

[ORAL ARGUMENT NOT YET SCHEDULED]

United States Court of Appeals  
for the District of Columbia Circuit

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Case Number 18-3052  
(1:18-gj-00034-BAH)

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IN RE: GRAND JURY INVESTIGATION

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ANDREW MILLER,  
Appellant,  
v.  
UNITED STATES OF AMERICA,  
Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
GRAND JURY ACTION NO. 18-34 (BAH)

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*Amicus Curiae* Brief of Montgomery Blair Sibley  
Supporting Both Appellant Andrew Miller and Reversal

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*Amicus Curiae* Montgomery Blair Sibley certifies the following:

**A. Parties**

Appellant Andrew Miller was subpoenaed to testify before a grand jury empaneled in the United States District Court for the District of Columbia, No. 1:18-gj-00034-BAH. He filed a motion to quash the subpoena, which the district court (Beryl A. Howell, C.J.) denied. Chief Judge Howell later found Mr. Miller in contempt for refusing to appear before the grand jury. Appellee is the United States of America, which is represented by Special Counsel Robert S. Mueller III (the Special Counsel). There were no intervenors or *Amici Curiae* in the district court, which held its proceedings under seal. On August 30, 2018, a two-judge panel of this Court denied Concord's motion to intervene but granted Concord permission to participate as an *Amicus Curiae*. Montgomery Blair Sibley is seeking leave by motion pursuant to D.C. Circuit Rule 29 to appear as *Amicus Curiae*.

**B. Rulings Under Review**

The rulings under review are the contempt order now unsealed entered against Mr. Miller on August 10, 2018, ECF No. 36. That order was preceded by a sealed memorandum opinion and order entered on July 31, 2018, ECF No. 23, denying Mr. Miller's motion to quash. A redacted version of the memorandum opinion was released on August 8, 2018, ECF No. 32-3. There is no official

citation for the contempt order, the redacted version of which can be found in Appx B of the Appendix. The official citation for the redacted memorandum opinion is *In re Grand Jury Investigation*, 315 F. Supp. 3d 602 (D.D.C. 2018).

**C. Related Cases**

The case on review has not previously been before this Court or any other court. There is a “related case” within the meaning of Circuit Rule 28(a)(1)(c). The criminal action brought against Concord by the Special Counsel, No. 1:18-cr-00032-DLF (D.D.C.), involves one of the same parties (the United States of America) and legal issues similar to those presented here. On August 15, 2018, the district court (Dabney L. Friedrich, J.) issued a memorandum opinion denying Concord’s motion to dismiss the criminal action. The official citation for Judge Friedrich’s memorandum opinion is *United States v. Concord Management & Consulting LLC*, 317 F. Supp. 3d 598 (D.D.C. 2018).

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### **Rule 29(a)(4) Statement**

*Amicus Curiae* Montgomery Blair Sibley states that he is a Citizen of the United States whose only interest in this case is that of all United States Citizens: “[T]o require that the Government be administered according to law and that the public moneys be not wasted.” *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). As authority to file this *Amicus Curiae* Brief, *Amicus Curiae* Montgomery Blair Sibley states that all parties have consented to the filing of this *Amicus Curiae* brief.

*Amicus Curiae* Montgomery Blair Sibley further states that: (i) No party’s counsel authored this *Amicus Curiae* brief in whole or in part; (ii) No party or a party’s counsel contributed money that was intended to fund preparing or submitting this *Amicus Curiae* brief; and (iii) No person contributed money that was intended to fund preparing or submitting this *Amicus Curiae* brief.

### **Statement of the Issues Presented for Review**

Whether the time limitation set in 5 U.S. Code §3346, applies to Deputy Attorney General Rod Rosenstein thus ending his assumed authority to act as “Acting Attorney General” on December 17, 2017 – 210 days after he commenced exercising that authority and accordingly ending the putative Special Counsel’s Authority on that date.

## Statutes and Regulations

The applicable constitutional provisions, statutes and regulations are provided in the body of this Brief.

## Summary of the Argument

The time limitation imposed by 5 U.S. Code §3346 limited the duration that Deputy Attorney General Rod Rosenstein could exercise the authority he assumed as “Acting Attorney General”. As such, his appointment of the Special Counsel expired on December 17, 2017 – 210 days after the Deputy Attorney General commenced exercising that authority. *A priori*, any authority the putative Special Counsel enjoyed expired on that date as well and all actions taken by the Special Counsel are *void ab initio*.

## Argument

### I. Congress at 5 U.S. Code §3346 Sets A Definite Time Limitation

Five U.S. Code §3345(a) - “Acting officer” states in pertinent part: “If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is **otherwise unable to perform the functions and duties of the office** - (1) the first assistant to the office of such officer shall perform the functions and

duties of the office **temporarily in an acting capacity subject to the time limitations of section 3346.**” (Emphasis added).

Notably, as detailed in Deputy Attorney General Rosenstein’s letter of May 17, 2017, attached as Appendix 1 to the Brief of Andrew Miller, Deputy Attorney General Rosenstein indirectly invoked 5 U.S. Code § 3345(a) when appointing Mr. Mueller as “Special Counsel”. The Supreme Court recently addressed Section 3345 in *NLRB v. S.W. General, Inc.*, 37 S. Ct. 929, 197 L. Ed. 2d 263 (2017) (“The general rule is that the first assistant to a vacant office shall become the acting officer.”) *Id.* 936. As such, Mr. Rosenstein was expressly limited by 5 U.S. Code § 3346, “Time Limitation” which states in pertinent part:

Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office (1) for no longer than 210 days beginning on the date the vacancy occurs;

Assuming that Attorney General Session was “otherwise unable to perform the functions and duties of [his] office” due to his supposed conflict of interest, the authority of Mr. Rosenstein to act as an “Acting Attorney General” expired on December 17, 2017 – 210 days after he commenced exercising that authority on May 17, 2017. *A priori*, the Special Counsel’s authority, whatever that may have been, likewise expired with Mr. Rosenstein’s statutory sunset of his ability to act as “Acting Attorney General”. *Accord: De Castro v. Board of Comm.*, 322 U.S. 451,



462(1944)(When the Law “is silent as to their term of office, they can presumably be appointed for any term not exceeding that of the officer appointing them.”); *Shurtleff v. U.S.*, 189 U.S. 311, 316 (1903)(With the exception of Article III Federal Judges, “no civil officer has held office by a life tenure since the foundation of the Government.”); *Kalaris v. Donovan*, 679 F.2d 376, 397 (D.C. Cir. 1982)(In the “absence of a Congressional statute to the contrary, inferior officers...serve...at the discretion of their appointing officers.”).

## **II. All Acts by The Special Counsel Post-December 17, 2017 are Void**

Five U.S.C. §3348(d) “ensures compliance by providing that, in general, ‘any function or duty of a vacant office’ performed by a person not properly serving under the statute “shall have no force or effect.” *Id.* 937.

Accordingly, since December 17, 2017, the Special Counsel’s actions have been *void ab initio*.

### **Relief Requested**

Wherefore, *Amicus Curiae* Sibley respectfully requests that this Court reverse and remand this matter for further proceedings holding that since December 17, 2017, all actions taken by the Special Counsel are *void ab initio*.

### Certificate of Service

I HEREBY CERTIFY that a true and accurate copy of the foregoing will be served on the participants in this case the Court's CM/ECF system.

By:   
Montgomery Blair Sibley

### Certificate of Compliance with Type-Volume Limit

I HEREBY CERTIFY that this document complies with the type-volume limit of Fed. R. App. P., Rule 32(a)(7)(B) and the word limit of Fed. R. App. P. Rule, 5(c)(1) because, excluding the parts of the document exempted by Fed. R. App. P., Rule 32(f) this document contains 1,642 words.

I HEREBY CERTIFY that this document complies with the typeface requirements of Fed. R. App. P., Rule 32(a)(5) and the type-style requirements of Fed. R. App., Rule P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Google Docs in 14 point font size and Times New Roman type style.

By:   
Montgomery Blair Sibley