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November 15, 2018

Clerk of Court
United States Court Appeals
333 Constitution Avenue, N.W. Ste 5423
Washington DC 20001-2866



Re: *In re: Grand Jury Investigation*
Court of Appeals Docket #: 18-3052

A.C.C.
Greetings,

Pursuant to FRAP Rules 2 and 28(j), D.C. Circuit Rule 28(f), and the November 9, 2018, Order of this Court, *Amicus Curiae* Sibley prays for permission to submit this Letter in lieu of a formal brief given the constraints of time imposed by the late notice to him of the aforementioned Order and in response to that Order states:

The resignation of Attorney General Sessions on **November 7, 2018**, terminated the authority of "Acting" Attorney General Rosenstein and consequently terminated Mr. Mueller's putative authority to act as "Special Counsel". Let me explain.

1. Congress, Not the Constitution, Created the Office of Attorney General

Congress established by Law the Department of Justice ("DOJ") at 28 U.S.C. §501 and the Office of Attorney General ("AG") by Law at 28 U.S.C. §503 with the AG being designated as the Head of the DOJ. Section 503 does not provide a term of office for the AG. Likewise, Congress established by Law the office of Deputy Attorney General ("DAG") at 28 U.S.C. §504. Section 504 does not provide a term of office for the DAG.

2. The President Had Authority to Appoint an Acting Attorney General

Article II, Section 2, Clause 3, states: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." On **November 7, 2018**, the Senate was in recess¹. Accordingly, the appointment of Matthew Whitaker, as Acting Attorney General satisfied the requirements of Article II, Section 2, Clause 3. Moreover, Congress has expressly provided for

¹ Retrieved from: https://www.senate.gov/legislative/resources/pdf/2018_calendar.pdf

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such an appointment at 5 U.S.C. §3345(a)(3)(A) "Acting officer". Accordingly, the appointment of Mr. Whitaker is on firm Constitutional and statutory grounds.²

3. Vacancies in the Office of Attorney General

A key "constitutional means" vested in the President -- perhaps the key means -- was "the power of appointing, overseeing, and controlling those who execute the laws." 1 *Annals of Cong.*, at 463. And while a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, *The Federalist* No. 51, at 349, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010).

Yet the unresolved question remains: What is the term of office for an "Acting" Attorney General?

Clearly, when the Law "is silent as to their term of office, [municipal officers] can presumably be appointed for any term *not exceeding that of the officer appointing them.*" *De Castro v. Board of Comm.*, 322 U.S. 451, 462 (1944). Notably with the exception of Article III Federal Judges, "no civil officer has held office by a life tenure since the foundation of the Government." *Shurtleff v. U.S.*, 189 U.S. 311, 316(1903).

Here, Mr. Rosenstein's "term of office" as the putative "Acting" Attorney General ended on **November 7, 2018**, with the proper appointment of Mr. Whitaker as the "Acting Attorney General". Accordingly, likewise Mr. Mueller's putative authority ended at the same time.³

² Any conflict between 5 U.S.C. §3345(a)(3)(A)(enacted **Oct. 21, 1998**, at P.L. 105-277) and 28 U.S.C. §508 (enacted **Sept. 6, 1966** by P.L. 89-554) must be resolved in favor of the former given the "repeal by implication" rule of statutory construction. "Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457 (1945). Here that "repugnancy" is the mandate of §508 that: "In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office" against §3345(a)(3)(A) which allows the appointment of Mr. Whitaker.

³ Query: **Is Mr. Mueller committing a federal felony?** When an individual seeks to exercise the attributes of an Officer of the United States, and even go so far as to attach the Title of such officer to their name, i.e., "Special Counsel", they are committing a federal crime under 18 U.S.C. §912 (impersonating an officer of the United States), and if such impersonation occurs while representing the U.S. government in Federal Court, a fraud upon that Court has been committed.

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Respectfully submitted,



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