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July 3, 2018

President Donald Trump
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Re: Deputy Attorney General Rosenstein's Appointment of Robert Mueller
Was Constitutionally *Void Ab Initio*

Dear Mr. President,

I write to assert that based upon the recent holding by the U.S. Supreme Court on **June 21, 2018**, in deciding the case of *Lucia v. Securities and Exchange Commission*, Docket No.: 17-130, there is no doubt that the appointment of Robert Mueller by Acting Attorney General Rosenstein was both Constitutionally and statutorily a void act. As a result, all actions taken by Mr. Mueller are *void ab initio*. Let me explain:

I. THERE ONLY THREE CLASSES OF FEDERAL AGENTS

In *Lucia*, the Court addressed the question as to: “whether the [SEC]'s [Administrative Law Judges] are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, §2, cl. 2”. In particular, Article II, §2, cl. 2 states:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Regarding the distinction between “all other Officers of the United States” and “such inferior Officers” that Congress may delegate the appointment to “the President alone, in the Courts of Law,

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or in the Heads of Departments”, the Court in *Lucia* stated: “Only the President, with the advice and consent of the Senate, can appoint a Principal officer; but Congress (instead of relying on that method) may authorize the President alone, a court, or a department head to appoint an Inferior officer. *See ibid.*”

II. MR. MUELLER IS NOT SIMPLY [AN] EMPLOYEE OF THE FEDERAL GOVERNMENT

Lucia next addresses the question of who is an “Officer” and who is a mere “employee of the Federal Government” holding:

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *United States v. Germaine*, 99 U. S. 508, 510 (1879) held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." *Id.*, at 511-512. Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Id.*, at 511. *Buckley v. Valeo*, 424 U. S. 1 (1976)(*per curiam*) then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." 424 U. S., at 126. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Here, Mr. Mueller fails both tests. First, his appointment is clearly not “occasional or temporary”; rather it is of indefinite duration. Second, and of greater import, Mr. Mueller is wielding the full power of a United States Attorney: issuing subpoenas, presenting matters to the Grand Jury and offering plea deals to criminal charges. Plainly, the “extent of power” that Mr. Mueller is exercising is the “significant authority pursuant to the laws of the United States.” Truly, Congress has mandated by law at 28 U.S.C. Section 541(a)¹ that same authority resides in U.S. Attorneys who are Principal Officers requiring Senate confirmation under Article II, Section 2, clause 2. As such, Mr. Mueller cannot be deemed a Federal Government “Employee”.

III. MR. MUELLER IS NOT A PRINCIPAL OFFICER OF THE UNITED STATES

In order for Mr. Mueller to be a “Principal Officer” of the United States, he would have had to be: (i) Appointed by the President and (ii) Approved by and with the advice and consent of

¹ “The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.”

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the Senate. Neither event occurred here as Mr. Mueller was appointed on **May 17, 2017**, solely upon the usurped authority of Deputy Attorney General Rosenstein. *See*: Rosenstein’s Appointment of Mueller Letter, attached hereto. As such, Mr. Mueller cannot claim legal authority as a “Principal Officer” of the United States.

IV. MR. MUELLER IS NOT AN INFERIOR OFFICER OF THE UNITED STATES

In order for Mr. Mueller to be an “Inferior Officer” of the United States, his appointment must be authorized by Congress. As Justice Thomas noted in *Lucia*, “While principal officers must be nominated by the President and confirmed by the Senate, Congress can authorize the appointment of “inferior Officers” by “the President alone,” “the Courts of Law,” or “the Heads of Departments.” Art. II, §2, cl. 2.” Here, notably, Congress has not authorized the creation of the “inferior” office of “Special Counsel”.² Congress has authorized both Assistant United States Attorneys³ and Special United States Attorneys⁴, but at present there is no Congressional Authorization for a “Special Counsel”.⁵ As such, the putative appointment of Mr. Mueller as an

² “I hereby order as follows: (a) Robert S. Mueller III is appointed to serve as Special Counsel for the United States Department of Justice; . . .” Rod J. Rosenstein, Acting Attorney General, May 17, 2017.

³ 28 U.S.C. Section 542 establishes “one or more” Assistant United States Attorneys (“AUSAs”) to be appointed by the Attorney General and are removable by him or her.

⁴ 28 U.S.C. Section 543 establishes the office of Special Assistant United States Attorney (“SAUSA”) to be appointed by the AG and is removable by him or her.

⁵ The analogous, Congressionally-established office of “Independent Counsel” no longer exists. That Office was originally created by the Ethics in Government Act of 1978 and the Ethics in Government Act Amendments of 1982 (96 Stat. 2039), January 3, 1983. It was reauthorized for five years by the Independent Counsel Reauthorization Act of 1987 (101 Stat. 1293), December 15, 1987. It lapsed on December 15, 1992, as a result of a failure of reauthorization by Congress. The Office was reinstated by the Independent Counsel Reauthorization Act of 1994 (PL 103-270) on June 30, 1994. At the end of 1999, an attempt was made to convert the office of “Independent Counsel” into the Office of the Special Counsel pursuant to 28 Code of Federal Regulations, § 600.1 “*Grounds for appointing a Special Counsel*” which states in part: “The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted . . .”. This section of the Code of Federal Regulations – which is not a Congressional act – cannot override the restrictions of Article II, §2, cl. 2 which requires that Congress must first establish the “Office” which a

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“Inferior Officer” designated a “Special Counsel” is a Constitutional nullity.

V. IN ALL EVENTS, MR. MUELLER’S APPOINTMENT EXPIRED ON DECEMBER 13, 2017

Assuming for purposes of argument, that Mr. Rosenstein could appoint Mr. Mueller as a “Special Counsel”, that appointment was expressly limited by statute. First, 5 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.” Here, as detailed in Deputy Attorney General Rosenstein’s letter of May 17, 2017, he had invoked 5 U.S. Code § 3345(a) when appointing Mr. Mueller as “Special Counsel”. As such, Mr. Rosenstein was expressly limited by 5 U.S. Code § 3346, “*Time Limitation*” which states:

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;

Again, assuming Attorney General Session was “otherwise unable to perform the functions and duties of the 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. *A priori*, Mr. Mueller’s authority, whatever that may be, likewise expired on **December 17, 2017**, with Mr. Rosenstein’s statutory sunset of his ability to act as “Acting Attorney General”.

VI. CONCLUSION

In sum:

- ◆ If Mr. Rosenstein is otherwise qualified to Act as the Attorney General under 5 U.S.C. Section 3345(a)(1), his term of office would expire 210 days from when he began Acting as the Attorney General, to wit, **December 17, 2017**;
- ◆ The office Mr. Mueller purports to currently hold is not established by Congress as required by the Appointments Clause;
- ◆ The power Mr. Mueller is exercising is equal to or greater than a United States

Department head may thereafter fill.

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Attorney;

- ◆ United States Attorneys are principal officers requiring Senate confirmation under 28 U.S.C. Section 541
- ◆ Returning to *Lucia*, the Supreme Court has held that “one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case” is entitled to relief. *Ryder v. United States*, 515 U. S. 177, 182-183 (1995). . . . This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188 as all proceedings by a Constitutionally-invalid officer are void.
- ◆ Therefore, Mr. Mueller is acting in violation of the Appointments Clause and his actions are thus *void ab initio*.⁶

I am available to address any questions, comments or concerns you may have.

Yours,



⁶ Interestingly, neither legal counsel for Paul Manafort or Michael Flynn has raised this Article II objection to Mr. Mueller’s appointment.

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cc:

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ORDER NO. 3915-2017

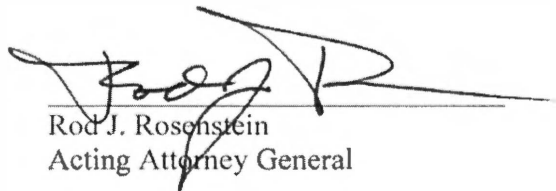
APPOINTMENT OF SPECIAL COUNSEL
TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE
2016 PRESIDENTIAL ELECTION AND RELATED MATTERS

By virtue of the authority vested in me as Acting Attorney General, including 28 U.S.C. §§ 509, 510, and 515, in order to discharge my 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, I hereby order as follows:

- (a) Robert S. Mueller III is appointed to serve as Special Counsel for the United States Department of Justice.
- (b) The Special Counsel 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).
- (c) If the Special Counsel believes it is necessary and appropriate, the Special Counsel is authorized to prosecute federal crimes arising from the investigation of these matters.
- (d) Sections 600.4 through 600.10 of Title 28 of the Code of Federal Regulations are applicable to the Special Counsel.

Date

5/17/17


Rod J. Rosenstein
Acting Attorney General