# IN TRUMPIAN FASHION, PAUL MANAFORT WINS BY LOSING ON CHALLENGE TO MUELLER

Remember how Republicans were gleeful over the ass-kicking T.S. Ellis gave Mueller's team arguing over the scope of the Special Counsel's authority back in May? As predicted by close EDVA watchers, Ellis ruled yesterday against Paul Manafort, finding that the tax fraud investigation into Manafort was a logical part of understanding whether Trump's campaign colluded with Russia to win the election.

The opinion is actually a political shitshow, though, which guarantees both a Manafort appeal (if he continues his valiant effort to win a future Trump pardon using stall tactics, anyway) and Congressional gamesmanship using it.

Ultimately, Ellis rules (as Amy Berman Jackson already had) that Mueller was authorized to investigate Manafort, in this case for tax fraud, based on his primary authority to investigate the ties between Trump's campaign and Russia. Ellis makes the case that this investigation falls under Mueller's primary grant perhaps even more plainly than ABJ did.

> Given that the Special Counsel was authorized to investigate and to prosecute this matter pursuant to ¶ (b)(i) of the May 17 Appointment Order and the August 2 Scope Memorandum, that conclusion is dispositive and defendant's arguments with respect to ¶ (b)(ii) of the May 17 Appointment Order need not be addressed.
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> To begin with, defendant concedes that ¶ (b)(i) is a valid grant of jurisdiction. Specifically, defendant acknowledges

> that the Acting Attorney General acted consistently with the Special Counsel regulations when the Acting Attorney General authorized the Special Counsel to investigate the matters included in ¶ (b)(i) of the May 17 Appointment Order, namely "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump." May 17 Appointment Order ¶ (b)(i). Thus, the only issue is whether the Special Counsel's investigation and prosecution of the matters contained in the Superseding Indictment falls within the valid grant of jurisdiction contained in ¶ b(i) of the May 17 Appointment Order.
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> It does; the Special Counsel's investigation of defendant falls squarely within the jurisdiction outlined in ¶ b(i) of the May 17 Appointment Order, and because ¶ b(i) was an appropriate grant of authority, there is no basis for dismissal of the Superseding Indictment on this ground. Specifically, in the May 17 Appointment Order, the Acting Attorney General authorized the Special Counsel to investigate, among other things, "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump … ." May 17 Appointment Order ¶ (b)(i). It is undisputed that defendant is an "individual[] associated with the campaign of President Donald Trump[;]" indeed, defendant served as the chairman of President Donald Trump's campaign from March 2016 until August 2016. Moreover, the Special Counsel's investigation focused on potential links between defendant and the Russian government. In particular, the Special Counsel investigated defendant's political consulting work on behalf of,

> and receipt of substantial payments from, then-President Victor Yanukovych of the Ukraine and the Party of Regions, Yanukovych's proRussian political party in the Ukraine. See Superseding Indictment ¶¶ 10-11. To be sure, history is replete with evidence of the existing and longstanding antagonism between the Ukraine and Russia. Indeed, armed conflict in the eastern Ukraine is still underway.19 Nonetheless, the fact that the Yanukovych was a strongly pro-Russian President warranted the investigation here. The fact that the Russian government did not make payments to defendant directly is not determinative because the text of the May 17 Appointment Order authorizes investigation of "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump."

This language is all Ellis needed to rule against Manafort's challenge. His discussion of the alternate issues is welcome, but superfluous.

But along the way, Ellis engages in a bunch of often inaccurate blather which serves mostly to foment the kind of politicization he claims to despise.

About the only neutral thing he does in his long discussion of special counsels is to give Steven Calabresi the ass-kicking he deserved for an op-ed that Kellyanne Conway's spouse George condemned for its "lack of rigor."

> Yet, even the current Special Counsel regulations are not entirely free from constitutional attack. Indeed, Professor Steven Calabresi has argued that the appointment of the Special Counsel may run afoul of the Appointments Clause of the Constitution because the Special

> Counsel is a principal, not an inferior officer, and therefore must be appointed by the President with the advice and consent of the Senate. See Steven G. Calabresi, Mueller's Investigation Crosses the Legal Line, Wall Street J. (May 13, 2018) https://www.wsj.com/articles/muellersinvestigation-crosses-the-legal-line-1526233750; see also Steven G. Calabresi, Opinion on the Constitutionality of Robert Mueller's Appointment (May 22, 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183324. Defendant does not argue that the appointment of the Special Counsel violates the Appointments Clause of the Constitution, so that particular objection need not be addressed in detail here, but it is worth noting that such an objection would likely fail. The Special Counsel appears quite plainly to be an inferior officer. He is required to report to and is directed by the Deputy Attorney General.

But the rest of his long history of special counsels plays to the partisan assault on prosecutorial independence led by Republicans. For example, Ellis gets key distinctions about the current Special Counsel from past ones wrong, and even argues that this one, which meets bi-weekly with top DOJ officials and has provided a shit-ton of documents to Congress to review, is "in some ways less accountable than the independent counsel of the past," in part because it gave annual progress reports to Congress.

He suggests that a Special Counsel's hiring choices might inject bias into the investigation, echoing Trump's inaccurate 13 Angry Democrats line.

> The Special Counsel must also hire others to assist in the investigative

> process, and those applying to join the investigation may have their own biases and incentives to prosecute the target of the investigation, or their self-selection into the investigation may create an appearance of bias. See Akhil Amar, On Impeaching Presidents, 28 Hofstra L. Rev. 291, 296 (1999) (“An ad hoc independent counsel must build an organization from scratch, and those who volunteer may have an ax to grind, since the target is known in advance.”). In this case, many of the individuals working for the Special Counsel have donated to or worked for Democrats in the past, creating a public appearance of possible bias. See Alex Hosenball et al., Meet special counsel Robert Mueller’s prosecution team, ABC News (Mar. 17, 2018) https://abcnews.go.com/Politics/meet-special-counsel-robert-muellers-prosecutionteam/story?id=55219043. Similar accusations of bias were made against Kenneth Starr during the Whitewater investigation, with a number of Democrats criticizing the appointment of Kenneth Starr because of his connections to the Republican Party. See David Johnston, Appointment in Whitewater Turns into a Partisan Battle, N.Y. Times (Aug. 13, 1994) https://www.nytimes.com/1994/08/13/us/appointment-in-whitewater-turns-into-a-partisan-battle. html. Both cases highlight the fact that even the selection of the Special Counsel and his or her subordinates can provide grist for the media mill, heightening partisan tension and increasing the likelihood that substantial portions of the public will perceive work of the Special Counsel as partisan warfare.

He argues that it would be better to investigate election interference with a bipartisan

commission than a Department of Justice made up of experienced professionals bound by certain guidelines and precedents, something that would look a lot like the Intelligence Committee reviews which exhibit varying degrees of dysfunction.

> The Constitution's system of checks and balances, reflected to some extent in the regulations at issue, are designed to ensure that no single individual or branch of government has plenary or absolute power. The appointment of special prosecutors has the potential to disrupt these checks and balances, and to inject a level of toxic partisanship into investigation of matters of public importance.27
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> 27 A better mechanism for addressing concerns about election interference would be the creation of a bipartisan commission with subpoena power and the authority to investigate all issues related to alleged interference in the 2016 Presidential election. If crimes were uncovered during the course of the commission's investigation, those crimes could be referred to appropriate existing authorities within the DOJ.

All that's ridiculous enough. But perhaps the most alarming thing Ellis does is use the *ex parte* review he did of an unredacted copy of Rod Rosenstein's August 2, 2017 memo to telegraphically confirm that Trump is named as a subject of investigation. He does that, I argue, by putting footnotes 14 and 15 right next to each other.

> With respect to the defendant, the August 2 Scope Memorandum identified several allegations, including allegations that the defendant:
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> > [c]ommitted 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;
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> [c]ommitted 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 noted that these allegations against the defendant "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." Id. at 1. Several months later, on February 22, 2018, the Special Counsel charged defendant15 with, and a grand jury indicted defendant on (i) five counts of subscribing to false income tax returns, in violation of 26 U.S.C. § 7206(1) (Counts 1-5); (ii) four counts of failing to file reports of foreign bank accounts, in violation of 31 U.S.C. §§ 5314, 5322(a) (Counts 11-14); and (iii) nine counts bank fraud and conspiracy to commit bank fraud, in violation of 18 U.S.C. §§ 1344, 1349 (Counts 24-32).

14 Prior to the hearing, the Special Counsel submitted the August 2 Scope Memorandum in this record, albeit with significant redactions. In the course of the hearing on defendant's motion to dismiss the Superseding Indictment, the Special Counsel was ordered to produce an un-redacted copy of the August 2 Scope Memorandum. The Special Counsel complied with this directive, and a review of the un-redacted memorandum confirms that the only portions pertinent to the issues in this case are those already available in this public record and excerpted above.

> 15 Given the investigation's focus on President Trump's campaign, even a blind person can see that the true target of the Special Counsel's investigation is President Trump, not defendant, and that defendant's prosecution is part of that larger plan. Specifically, the charges against defendant are intended to induce defendant to cooperate with the Special Counsel by providing evidence against the President or other members of the campaign. Although these kinds of high-pressure prosecutorial tactics are neither uncommon nor illegal, they are distasteful.

This passage states that everything pertinent to "the issues in this case" are public, which actually falls short of stating that none of the rest of them pertain to Manafort. Then, visually, the next line after describing the memo, Ellis states that "even a blind person can see that the true target of the Special Counsel's investigation is President Trump."

We are all blind to what's behind those redactions, he is not, but even we can see, Ellis suggests, that Trump is the target. From that Ellis goes on to suggest that pressuring someone to flip is "distasteful," which I hope gets quoted back at him liberally by people are are not the President's former campaign manager.

I mean, it is true that we all knew that Trump's obstruction was, by August 2, 2017, part of the investigation (and that since then his "collusion" has likely been added to Rosenstein's memos). It is by no means a given that proof of "collusion" will go beyond the people, including Manafort, who may have orchestrated it. But Ellis puts the suggestion, visually at least, into the record for those of us who otherwise can't see it, that "collusion" itself is about Trump.

All of which makes this legal opinion more about further embroiling political strife Ellis claims

to dislike than about the law.