cited at Doc. 235 at 27, 28, 37), a state official who was never properly appointed to

[12] *See United States v. Wooten*, 377 F.3d 1134, 1139-1141 (10th Cir. 2004) (declining to address whether the Posse Comitatus Act barred an Army lawyer from being appointed and acting as a SAUSA, because even if his "appointment and participation in th[e] case violated the [Act]" the court still had jurisdiction and any error was harmless); *Male Juvenile*, 148 F.3d at 469-470, 472 (jurisdictional certification required by statute to proceed in federal court not signed by official required by statute and therefore no jurisdiction); *see also United States v. Alcantar-Valenzuela*, 191 F.3d 461, 461 (9th Cir. 1999) (unpublished mem.) (unspecified problem in SAUSA appointment but error harmless); *United States v. Boruff*, 909 F.2d 111, 117-118 (5th Cir. 1990) (violation of Rule 7 where no attorney signed indictment, but error harmless because, *inter alia*, indictment "bore the signature of the grand jury foreperson and the stamp of the court").

represent the United States conducted a federal prosecution. By statute, the Attorney General could appoint Special Assistant United States Attorneys (SAUSAs), *see* 28 U.S.C. § 543, and the Attorney General had delegated that power to the Deputy Attorney General. *See* 24 F.3d at 1065; *United States v. Plesinski*, 912 F.2d 1033, 1034-1035, 1037-1038 (9th Cir. 1990) (explaining the history of the same prosecutor). But the Office of Personnel Management, which had no legal authority to appoint the state official as a SAUSA, attempted to do so. 24 F.3d at 1065. As a result, the prosecutor had never validly been appointed and lacked statutory authority to act. (Nonetheless, the courts found the errors harmless. *See Fowlie*, 24 F.3d at 1066; *Plesinski*, 912 F.3d at 1038-1039.) Here, by contrast, no dispute exists that the Acting Attorney General was fully authorized to appoint the Special Counsel under Section 515 and did so.

4. Finally, even if there were any technical error here, that error would be harmless. As a general matter, "a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendant." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988); *see* Fed. R. Crim. P. 52(a); *United States v. Mechanik*, 475 U.S. 66, 71-72 (1986). This requirement ensures that the substantial "societal costs" that result from dismissing a grand jury's indictment will not be imposed unjustifiedly. *Bank of Nova Scotia*, 487 U.S. at 255.

The relevant (and controlling) principle here is that, when an attorney who lacks authority under statute or rule conducts grand jury proceedings or signs an indictment, the supervision and involvement of other DOJ career attorneys renders the mistake harmless. *See, e.g.*, *Plesinski*, 912 F.2d at 1038 (state official made a SAUSA by person without legal authority to so, but error harmless where an AUSA supervised his conduct); *United States v. Vance*, 256 F.2d 82, 83 (6th Cir. 1958) (per curiam) (even if indictment had to be signed by U.S. Attorney, signature by AUSA is a harmless error); *cf. Caha v. United States*, 152 U.S. 211, 221 (1894) (indictment signed by

wrong official). Many of the cases that Manafort relies on and that assertedly concern "jurisdiction" support that principle. *See, e.g., Fowlie*, 24 F.3d at 1066 (supervision by Assistant U.S. Attorneys rendered SAUSA's error harmless); *Durham*, 941 F.2d at 891-892 ("direction and supervision of the United States Attorney").

As explained above, every key step in this case—including the investigative path and the Indictment itself—has been authorized by the Acting Attorney General through ongoing consultation. Additionally, under the applicable rules, the National Security Division (NSD) approved the charges relating to the Foreign Agents Registration Act (FARA), and the Tax Division approved the tax-related charges. *See* 28 C.F.R. § 600.7(a) (special counsel is to comply with Department of Justice rules, regulations, procedures, and policies); USAM § 6-4.200 (Tax Division must approve all criminal tax charges); USAM § 9-90.710 (NSD must approve FARA charges). And the Senior Assistant Special Counsel in charge of this prosecution is a long time, career prosecutor with the internal authority to conduct this prosecution, separate and aside from his role in the Special Counsel's Office. In light of the ongoing supervision by the Acting Attorney General and involvement by other career DOJ attorneys, any error claimed by Manafort would be harmless.

Manafort posits (Doc. 235 at 29-31) that, if the Special Counsel had never been appointed, he would not have been prosecuted, and therefore the alleged errors prejudiced him. That speculation is unsupported as a factual matter.[13] In any event, the question is not what would have happened if no Special Counsel had been appointed. The legal test is whether the "errors in grand

[13] For example, Manafort states that he "*already disclosed* to the DOJ the conduct" charged here. Doc. 235 at 30 (emphasis in original). But the grand jury's indictment alleges that through 2017, Manafort "engaged in a scheme to hide" his foreign income from the government, Indictment, Doc. 202 ¶ 2, "concealed the existence and ownership of the foreign companies and bank accounts" from the government, *id.* ¶ 3, and "concealed" his work as an agent of foreign principals from the government, *id.* ¶ 4—including through false and misleading statements made to the Department of Justice in 2016, *id.* ¶¶ 27, 43.

jury proceedings" were harmful. *Bank of Nova Scotia*, 487 U.S. at 254. The very existence of the Special Counsel is not the asserted "error." Manafort does not dispute that the Acting Attorney General could have appointed the Special Counsel and directed him to investigate these precise matters. Rather, Manafort has argued that the Acting Attorney General did not take the correct steps in authorizing the Special Counsel to investigate the conduct charged here, and the Special Counsel therefore was not technically authorized to act. The claimed "error" is the assertedly unauthorized participation of the Special Counsel in these matters. Any such error is harmless because, among other things, the Special Counsel's decision to seek an indictment was supervised and approved by the Acting Attorney General, who is plainly authorized to authorize that action, even if a technical error occurred in executing that authorization. *See, e.g.*, *Rosenstein Testimony* at 28 ("the [S]pecial [C]ounsel is conducting himself consistently with [the Department's] understanding about the scope of his investigation"); *id.* at 146 ("I'm comfortable with the process that was followed with regard to th[e] [initial] indictment").

Manafort's invitation to speculate about what may have transpired if the Special Counsel never pursued these matters is untenable. It would require a court not only to review the record of this case or the factual approval of the DOJ chain of command, but also to look backwards at what facts were already known to agents and attorneys and what steps were already underway, and then to imagine how quickly other attorneys and other offices would have pursued the investigations, how they would have prioritized cases competing for their attention, and what evidence they would have uncovered. And Manafort would apparently ask courts doing so to ignore the fact that the Acting Attorney General and other components within the Department of Justice have indicated their actual interest in pursuing those matters.

This form of review threatens invasive inquiry not just into internal Executive Branch

matters but also, as Manafort apparently recognizes, into grand jury operations normally shielded from public scrutiny. *See* Doc. 235 at 31 n.8 (suggesting that, to dispel "any doubt about the Special Counsel's involvement in the grand jury process, the Court should order production of the grand jury transcripts, including transcripts of the Special Counsel's or his staff's colloquies with the grand jury, and permit further briefing and argument on that issue"). An inquiry of this nature would impose tremendous costs on the criminal justice system.

Consider how Manafort's analysis would apply to ordinary cases where the appropriate chain of command had authorized an attorney's pursuit of certain conduct and charges, but some technical flaw existed in conferring authority on the attorney, or some rule concerning assignment of responsibility within DOJ barred that attorney's participation. A defendant could argue (as Manafort has here) that other attorneys had not yet prosecuted the same crimes, that the particular attorney who brought charges must have been the "driving force behind the decision to charge" (Doc. 235 at 31), and therefore that the indictment should be dismissed. A defendant could seek to make the same argument after a case had been fully tried. That form of harmless error review would strike the wrong balance between societal costs and the rights of an accused who was in the sights of an undisputedly authorized Department of Justice attorney—here, the Acting Attorney General, with additional approval by the National Security Division and Tax Division, and participation by others in the Department.

CONCLUSION

For the foregoing reasons, Manafort's motion to dismiss should be denied.

Dated: April 2, 2018

Respectfully submitted,

ROBERT S. MUELLER III
Special Counsel

/s/ Andrew Weissmann
Michael R. Dreeben
Andrew Weissmann
Greg D. Andres (D.D.C. Bar No. 459221)
Adam C. Jed
United States Department of Justice
Special Counsel's Office
950 Pennsylvania Avenue NW
Washington, DC 20530
Telephone: (202) 616-0800

Attorneys for the United States of America