DID MUELLER'S TEAM DECIDE THEY NO LONGER NEED MANAFORT TO FLIP?

One detail of the attacks TS Ellis made on Mueller's team on Friday has gotten a lot of attention: his insinuation that Mueller's team was only charging Manafort with bank fraud and tax evasion to get him to flip on Trump.

> THE COURT: Apparently, if I look at the indictment, none of that information has anything to do with links or coordination between the Russian government and individuals associated with the campaign of Donald Trump. That seems to me to be obvious because they all long predate any contact or any affiliation of this defendant with the campaign. So I don't see what relation this indictment has with anything the special prosecutor is authorized to investigate.
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> It looks to me instead that what is happening is that this investigation was underway. It had something. The special prosecutor took it, got indictments, and then in a time-honored practice which I'm fully familiar with — it exists largely in the drug area. If you get somebody in a conspiracy and get something against them, you can then tighten the screws, and they will begin to provide information in what you're really interested in. That seems to me to be what is happening here. I'm not saying it's illegitimate, but I think we ought to be very clear about these facts and what is happening.
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> [snip]
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> THE COURT: That's right, but your

> argument says, Even though the investigation was really done by the Justice Department, handed to you, and then you're now using it, as I indicated before, as a means of persuading Mr. Manafort to provide information.
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> It's vernacular by the way. I've been here a long time. The vernacular is to sing. That's what prosecutors use, but what you've got to be careful of is they may not just sing. They may also compose.
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> [snip]
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> THE COURT: It factually did not arise from the investigation. Now, saying it could have arised under it is another matter, but factually, it's very clear. This was an ongoing investigation. You all got it from the Department of Justice. You're pursuing it. Now I had speculated about why you're really interested in it in this case. You don't really care about Mr. Manafort's bank fraud. Well, the government does. You really care about what information Mr. Manafort can give you that would reflect on Mr. Trump or lead to his prosecution or impeachment or whatever. That's what you're really interested in.

In spite of Ellis' repeated suggestion that Mueller was just trying to get Manafort to flip *and that that might not be illegitimate*, Michael Dreeben never took Ellis' bait, each time returning to the government's argument that the indictment was clearly authorized by Rod Rosenstein's initial appointment memo, and in any case Manafort can't challenge his indictment based off whether Mueller adhered to internal DOJ regulations.

> THE COURT: Where am I wrong in that regard?
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> MR. DREEBEN: The issue, I think, before

> you is whether Mr. Manafort can dismiss the indictment based on his claim.
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> [snip]
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> In any event, your point, if I can distill it to its essence, is that this indictment can be traced to the authority the special prosecutor was given in the May and August letters. That, as far as you're concerned, is the beginning and end of the matter.
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> MR. DREEBEN: Yes, Your Honor, it is the beginning and almost the end. And this is my last point, I promise.
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> THE COURT: All right.
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> MR. DREEBEN: The special counsel regulations that my friend is relying on are internal DOJ regulations. He referred to them as if they're a statute. I want to be clear. They are not enacted by Congress. They are internal regulations of the Department of Justice.

Dreeben's refusal to engage is all the more striking given one of the differences between the 45-page government response dated April 2 for Manafort's DC challenge and the 30-page government response dated April 10 for Manafort's EDVA challenge.

The two briefs are very similar and in some passages verbatim or nearly so. The DC version has more discussion of the Acting Attorney General's statutory authority to appoint a Special Counsel — language like this:

> 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.

It includes a longer discussion about how a Special Counsel differs from a Ken Starr type Independent Counsel. It cites some DC-specific precedents. And in general, the discussion in the DC brief is more extensive than the EDVA.

Generally, the differences are probably explained by differing page limits in DC and EDVA.

But along the way, an interesting passage I noted here got dropped: in addition to the general language about a special counsel appointment including the investigation of obstruction of that investigation, the DC brief noted the underlying discussion on Special Counsel regulations envisions the prosecution of people if "otherwise unrelated allegations against a central witness in the matter is necessary to obtain cooperation."

> [I]n 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
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> 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).

This exclusion, too, likely arises from page limits (and its exclusion may explain why Dreeben didn't point to it in Friday's argument).

But given Ellis' focus on it, I find the exclusion notable.

Again, it's most likely this is just a decision dictated by page limits. But it's possible that Mueller's team believed this language less important to include in any decisions issued in EDVA than DC. For example, the existing cooperation agreements were all signed in DC, even where (with George Papadopoulos and Richard Pinedo) at least some of the crimes occurred elsewhere. If Manafort ever flips, that plea agreement will presumably go through DC as well.

Or maybe, given Rick Gates' cooperation, Mueller's team has decided they can proceed without Manafort flipping, and instead send him

to prison the same way Al Capone went: with tax charges rather than the most heinous crimes.