From: Horwitz, Sari (b) (6) >
Sent: Saturday, April 14, 2018 8:58 AM
To: Rosenstein, Rod (ODAG)
Subject: Re: Contact

Rod, I respect that. But if at some time you decide it would be appropriate to talk to a reporter, I hope it will be me.
Sari

Sent from my iPhone

> On Apr 14, 2018, at 8:01 PM, Rosenstein, Rod (ODAG (b) (6) wrote:
>
> [EXTERNAL EMAIL]
>
> Off the record: I have not talked to any reporters about these events. I am not planning to talk to any reporters. I will let you know if that changes. Feel free to contact Flores or Murphy if you have a specific request.
>
>> On Apr 13, 2018, at 6:36 PM, Horwitz, Sari (b) (6) > wrote:
>>
>> Hello Rod,
>> I'm in China right now, but returning Sunday. If it's necessary, is there a way I can be in touch with you today or over the weekend?
>> Sari
>>
>> Sent from my iPhone

From: Marcus, Rut (b) (6)
Sent: Tuesday, April 17, 2018 8:39 AM
To: Rosenstein, Rod (ODAG)
Subject: Re: query from WaPo oped page

I know; my query was merely anticipatory, which I hope is entirely unnecessary. Thanks so much,
Ruth

Sent from my iPhone

On Apr 16, 2018, at 11:17 PM, Rosenstein, Rod (ODAG (b) (6) > wrote:

> [EXTERNAL EMAIL]
>
> Off the record:
>
> I am impressed that you have my email address! But you will not be surprised to hear that I am not making any comments. Thank you for asking.
>
> On Apr 16, 2018, at 5:15 PM, Marcus, Rut (b) (6) wrote:
>
> > Hi Rod, I know you are swamped, to say the least. Just wanted to convey to you that if it turns out you have something you'd like to say, our page is and will remain open to your thoughts. This is the best way to reach me, or my cell (b) (6),
> > Best,
> > Ruth

From: Horwitz, Sari (b) (6) >
Sent: Monday, April 30, 2018 4:11 PM
To: Rosenstein, Rod (ODAG)
Subject: RE: Can we talk?

It is something I would rather tell you personally. Not about a daily story.

From: Rosenstein, Rod (ODAG (b) (6) >
Sent: Monday, April 30, 2018 3:31 PM
To: Horwitz, Sar (b) (6)
Subject: Re: Can we talk?

[EXTERNAL EMAIL]

Off the record:

Is it something you can't tell Sarah or Ian? I try to avoid media calls. (Nothing personal!)

On Apr 30, 2018, at 2:02 PM, Horwitz, Sar (b) (6) > wrote:

> I need to tell you about something. Is there any way to do that?
> Sari

From: Raman, Sujit (ODAG)
Sent: Thursday, May 24, 2018 7:23 PM
To: Murphy, Marcia (ODAG); Gauhar, Tashina (ODAG); Bolitho, Zachary (ODAG); O'Callaghan, Edward C. (ODAG)
Cc: Suero, Maya A. (ODAG); Gamble, Nathaniel (ODAG)
Subject: RE: Anything for the DAG's binder for the election interference meeting tomorrow?
Attachments: 2018-05 Cyber Task Force Report - Foreign Influence Section v.4.docx; Policy on Disclosure of Foreign Influence Operations v8.0.docx

Please add the attached two documents. Many thanks.

From: Murphy, Marcia (ODAG)
Sent: Thursday, May 24, 2018 3:42 PM
To: Raman, Sujit (ODAG) (b) (6) >; Gauhar, Tashina (ODAG) (b) (6)
Cc: Suero, Maya A. (ODAG (b) (6) >; Gamble, Nathaniel (ODAG) (b) (6) >
Subject: Anything for the DAG's binder for the election interference meeting tomorrow?

Marcy Murphy
Confidential Assistant to the
Deputy Attorney General
(b) (6)

From: Rosenstein, Rod (ODAG)
Sent: Tuesday, May 29, 2018 4:26 PM
To: Schools, Scott (ODAG); Boyd, Stephen E. (OLA); Lasseter, David F. (OLA)
Cc: O'Callaghan, Edward C. (ODAG); Bolitho, Zachary (ODAG)
Subject: RE: Draft response to Grassley 5/17 letter
Attachments: Draft.Response.Grassley.2018.05.17.docx

Revised draft. This will require a few days of review by OLC. It is worth discussing whether this is the right time to respond comprehensively, or whether to await for the next confrontation. The IG report may make this a useful moment to restore regular order.

From: Rosenstein, Rod (ODAG)
Sent: Monday, May 21, 2018 1:54 AM
To: Schools, Scott (ODAG (b) (6) >; Boyd, Stephen E. (OLA (b) (6) >; Lasseter, David F. (OLA (b) (6) >
Cc: O'Callaghan, Edward C. (ODAG (b) (6)
Subject: Draft response to Grassley 5/17 letter

This one is no rush, and perhaps should wait until the OIG report is public. This seems like a good opportunity t (b) (5) [redacted] It also gives me a chance to highlight tha (b) (5) [redacted]

From: Boyd, Stephen E. (OLA)
Sent: Tuesday, May 29, 2018 9:40 PM
To: Rosenstein, Rod (ODAG); O'Callaghan, Edward C. (ODAG); Schools, Scott (ODAG)
Cc: Flores, Sarah Isgur (OPA); Lasseter, David F. (OLA)
Subject: Re: Gowdy

Recommended viewing.

Sent from my iPhone

On May 29, 2018, at 9:21 PM, Pettit, Mark T. (OPA (b) (6) > wrote:

> http://video.foxnews.com/v/5791102112001/?#sp_show-clips
>
> Martha:
> Ed in moments, house oversight committee chairman trey gowdy with his reaction to that. but we begin with chief national correspondent ed henry standing by tonight in washington. hi, ed.
>
> Ed:
> martha, great to see you. the president's lead attorney rudy giuliani openly admitted they believe special counsel robert mueller's that investigation to impact the political question of whether he will face impeachment. where the president is succeeding on that score is raising doubts about the investigators. former officials like james comey and james clapper who, when confronted with mounting evidence that there was surveillance of the trump camp, have tried to shift it to salesman particular call question whethersemantical whetherit was spying or informants. tweeting with spies or informants as the democrats like to call them because it sounds less sinister but it's not all over my campaign each from a very early date. why didn't the crooked highest levels of the fbi or quote unquote justice contact me to tell me the phony russia problem. orthopedic the president keeps trying to frame this as democrats are out to get him when it's widely believed mueller is a republican. other key investigators like rod rosenstein and fbi director christopher wray were appointed, nominated by the president himself. the president alleging mueller is going to interfere with the mid terms tweeting, quote: the 13 angry democrats plus people who worked 8 years for obama working on the rigged russia witch-hunt will be meddling with the midterm elections especially now that republicans, stay tough, are taking the lead in the polls there was no collusion, except by the democrats. one of those democrats pursuing the president adam schiff. he keeps say there is no evidence to support the allegation that the fbi placed a spy inside the trump camp. that phrasing leaves the door open to one or more informants conducting surveillance of the trump camp. listen.
>
> Recording:
> there is no evidence to support that spy theory. you know, this is just a piece of propaganda the president wants to put out and repeat.
>
> Ed:
> giuliani said again he wants to see the intel on this spy issue before agreeing to a presidential interview with mueller. doesn't have time until the on again and off again summit with kim jong un. the president announced sorry he can't spend more time on the russia probe because he has to deal with north korea

and other issueswhen he tweets more than a dozen times about the russia probe that keeps the focus, yes, on the russia probe. martha?

martha:
indeed it does. ed, thank you very much. joining us now south carolina congressman trey gowdy chairman of the house oversight and government reform committee and house intel committee. you were one who saw some of the background documents related to this issue of whether or not there was a spy or informant in the campaign late last week. anything that you can share on a broad scale about what went down there?

Gowdy:
i think there are two things important to understand. number one, the source of president trump's frustration. brennan said he should be in the dust bin of history. comey said impeachment is too good of a remedy. clapper doesn't like him. loretta lynch said call it a matter, not an investigation. schiff said he had evidence of collusion before we even began the investigation and 60 democrats have voted to impeach him before bob mueller has come up with a single, solitary finding. that's what has him frustrated. what should have him heartenside chris wray, rod rosenstein and all the senior were all trump appointees. here is what is fair to ask. what did the fbi do? when did they do it? what was the factual predicate upon which they took whatever actions they took and against whom were they directed? but, remember, martha, it was president trump himself who said, number one, i didn't collude with russia but if anyone connected with my campaign did, i want the fbi to find that out. it looks to me like the fbi was doing what president trump said i want you to do find it out. he is not the target. so, when schiff and others don't make that clear, they are doing a disservice to our fellow citizens. he is not the target.

martha:
this raises the question that the president raised in this -- one of those tweets. there were a lot of them. in which we talked about quite a bit here last week if that were the case, why didn't they give him a little briefing. here is what we found out. you know, we do have somebody who asked some questions of george papadopoulos. we do have somebody who has asked questions of carter page. here's what you need to know

Gowdy:
i think defensive briefings are done a lot. and why the comey fbi didn't do it, i don't know. but chris wray and rod rosenstein have at least made it clear to us, donald trump was never the target of the investigation. he is not the current target of the investigation. now, keep in mind, that can all change depending on what a witness says. as of now, i think chris wray and rod rosenstein are stunned whenever people think trump is the target of their investigation. i will leave it up to them how to brief the president.

martha:
that point of view that you are talking about right now, was that strengthened when you went into this briefing last week?

Gowdy:
yes. i am even more convinced that the fbi did exactly what my fellow citizens would want them to do when they got the information they got. and that it has nothing to do with donald trump.

martha:
all right. so, given the things that were over here on the right hand, all the frustrations, do you think it's problematic the way the president has -- is tweeting about this all the time? because he feels like he

needs to vent. he has got to get his message out there. is it legally problematic in your mind what he is doing?

Gowdy:
i think any time you create prior statements you give mueller or other folks a chance to question you on them and ask what was your factual basis. why did you say that? the president should have access to the best legal minds in the country. and i think he should take advantage of those. and he has got some really good communicators that are on his staff and at his call. if i were his lawyer, and i never will be, i would tell him to rely on his lawyers and his comms folks.

martha:
here is one of them, rudy giuliani speaking with bill hemmer over the holiday weekend. watch.

Rudy clip:
this what's wrong with the government trying to figure out what russia was up to? nothing wrong with the government doing that. everything wrong with the government spying on a candidate of the opposition party. that's a watergate. spy gate. i mean, and without any warning to him and now, to compound that and to make it into a criminal investigation, bill. that's why this is a rigged investigation.

Gowdy:
there are two things former u.s. attorney said. number one, no one knows whether this is a criminal investigation. mueller was told to do a counter intelligence investigation into what russia did. number two, president trump himself in the comey memos said if anyone connected with my campaign was working with russia, i want you to investigate it and it sounds to me like that is exactly what the fbi did. i think when the president finds out what happened, he is going to be not just fine, he is going to be glad that we have an fbi that took seriously what they heard. he was never the target. russia is the target.

martha:
sounds to me as if you would advise him there is no problem with him sitting down with robert mueller.

Gowdy:
absolutely not. i have always said i think you ought to sit down with bob mueller. you told us publicly there was no collusion. you told us publicly there was no obstruction. say in private what have you said publicly. limit the scope to exactly what the mueller memo is, but if he were my client, and i would say if you have done nothing wrong, then you need to sit down and tell mueller what you know.

martha:
there was one judge who said that the scope was all over the place. do you feel comfortable with the scope of this investigation and do you feel like your committee has been shared with to the extent that that exists that the scope exists?

Gowdy:
i'm not sure what the scope of the mueller probe is i know this: rosenstein is the one who created the memo.

martha:
right.

Gowdy:
it's not bob mueller's fault.

martha:

have you seen that memo.

Gowdy:
i have. i have seen the memo have you seen also. the other memo some of my colleagues wants to see is a more narrow.

martha:
the one that basically says investigate russia and anything related to it?

Gowdy:
and as a throw away line at the end and, of course, if there is any accurately look at that, too. we run towards the criminality. but i would think everyone would want to know what russia did. with home is the the second part. what did russia do?

martha:
thank you very much. good to see you, congressman.

USDOJ-Office of Public Affairs

From: USDOJ-Office of Public Affairs
Sent: Tuesday, June 12, 2018 11:12 AM
To: Rosenstein, Rod (ODAG)
Subject: DEPUTY ASSISTANT ATTORNEY GENERAL ADAM S. HICKEY TESTIFIES BEFORE SENATE JUDICIARY COMMITTEE AT HEARING TITLED "ELECTION INTERFERENCE: ENSURING LAW ENFORCEMENT IS EQUIPPED TO TARGET THOSE SEEKING TO DO HARM"

FOR IMMEDIATE RELEASE
TUESDAY, JUNE 12, 2018

DEPUTY ASSISTANT ATTORNEY GENERAL ADAM S. HICKEY TESTIFIES BEFORE SENATE JUDICIARY COMMITTEE AT HEARING TITLED "ELECTION INTERFERENCE: ENSURING LAW ENFORCEMENT IS EQUIPPED TO TARGET THOSE SEEKING TO DO HARM"

Remarks as prepared for delivery

WASHINGTON, D.C.

Good morning, Chairman Grassley, Ranking Member Feinstein, and distinguished Members of the Committee. Thank you for the opportunity to

testify on behalf of the Department of Justice concerning our efforts to combat election interference.

The Attorney General identified this issue as a priority when he created a Cyber Digital Task Force earlier this year and directed it to address "efforts to interfere with our elections," among other threats. That Task Force is expected to submit a report to the Attorney General by the end of this month and will issue a public report in mid July. The Department appreciates the Committee's interest in making sure that law enforcement has the tools we need to target those who may seek to do us harm by interfering in our elections.

As I describe below, the Department's principal role in combatting election interference is the investigation and prosecution of Federal crimes, but our investigations can yield more than criminal charges to protect national security. Foreign influence efforts extend beyond efforts to interfere with elections, and they require more than law enforcement responses alone. I will cover three areas in my testimony today. First, I will describe what we mean by the term "foreign influence operations" and provide examples of operations we have observed in the past. Second, I will discuss how the Department has categorized recent foreign influence operations targeting our elections. Third, and finally, I will explain how the Department is responding to those operations and how our efforts fit within the "whole of society" approach that is necessary to defeat foreign influence operations.

I. Background on Foreign Influence Operations

Foreign influence operations include covert actions by foreign governments intended to affect U.S. political sentiment and public discourse, sow divisions in our society, or undermine confidence in our democratic institutions to achieve strategic geopolitical objectives.

Foreign influence operations aimed at the United States are not a new problem. These efforts have taken many forms across the decades, from funding newspapers and forging internal government communications, to more recently creating and operating false U.S. personas on Internet sites designed to attract U.S. audiences and spread divisive messages. The nature of the problem, however and how the U.S. government must combat it are changing as advances in technology allow foreign actors to reach unprecedented numbers of Americans covertly and without setting foot on U.S. soil. Fabricated news stories and sensational headlines like those sometimes found on social media platforms are just the latest iteration of a practice foreign adversaries have long employed in an effort to discredit and undermine individuals or organizations in the United States.

Although the tactics have evolved, the goals of these activities remain the same: to spread disinformation and to sow discord on a mass scale in order to weaken the U.S. democratic process, and ultimately to undermine the appeal of

democracy itself.

As one deliberate component of this strategy, foreign influence operations have targeted U.S. elections. Indeed, elections are a particularly attractive target for foreign influence campaigns because they provide an opportunity to undermine confidence in a core element of our democracy: the process by which we select our leaders. As explained in the January 2017 report by the Office of the Director of National Intelligence (ODNI) addressing Russian interference in the 2016 U.S. presidential election, Russia has had a "longstanding desire to undermine the U.S. led liberal democratic order," and that nation's recent election focused "activities demonstrated a significant escalation in directness, level of activity and scope of effort compared to previous operations." Russia's foreign influence campaign, according to ODNI, "followed a Russian messaging strategy that blends covert intelligence operations such as cyber activity with overt efforts by Russian Government agencies, state funded media, third party intermediaries, and paid social media users or 'trolls.'"

Although foreign influence operations did not begin and will not end with the 2016 election, the operations we saw in 2016 represent a significant escalation in the directness, level of activity and scope of efforts aimed at the United States and our democracy, based in large part on the utility of the Internet for conducting these operations. They require a strong response.

II. Types of Foreign Influence Operations

In advance of the 2018 mid term elections, the Department is mindful of ODNI's assessment that Russia, and possibly other adversaries, likely will seek to interfere in the 2018 midterm elections through influence operations. Such operations could include a broad spectrum of activity, which we categorize as follows. Importantly, these categories are just a way to conceptualize the types of foreign influence activity our adversaries might engage in; they are not an indication that foreign governments actually have engaged in each described category of activity.

1. Cyber operations targeting election infrastructure. Such operations could seek to undermine the integrity or availability of election related data. For example, adversaries could employ cyber enabled or other means to target election infrastructure, such as voter registration databases and voting machines. Operations aimed at removing otherwise eligible voters from the rolls or attempting to manipulate the results of an election (or even just disinformation suggesting that such manipulation has occurred), could undermine the integrity and legitimacy of elections, as well as public confidence in election results. To our knowledge, no foreign government has succeeded in perpetrating ballot fraud, but raising even the doubt that it has occurred could be damaging.

2. Cyber operations targeting political organizations, campaigns, and public

officials. These operations could seek to compromise the confidentiality of private information of the targeted groups or individuals, as well as its integrity. For example, adversaries could conduct cyber or other operations against U.S. political organizations and campaigns to steal confidential information and use that information, or alterations thereof, to discredit or embarrass candidates, undermine political organizations, or impugn the integrity of public officials.

3. Covert influence operations to assist or harm political organizations, campaigns and public officials. For example, adversaries could conduct covert influence operations to provide assistance that is prohibited from foreign sources to political organizations, campaigns and government officials. These intelligence operations might involve covert offers of financial, logistical, or other campaign support to, or covert attempts to influence the policies or positions of, unwitting politicians, party leaders, campaign officials, or even the public.

4. Covert influence operations, including disinformation operations, to influence public opinion and sow division. Using false U.S. personas, adversaries could covertly create and operate social media pages and other forums designed to attract U.S. audiences and spread disinformation, or divisive messages. These messages need not relate directly to campaigns. They may seek to depress voter turnout among particular groups, encourage third party voting, or convince the public of widespread voter fraud in order to undermine confidence in election results.

5. Overt influence efforts, such as the use of foreign media outlets or other organizations to influence policymakers and the public. For example, adversaries could use state owned or state influenced media outlets to reach U.S. policymakers or the public. Governments can disguise these outlets as independent, while using them to promote divisive narratives and political objectives.

III. The Department of Justice's Role in Addressing Foreign Influence Operations

The Department of Justice has a significant role in investigating and disrupting foreign government activity inside the United States that threatens U.S. national security. With both law enforcement and intelligence authorities, the FBI is the lead federal agency responsible for investigating foreign influence operations, and the Department's prosecutors are responsible for charging and prosecuting any federal crimes committed during a foreign influence operation. The FBI has established the Foreign Influence Task Force (FITF) to identify and combat foreign influence operations targeting U.S. democratic institutions, with focus on the U.S. electoral process and the 2018 and 2020 elections. Through our own authorities and in close coordination with our partner Departments and agencies, the Department can act against threats posed by foreign influence

operations in several ways.

First, as an intelligence driven organization and member of the Intelligence Community (IC), the FBI can pursue tips and leads, including from classified information, to investigate illegal foreign influence activities and, in coordination with the IC and the Department of Homeland Security, share information from those investigations with State and local election officials, political organizations, and others to help them detect, prevent, and respond to computer hacking, espionage, and other criminal activities.

Second, through the FITF, the Department maintains strategic relationships with social media providers, who bear the primary responsibility for securing their own products, platforms and services from this threat. By sharing information with them, the FBI can help providers with their own initiatives to track foreign influence activity and to enforce terms of service that prohibit the use of their platforms for such activities. This approach is similar to the Department's approach in working with social media providers to address terrorists' use of social media.

Third, the Department's investigations may expose conduct that warrants criminal charges. Criminal charges are a basic tool the Department uses to pursue justice and deter similar conduct in the future. We work with other nations to obtain custody of foreign defendants whenever possible, and those who seek to avoid justice in U.S. courts will find their freedom of travel significantly restricted. Criminal charges also provide the public with information about the activities of foreign actors we seek to hold accountable and raise awareness of the threats we face.

Fourth, the Department's investigations can support the actions of other U.S. government agencies using diplomatic, intelligence, military, and economic tools. For example, in several recent cases, the Secretary of the Treasury has imposed financial sanctions on defendants abroad under executive orders that authorize the imposition of sanctions for malicious cyber enabled activity. (See E.O. 13694 (Apr. 1, 2015), as amended by E.O. 13757 (Dec. 29, 2016).) Treasury's action blocked all property and interests in property of the designated persons subject to U.S. jurisdiction and prohibited U.S. persons from engaging in transactions with the sanctioned individuals.

Finally, in appropriate cases, information gathered during our investigations can be used either by the Department or in coordination with our U.S. government partners to alert victims, other affected individuals, and the public to foreign influence activities. Exposure of foreign influence operations ultimately may be one of the best ways to counter them. Victim notifications, defensive counterintelligence briefings and public safety announcements are traditional Department activities, but they must be conducted with particular sensitivity in the context of elections, to avoid even the appearance of partiality.

In taking these actions, we are alert to ways in which current law may benefit from reform. By providing ready access to the American public and policymakers from abroad, the Internet makes it easier for foreign governments to evade restrictions on undeclared domestic activities and mask their identities while reaching an intended audience. We welcome the opportunity to work with Congress to combat foreign influence operations, including those aimed at our elections, by clarifying or expanding our laws to provide new tools or sharpen existing ones, if appropriate.

IV. Conclusion

The nature of foreign influence operations will continue to change as technology and our foreign adversaries' tactics continue to change. Our adversaries will persist in seeking to exploit the diversity and richness of today's information space, and the tactics and technology they employ will continue to evolve.

The Department plays an important role in combating foreign efforts to interfere in our elections. At the same time, it cannot and should not attempt to address the problem alone. There are limits to the Department's role and the role of the U.S. government more broadly in addressing foreign influence operations aimed at sowing discord and undermining our institutions. Combating foreign influence operations requires a "whole of society" approach that relies on coordinated actions by Federal, State, and local government agencies; support from the private sector; and the active engagement of an informed public.

I want to thank the Committee again for providing me this opportunity to discuss these important issues on behalf of the Department. We look forward to continuing to work with Congress to improve our ability to respond to this threat. I am happy to answer any questions you may have.

# # #

NSD

18 767

Do not reply to this message. If you have questions, please use the contacts in the message or call the Office of Public Affairs at 202 514 2007.

Rosenstein, Rod (ODAG)

From:	Rosenstein, Rod (ODAG)
Sent:	Tuesday, June 19, 2018 11:21 AM
To:	O'Callaghan, Edward C. (ODAG); Schools, Scott (ODAG)
Subject:	FINAL MEMORANDUM.pdf
Attachments:	image1.png; ATT00001.txt; FINAL MEMORANDUM.pdf; ATT00002.txt

This was unsolicited. I am passing it on for any appropriate consideration:

MEMORANDUM 8 June 2018

To: Deputy Attorney General Rod Rosenstein
Assistant Attorney General Steve Engel

From: Bill Barr

Re: Mueller's "Obstruction" Theory

I am writing as a former official deeply concerned with the institutions of the Presidency and the Department of Justice. I realize that I am in the dark about many facts, but I hope my views may be useful.

It appears Mueller's team is investigating a possible case of "obstruction" by the President predicated substantially on his expression of hope that the Comey could eventually "let…go" of its investigation of Flynn and his action in firing Comey. In pursuit of this obstruction theory, it appears that Mueller's team is demanding that the President submit to interrogation about these incidents, using the threat of subpoenas to coerce his submission.

Mueller should not be permitted to demand that the President submit to interrogation about alleged obstruction. Apart from whether Mueller a strong enough factual basis for doing so, Mueller's obstruction theory is fatally misconceived. As I understand it, his theory is premised on a novel and legally insupportable reading of the law. Moreover, in my view, if credited by the Department, it would have grave consequences far beyond the immediate confines of this case and would do lasting damage to the Presidency and to the administration of law within the Executive branch.

As things stand, obstruction laws do not criminalize just any act that can influence a "proceeding." Rather they are concerned with acts intended to have a *particular kind* of impact. A "proceeding" is a formalized process for finding the truth. In general, obstruction laws are meant to protect proceedings from actions designed subvert the integrity of their truth-finding function through compromising the honesty of decision-makers (*e.g.*, judge, jury) or impairing the integrity or availability of evidence testimonial, documentary, or physical. Thus, obstruction laws prohibit a range of "bad acts" such as tampering with a witness or juror; or destroying, altering, or falsifying evidence all of which are inherently wrongful because, by their very nature, they are directed at depriving the proceeding of honest decision-makers or access to full and accurate evidence. In general, then, the *actus reus* of an obstruction offense is the inherently subversive "bad act" of impairing the integrity of a decision-maker or evidence. The requisite *mens rea* is simply intending the wrongful impairment that inexorably flows from the act.

Obviously, the President and any other official can commit obstruction in this classic sense of sabotaging a proceeding's truth-finding function. Thus, for example, if a President knowingly destroys or alters evidence, suborns perjury, or induces a witness to change testimony, or commits

any act deliberately impairing the integrity or availability of evidence, then he, like anyone else, commits the crime of obstruction. Indeed, the acts of obstruction alleged against Presidents Nixon and Clinton in their respective impeachments were all such "bad acts" involving the impairment of evidence. Enforcing these laws against the President in no way infringes on the President's plenary power over law enforcement because exercising this discretion such as his complete authority to start or stop a law enforcement proceeding -- does not involve commission of any of these inherently wrongful, subversive acts.

The President, as far as I know, is not being accused of engaging in any wrongful act of evidence impairment. Instead, Mueller is proposing an unprecedented expansion of obstruction laws so as to reach facially-lawful actions taken by the President in exercising the discretion vested in him by the Constitution. It appears Mueller is relying on 18 U.S.C. §1512, which generally prohibits acts undermining the integrity of evidence or preventing its production. Section 1512 is relevant here because, unlike other obstruction statutes, it does not require that a proceeding be actually "pending" at the time of an obstruction, but only that a defendant have in mind an anticipated proceeding. Because there were seemingly no relevant proceedings pending when the President allegedly engaged in the alleged obstruction, I believe that Mueller's team is considering the "residual clause" in Section 1512 subsection (c)(2) as the potential basis for an obstruction case. Subsection (c) reads:

> (c) Whoever corruptly-- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) *otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so [is guilty of the crime of obstruction]. [emphasis added].

As I understand the theory, Mueller proposes to give clause (c)(2), which previously has been *exclusively* confined to acts of evidence impairment, a new unbounded interpretation. First, by reading clause (c)(2) in isolation, and glossing over key terms, he construes the clause as a free-standing, all-encompassing provision prohibiting *any act* influencing a proceeding if done with an improper motive. Second, in a further unprecedented step, Mueller would apply this sweeping prohibition to facially-lawful acts taken by public officials exercising of their discretionary powers if those acts influence a proceeding. Thus, under this theory, simply by exercising his Constitutional discretion in a facially-lawful way for example, by removing or appointing an official; using his prosecutorial discretion to give direction on a case; or using his pardoning power a President can be accused of committing a crime based solely on his subjective state of mind. As a result, any discretionary act by a President that influences a proceeding can become the subject of a criminal grand jury investigation, probing whether the President acted with an improper motive.

If embraced by the Department, this theory would have potentially disastrous implications, not just for the Presidency, but for the Executive branch as a whole and for the Department in particular. While Mueller's focus is the President's discretionary actions, his theory would apply to *all exercises of prosecutorial discretion* by the President's subordinates, from the Attorney General down to the most junior line prosecutor. Simply by giving direction on a case, or class of

cases, an official opens himself to the charge that he has acted with an "improper" motive and thus becomes subject to a criminal investigation. Moreover, the challenge to Comey's removal shows that not just prosecutorial decisions are at issue. Any personnel or management decisions taken by an official charged with supervising and conducting litigation and enforcement matters in the Executive branch can become grist for the criminal mill based solely on the official's subjective state of mind. All that is needed is a claim that a supervisor is acting with an improper purpose and any act arguably constraining a case such as removing a U.S. Attorney -- could be cast as a crime of obstruction.

It is inconceivable to me that the Department could accept Mueller's interpretation of §1512(c)(2). It is untenable as a matter of law and cannot provide a legitimate basis for interrogating the President. I know you will agree that, if a DOJ investigation is going to take down a democratically-elected President, it is imperative to the health of our system and to our national cohesion that any claim of wrongdoing is solidly based on evidence of a *real* crime not a debatable one. It is time to travel well-worn paths; not to veer into novel, unsettled or contested areas of the law; and not to indulge the fancies by overly-zealous prosecutors.

As elaborated on below, Mueller's theory should be rejected for the following reasons:

First, the sweeping interpretation being proposed for § 1512's residual clause is contrary to the statute's plain meaning and would directly contravene the Department's longstanding and consistent position that generally-worded statutes like § 1512 cannot be applied to the President's exercise of his constitutional powers in the absence of a "clear statement" in the statute that such an application was intended.

Second, Mueller's premise that, whenever an investigation touches on the President's own conduct, it is inherently "corrupt" under § 1512 for the President to influence that matter is insupportable. In granting plenary law enforcement powers to the President, the Constitution places no such limit on the President's supervisory authority. Moreover, such a limitation cannot be reconciled with the Department's longstanding position that the "conflict of interest" laws do not, and cannot, apply to the President, since to apply them would impermissibly "disempower" the President from supervising a class of cases that the Constitution grants him the authority to supervise.

Third, defining facially-lawful exercises of Executive discretion as potential crimes, based solely on subjective motive, would violate Article II of the Constitution by impermissibly burdening the exercise of core discretionary powers within the Executive branch.

Fourth, even if one were to indulge Mueller's obstruction theory, in the particular circumstances here, the President's motive in removing Comey and commenting on Flynn could not have been "corrupt" unless the President and his campaign were actually guilty of illegal collusion. Because the obstruction claim is entirely dependent on first finding collusion, Mueller should not be permitted to interrogate the President about obstruction until has enough evidence to establish collusion.

I. The Statute's Plain Meaning, and "the Clear Statement" Rule Long Adhered To By the Department, Preclude Its Application to Facially-Lawful Exercises of the President's Constitutional Discretion.

The unbounded construction Mueller would give §1512's residual clause is contrary to the provision's text, structure, and legislative history. By its terms, §1512 focuses exclusively on actions that subvert the truth-finding function of a proceeding by impairing the availability or integrity of evidence testimonial, documentary, or physical. Thus, §1512 proscribes a litany of specifically-defined acts of obstruction, including killing a witness, threatening a witness to prevent or alter testimony, destroying or altering documentary or physical evidence, and harassing a witness to hinder testimony. All of these enumerated acts are "obstructive" in precisely the same way they interfere with a proceeding's ability to gather complete and reliable evidence.

The question here is whether the phrase "or corruptly otherwise obstructs" in clause (c)(2) is divorced from the litany of the specific prohibitions in § 1512, and is thus a free-standing, all-encompassing prohibition reaching *any* act that influences a proceeding, or whether the clause's prohibition against "otherwise" obstructing is somehow tied to, and limited by, the character of all the other forms of obstruction listed in the statute. I think it is clear that use of the word "otherwise" in the residual clause expressly links the clause to the forms of obstruction specifically defined elsewhere in the provision. Unless it serves that purpose, the word "otherwise" does no work at all and is mere surplusage. Mueller's interpretation of the residual clause as covering *any and all acts* that influence a proceeding reads the word "otherwise" out of the statute altogether. But any proper interpretation of the clause must give effect to the word "otherwise;" it must do some work.

As the Supreme Court has suggested, *Begay v. United States,* 553 U.S. 137, 142-143 (2008), when Congress enumerates various specific acts constituting a crime and then follows that enumeration with a residual clause, introduced with the words "or otherwise," then the more general action referred to immediately after the word "otherwise" is most naturally understood to cover acts that cause a *similar kind* of result as the preceding listed examples, but cause those results in a *different manner*. In other words, the specific examples enumerated prior to the residual clause are typically read as refining or limiting in some way the broader catch-all term used in the residual clause. *See also Yates v. United States*, 135 S.Ct. 1074, 1085-87 (2015). As the *Begay* Court observed, if Congress meant the residual clause to be so all-encompassing that it subsumes all the preceding enumerated examples, "it is hard to see why it would have needed to include the examples at all." 553 U.S. at 142; *see McDonnell v. United States*, 136 S.Ct. 2355, 2369 (2016). An example suffices to make the point: If a statute prohibits "slapping, punching, kicking, biting, gouging eyes, or otherwise hurting" another person, the word "hurting" in the residual clause would naturally be understood as referring to the same *kind* of physical injury inflicted by the enumerated acts, but inflicted in a different way *i.e.,* pulling hair. It normally would not be understood as referring to any kind of "hurting," such as hurting another's feelings, or hurting another's economic interests.

Consequently, under the statute's plain language and structure, the most natural and plausible reading of 1512(c)(2) is that it covers acts that have the *same kind of obstructive impact* as the listed forms of obstruction *i.e.,* impairing the availability or integrity of evidence but cause this impairment in a different way than the enumerated actions do. Under this construction,

then, the "catch all" language in clause (c)(2) encompasses any conduct, even if not specifically described in 1512, that is directed at undermining a proceeding's truth-finding function through actions impairing the integrity and availability of evidence. Indeed, this is how the residual clause has been applied. From a quick review of the cases, it appears all the cases have involved attempts to interfere with, or render false, the evidence that would become available to a proceeding. Even the more esoteric applications of clause (c)(2) have been directed against attempts to prevent the flow of evidence to a proceeding. *E.g., United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014)(soliciting tips from corrupt cops to evade surveillance); *United States v. Phillips*, 583 F.3d 1261 (10th Cir. 2009)(disclosing identity of undercover agent to subject of grand jury drug investigation). As far as I can tell, no case has ever treated as an "obstruction" an official's exercise of prosecutorial discretion or an official's management or personnel actions collaterally affecting a proceeding.

Further, reading the residual clause as an all-encompassing proscription cannot be reconciled either with the other subsections of § 1512, or with the other obstruction provisions in Title 18 that must be read *in pari passu* with those in § 1512. Given Mueller's sweeping interpretation, clause (c)(2) would render all the specific terms in clause (c)(1) surplusage; moreover, it would swallow up all the specific prohibitions in the remainder of § 1512 -- subsections (a), (b), and (d). More than that, it would subsume virtually all other obstruction provisions in Title 18. For example, it would supervene the omnibus clause in § 1503, applicable to pending judicial proceedings, as well as the omnibus clause in § 1505, applicable to pending proceedings before agencies and Congress. Construing the residual clause in § 1512(c)(2) as supplanting these provisions would eliminate the restrictions Congress built into those provisions -- *i.e.*, the requirement that a proceeding be "pending" -- and would supplant the lower penalties in those provisions with the substantially higher penalties in § 1512(c). It is not too much of an exaggeration to say that, if § 1512(c)(2) can be read as broadly as being proposed, then virtually all Federal obstruction law could be reduced to this single clause.

Needless to say, it is highly implausible that such a revolution in obstruction law was intended, or would have gone uncommented upon, when (c)(2) was enacted. On the contrary, the legislative history makes plain that Congress had a more focused purpose when it enacted (c)(2). That subsection was enacted in 2002 as part of the Sarbanes-Oxley Act. That statute was prompted by Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen, had systematically destroyed potentially incriminating documents. Subsection (c) was added to Section 1512 explicitly as a "loophole" closer meant to address the fact that the existing section 1512(b) covers document destruction only where a defendant has induced another person to do it and does not address document destruction carried out by a defendant directly.

As reported to the Senate, the Corporate Fraud Accountability Act was expressly designed to "clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. No. 107-146, at 14-15. Section 1512(c) did not exist as part of the original proposal. See S. 2010, 107th Cong. (2002). Instead, it was later introduced as an amendment by Senator Trent Lott in July 2002. 148 Cong. Rec. S6542 (daily ed. July 10, 2002). Senator Lott explained that, by adding new § 1512(c), his proposed amendment:

> would enact stronger laws against *document shredding*. Current law prohibits obstruction of justice by a defendant acting alone, but only if a proceeding is pending and a subpoena has been issued for the evidence that has been destroyed or altered .... [T]his section would allow the Government to charge obstruction against individuals who acted alone, even if the tampering took place prior to the issuance of a grand jury subpoena. I think this is something we need to make clear so we do not have a repeat of what we saw with the Enron matter earlier this year.

Id. at S6545 (statement of Sen. Lott) (emphasis supplied). Senator Orrin Hatch, in support of Senator Lott's amendment, explained that it would "close [] [the] loophole" created by the available obstruction statutes and hold criminally liable a person who, acting alone, destroys documents. Id. at S6550 (statement of Sen. Hatch). The legislative history thus confirms that § 1512(c) was not intended as a sweeping provision supplanting wide swathes of obstruction law, but rather as a targeted gap-filler designed to strengthen prohibitions on the impairment of evidence.

Not only is an all-encompassing reading of § 1512(c)(2) contrary to the language and manifest purpose of the statute, but it is precluded by a fundamental canon of statutory construction applicable to statutes of this sort. Statutes must be construed with reference to the constitutional framework within which they operate. *E.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Reading § 1512(c)(2) broadly to criminalize the President's facially-lawful exercises of his removal authority and his prosecutorial discretion, based on probing his subjective state of mind for evidence of an "improper" motive, would obviously intrude deeply into core areas of the President's constitutional powers. It is well-settled that statutes that do not *expressly* apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). OLC has long rigorously enforced this "clear statement" rule to limit the reach of broadly worded statutes so as to prevent undue intrusion into the President's exercise of his Constitutional discretion.

As OLC has explained, the "clear statement" rule has two sources. First, it arises from the long-recognized "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions. Second, the rule exists to protect the "usual constitutional balance" between the branches contemplated by the Framers by "requir[ing] an express statement by Congress before assuming it intended" to impinge upon Presidential authority. *Franklin*, 505 U.S. at 801; *see, e.g., Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges,* 19 Op. O.L.C. 350 (1995).

This clear statement rule has been applied frequently by the Supreme Court as well as the Executive branch with respect to statutes that might otherwise, if one were to ignore the constitutional context, be susceptible of an application that would affect the President's constitutional prerogatives. For instance, in *Franklin* the Court was called upon to determine whether the Administrative Procedure Act ("APA"), 5 U.S.C §§ 701-706, authorized "abuse of discretion" review of final actions by the President. Even though the statute defined reviewable action in a way that facially could include the President, and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court:

> [t]he President is not [expressly] excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800-01. To amplify, she continued, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." *Id.* at 801.

Similarly, in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), the Court held that the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 2, does not apply to the judicial recommendation panels of the American Bar Association because interpreting the statute as applying to them would raise serious constitutional questions relating to the President's constitutional appointment power. By its terms, FACA applied to any advisory committee used by an agency "in the interest of obtaining advice or recommendations for the President." 5 U.S.C. app. § 3(2(c). While acknowledging that a "straightforward reading" of the statute's language would seem to require its application to the ABA committee, *Public Citizen*, 491 U.S. at 453, the Court held that such a reading was precluded by the "cardinal principle" that a statute be interpreted to avoid serious constitutional question." *Id.* at 465-67. Notably, the majority stated, "[o]ur reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government," and "[t]hat construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable." *Id.* at 466.

> The Office of Legal Counsel has consistently "adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President would pose a significant question regarding the President's constitutional prerogatives." *E.g, The Constitutional Separation of Powers Between the President and Congress*, __ Op. O.L.C. 124, 178 (1996); *Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges***,** 19 Op. O.L.C. 350 (1995).

The Department has applied this principle to broadly-worded criminal statutes, like the one at issue here. Thus, in a closely analogous context, the Department has long held that the conflict-of-interest statute, 18 U.S.C § 208, does not apply to the President. That statute prohibits any "officer or employee of the executive branch" from "participat[ing] personally and substantially" in any particular matter in which he or she has a personal financial interest. *Id.* In the leading opinion on the matter, then-Deputy Attorney General Laurence Silberman determined that the legislative history disclosed no intention to cover the President and doing so would raise "serious questions as to the constitutionality" of the statute, because the effect of applying the statute to the President would "disempower" the President from performing his constitutionally-prescribed functions as to certain matters . See *Memorandum for Richard T. Burress, Office of the President,*

from Laurence H. Silberman, Deputy Attorney General, Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution at 2, 5 (Aug. 28, 1974).

Similarly, OLC opined that the Anti-Lobbying Act, 18 U.S.C. § 1913, does not apply fully against the President. *See Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 304-06 (1989). The Anti-Lobbying Act prohibits any appropriated funds from being "used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress." 18 U.S.C. § 1913. The statute provided an exception for communications by executive branch officers and employees if the communication was made pursuant to a request by a member of Congress or was a request to Congress for legislation or appropriations. OLC concluded that applying the Act as broadly as its terms would otherwise allow would raise serious constitutional questions as an infringement of the President's Recommendations Clause power.

In addition to the "clear statement" rule, other canons of statutory construction preclude giving the residual clause in §1512(c)(2) the unbounded scope proposed by Mueller's obstruction theory. As elaborated on in the ensuing section, to read the residual clause as extending beyond evidence impairment, and to apply it to any that "corruptly" affects a proceeding, would raise serious Due Process issues. Once divorced from the concrete standard of evidence impairment, the residual clause defines neither the crime's *actus reus* (what conduct amounts to obstruction) nor its *mens rea* (what state of mind is "corrupt") "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." *See e.g. McDonnell v. United States*, 136 S.Ct. at 2373. This vagueness defect becomes even more pronounced when the statute is applied to a wide range of public officials whose normal duties involve the exercise of prosecutorial discretion and the conduct and management of official proceedings. The "cardinal rule" that a statute be interpreted to avoid serious constitutional questions mandates rejection of the sweeping interpretation of the residual clause proposed by Mueller.

Even if the statute's plain meaning, fortified by the "clear statement" rule, were not dispositive, the fact that § 1512 is a criminal statute dictates a narrower reading than Mueller's all-encompassing interpretation. Even if the scope of § 1512(c)(2) were ambiguous, under the "rule of lenity," that ambiguity must be resolved against the Government's broader reading. *See, e.g., United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances -- where text, structure, and history fail to establish that the Government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.")

In sum, the sweeping construction of § 1512(c)'s residual clause posited by Mueller's obstruction theory is novel and extravagant. It is contrary to the statute's plain language, structure, and legislative history. Such a broad reading would contravene the "clear statement" rule of statutory construction, which the Department has rigorously adhered to in interpreting statutes, like this one, that would otherwise intrude on Executive authority. By it terms, § 1512 is intended to protect the truth-finding function of a proceeding by prohibiting acts that would impair the availability or integrity of evidence. The cases applying the "residual clause" have fallen within this scope. The clause has never before been applied to facially-lawful discretionary acts of

Executive branch official. Mueller's overly-aggressive use of the obstruction laws should not be embraced by the Department and cannot support interrogation of the President to evaluate his subjective state of mind.

II. Applying §1512(c)(2) to Review Facially-Lawful Exercises of the President's Removal Authority and Prosecutorial Discretion Would Impermissibly Infringe on the President's Constitutional Authority and the Functioning of the Executive Branch.

This case implicates at least two broad discretionary powers vested by the Constitution exclusively in the President. First, in removing Comey as director of the FBI there is no question that the President was exercising one of his core authorities under the Constitution. Because the President has Constitutional responsibility for seeing that the laws are faithfully executed, it is settled that he has "illimitable" discretion to remove principal officers carrying out his Executive functions. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138, 3152 (2010); *Myers v. United States*, 272 U.S. 52 (1926). Similarly, in commenting to Comey about Flynn's situation to the extent it is taken as the President having placed his thumb on the scale in favor of lenity the President was plainly within his plenary discretion over the prosecution function. The Constitution vests *all Federal law enforcement power*, and hence prosecutorial discretion, in the President. The President's discretion in these areas has long been considered "absolute," and his decisions exercising this discretion are presumed to be regular and are generally deemed non-reviewable. *See, e.g., United States v. Armstrong,* 517 U.S. 456, 464 (1996); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see generally* S. Prakash, The Chief Prosecutor, 73 Geo. Wash. L. Rev. 521 (2005)

The central problem with Mueller's interpretation of §1512(c)(2) is that, instead of applying the statute to inherently wrongful acts of evidence impairment, he would now define the *actus reus* of obstruction as *any act,* including facially lawful acts, that influence a proceeding. However, the Constitution vests plenary authority over law enforcement proceedings in the President, and therefore one of the President's core constitutional authorities is precisely to make decisions "influencing" proceedings. In addition, the Constitution vests other discretionary powers in the President that can have a collateral influence on proceedings including the power of appointment, removal, and pardon. The crux of Mueller's position is that, whenever the President exercises any of these discretionary powers and thereby "influences" a proceeding, he has completed the *actus reus* of the crime of obstruction. To establish guilt, all that remains is evaluation of the President's state of mind to divine whether he acted with a "corrupt" motive.

Construed in this manner, §1512(c)(2) would violate Article II of the Constitution in at least two respects:

First, Mueller's premise appears to be that, when a proceeding is looking into the President's own conduct, it would be "corrupt" within the meaning of §1512(c)(2) for the President to attempt to influence that proceeding. In other words, Mueller seems to be claiming that the obstruction statute effectively walls off the President from exercising Constitutional powers over cases in which his own conduct is being scrutinized. This premise is clearly wrong constitutionally. Nor can it be

reconciled with the Department's longstanding position that the "conflict of interest" laws do not, and cannot, apply to the President, since to apply them would impermissibly "disempower" the President from supervising a class of cases that the Constitution grants him the authority to supervise. Under the Constitution, the President's authority over law enforcement matters is necessarily all-encompassing, and Congress may not exscind certain matters from the scope of his responsibilities. The Framers' plan contemplates that the President's law enforcement powers extend to all matters, including those in which he had a personal stake, and that the proper mechanism for policing the President's faithful exercise of that discretion is the political process that is, the People, acting either directly, or through their elected representatives in Congress.

Second, quite apart from this misbegotten effort to "disempower" the President from acting on matters in which he has an interest, defining facially-lawful exercises of Executive discretion as potential crimes, based solely on the President's subjective motive, would violate Article II of the Constitution by impermissibly burdening the exercise of core discretionary powers within the Executive branch. The prospect of criminal liability based solely on the official's state of mind, coupled with the indefinite standards of "improper motive" and "obstruction," would cast a pall over a wide range of Executive decision-making, chill the exercise of discretion, and expose to intrusive and free-ranging examination of the President's (and his subordinate's) subjective state of mind in exercising that discretion.

A. Section 1512(c)(2) May Not "Disempower" the President from Exercising His Law Enforcement Authority Over a Particular Class of Matters.

As discussed further below, a fatal flaw in Mueller's interpretation of §1512(c)(2) is that, while defining obstruction solely as acting "corruptly," Mueller offers no definition of what "corruptly" means. It appears, however, that Mueller has in mind particular circumstances that he feels may give rise to possible "corruptness" in the current matter. His tacit premise appears to be that, when an investigation is looking into the President's own conduct, it would be "corrupt" for the President to attempt to influence that investigation.

On a superficial level, this outlook is unsurprising: at first blush it accords with the old Roman maxim that a man should not be the judge in his own case and, because "conflict-of-interest" laws apply to all the President's subordinates, DOJ prosecutors are steeped in the notion that it is illegal for an official to touch a case in which he has a personal stake. But constitutionally, as applied to the President, this mindset is entirely misconceived: there is no *legal* prohibition as opposed a political constraint -- against the President's acting on a matter in which he has a personal stake.

The Constitution itself places no limit on the President's authority to act on matters which concern him or his own conduct. On the contrary, the Constitution's grant of law enforcement power to the President is plenary. Constitutionally, it is wrong to conceive of the President as simply the highest officer within the Executive branch hierarchy. He alone *is* the Executive branch. As such, he is the sole repository of *all Executive powers* conferred by the Constitution. Thus, the full measure of law enforcement authority is placed in the President's hands, and no limit is placed on the kinds of cases subject to his control and supervision. While the President has subordinates --the Attorney General and DOJ lawyers -- who exercise prosecutorial discretion on

his behalf, they are merely "his hand," *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) the discretion they exercise is the President's discretion, and their decisions are legitimate precisely because they remain under his supervision, and he is still responsible and politically accountable for them.

Nor does any statute purport to restrict the President's authority over matters in which he has an interest. On the contrary, in 1974, the Department concluded that the conflict-of interest-laws cannot be construed as applying to the President, expressing "serious doubt as to the constitutionality" of a statute that sought "to disempower" the President from acting over particular matters. *Letter to Honorable Howard W. Cannon from Acting Attorney General Laurence H. Silberman*, dated September 20, 1974; and *Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution* at 2, 5 (Aug. 28, 1974). As far as I am aware, this is the only instance in which it has previously been suggested that a statute places a class of law enforcement cases "off limits" to the President's supervision based on his personal interest in the matters. The Department rejected that suggestion on the ground that Congress could not "disempower" the President from exercising his supervisory authority over such matters. For all the same reasons, Congress could not make it a crime for the President to exercise supervisory authority over cases in which his own conduct might be at issue.

The illimitable nature of the President's law enforcement discretion stems not just from the Constitution's plenary grant of those powers to the President, but also from the "unitary" character of the Executive branch itself. Because the President alone constitutes the Executive branch, the President cannot "recuse" himself. Just as Congress could not *en masse* recuse itself, leaving no source of the Legislative power, the President cannot take a holiday from his responsibilities. It is in the very nature of discretionary power that ultimate authority for making the choice must be vested in some final decision-maker. At the end of the day, there truly must be a desk at which "the buck stops." In the Executive, final responsibility must rest with the President. Thus, the President, "though able to delegate duties to others, cannot delegate ultimate responsibility or *the active obligation to supervise that goes with it*." *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 130 S. Ct. 3138, 3154 (2010) (*quoting Clinton v. Jones,* 520 U.S. 681, 712-713 (1997) (Breyer, J., concurring in judgment)) (emphasis added).

In framing a Constitution that entrusts broad discretion to the President, the Framers chose the means they thought best to police the exercise of that discretion. The Framers' idea was that, by placing all discretionary law enforcement authority in the hands of a single "Chief Magistrate" elected by all the People, and by making him politically accountable for all exercises of that discretion by himself or his agents, they were providing the best way of ensuring the "faithful exercise" of these powers. Every four years the people as a whole make a solemn national decision as to the person whom they trust to make these prudential judgments. In the interim, the people's representatives stand watch and have the tools to oversee, discipline, and, if they deem appropriate, remove the President from office. Thus, under the Framers' plan, the determination whether the President is making decisions based on "improper" motives or whether he is "faithfully" discharging his responsibilities is left to the People, through the election process, and the Congress, through the Impeachment process.

The Framers' idea of political accountability has proven remarkably successful, far more so than the disastrous experimentation with an "independent" counsel statute, which both parties agreed to purge from our system. By and large, fear of political retribution has ensured that, when confronted with serious allegations of misconduct within an Administration, Presidents have felt it necessary to take practical steps to assure the people that matters will be pursued with integrity. But the measures that Presidents have adopted are voluntary, dictated by political prudence, and adapted to the situation; they are not legally compelled. Moreover, Congress has usually been quick to respond to allegations of wrongdoing in the Executive and has shown itself more than willing to conduct investigations into such allegations. The fact that President is answerable for any abuses of discretion and is ultimately subject to the judgment of Congress through the impeachment process means that the President is *not* the judge in his own cause. *See Nixon v. Harlow*, 457 U.S. 731, 757-58 n.41 (1982)(" The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office.")

Mueller's core premise -- that the President acts "corruptly" if he attempts to influence a proceeding in which his own conduct is being scrutinized is untenable. Because the Constitution, and the Department's own rulings, envision that the President may exercise his supervisory authority over cases dealing with his own interests, the President transgresses no legal limitation when he does so. For that reason, the President's exercise of supervisory authority over such a case does not amount to "corruption." It may be in some cases politically unwise; but it is not a crime. Moreover, it cannot be presumed that any decision the President reaches in a case in which he is interested is "improperly" affected by that personal interest. Implicit in the Constitution's grant of authority over such cases, and in the Department's position that the President cannot be "disempowered" from acting in such cases, is the recognition that Presidents have the capacity to decide such matters based on the public's long-term interest.

In today's world, Presidents are frequently accused of wrongdoing. Let us say that an outgoing administration say, an incumbent U.S. Attorney -- launches a "investigation" of an incoming President. The new President knows it is bogus, is being conducted by political opponents, and is damaging his ability to establish his new Administration and to address urgent matters on behalf of the Nation. It would neither be "corrupt" nor a crime for the new President to terminate the matter and leave any further investigation to Congress. There is no legal principle that would insulate the matter from the President's supervisory authority and mandate that he passively submit while a bogus investigation runs its course.

At the end of the day, I believe Mueller's team would have to concede that a President does not act "corruptly" simply by acting on even terminating a matter that relates to his own conduct. But I suspect they would take the only logical fallback position from that namely, that it would be "corrupt" if the President had actually engaged in unlawful conduct and then blocked an investigation to "cover up" the wrongdoing. In other words, the notion would be that, if an investigation was bogus, the President ultimately had legitimate grounds for exercising his supervisory powers to stop the matter. Conversely, if the President had really engaged in wrongdoing, a decision to stop the case would have been a corrupt cover up. But, in the latter case, the predicate for finding any corruption would be first finding that the President had engaged in the wrongdoing he was allegedly trying to cover up. Under the particular circumstances here, the

issue of obstruction only becomes ripe after the alleged collusion by the President or his campaign is established first. While the distinct crime of obstruction can frequently be committed even if the underlying crime under investigation is never established, that is true only where the obstruction is an act that is wrongful in itself -- such as threatening a witness, or destroying evidence. But here, the only basis for ascribing "wrongfulness" (*i.e.,* an improper motive) to the President's actions is the claim that he was attempting to block the uncovering of wrongdoing by himself or his campaign. Until Mueller can show that there was unlawful collusion, he cannot show that the President had an improper "cover up" motive.

For reasons discussed below, I do not subscribe to this notion. But here it is largely an academic question. Either the President and his campaign engaged in illegal collusion or they did not. If they did, then the issue of "obstruction" is a sideshow. However, if they did not, then the cover up theory is untenable. And, at a practical level, in the absence of some wrongful act of evidence destruction, the Department would have no business pursuing the President where it cannot show any collusion. Mueller should get on with the task at hand and reach a conclusion on collusion. In the meantime, pursuing a novel obstruction theory against the President is not only premature but because it forces resolution of numerous constitutional issues grossly irresponsible.

B. Using Obstruction Laws to Review the President's Motives for Making Facially-Lawful Discretionary Decisions Impermissibly Infringes on the President's Constitutional Powers.

The crux of Mueller's claim here is that, when the President performs a facially-lawful discretionary action that influences a proceeding, he may be criminally investigated to determine whether he acted with an improper motive. It is hard to imagine a more invasive encroachment on Executive authority.

1. The Constitution Vests Discretion in the President To Decide Whether To Prosecute Cases or To Remove Principal Executive Officers, and Those Decisions are Not Reviewable.

The authority to decide whether or not to bring prosecutions, as well as the authority to appoint and remove principal Executive officers, and to grant pardons, are quintessentially Executive in character and among the discretionary powers vested exclusively in the President by the Constitution. When the President exercises these discretionary powers, it is presumed he does so lawfully, and his decisions are generally non-reviewable.

The principle of non-reviewability inheres in the very reason for vesting these powers in the President in the first place. In governing any society certain choices must be made that cannot be determined by tidy legal standards but require prudential judgment. The imperative is that there must be some ultimate decision-maker who has the final, authoritative say -- at whose desk the "buck" truly does stop. Any system whereby other officials, not empowered to make the decision themselves, are permitted to review the "final" decision for "improper motives" is antithetical both to the exercise of discretion and its finality. And, even if review can censor a particular choice, it leaves unaddressed the fact that a choice still remains to be made, and the reviewers have no power to make it. The prospect of review itself undermines discretion. *Wayte v. United States,* 470 U. S.

598, 607- 608 (1985); *cf. Franklin v. Massachusetts*, 505 U.S. at 801. But any regime that proposes to review and *punish* decision-makers for "improper motives" ends up doing more harm than good by chilling the exercise of discretion, "dampen[ing] the ardor of all but the most resolute …in the unflinching discharge of their duties." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2d Cir. 1949)(Learned Hand). In the end, the prospect of punishment chills the exercise of discretion over a far broader range of decisions than the supposedly improper decision being remedied. *McDonnell,* 136 S.Ct. at 2373.

For these reasons, the law has erected an array of protections designed to prevent, or strictly limit, review of the exercise of the Executive discretionary powers. *See, e.g., Nixon v. Fitzgerald*, 457 US 731,749 (1982) (the President's unique discretionary powers require that he have absolute immunity from civil suit for his official acts). An especially strong set of rules has been put in place to insulate those who exercise prosecutorial discretion from second-guessing and the possibility of punishment. *See. e.g., Imbler v. Pachtman*, 424 U. S. 409 (1976); *Yaselli v. Goff*, 275 U. S. 503 (1927), *aff'g* 12 F. 2d 396 (2d Cir. 1926). Thus, "it is entirely clear that the refusal to prosecute cannot be the subject of judicial review." *See, e.g., ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987); *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir. 1965) (The U.S. Attorney's decision not to prosecute even where there is probable cause is "a matter of executive discretion which cannot be coerced or reviewed by the courts."); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Even when there is a prosecutorial decision to proceed with a case, the law generally precludes review or, in the narrow circumstances where review is permitted, limits the extent to which the decision-makers' subjective motivations may be examined. Thus, a prosecutor's decision to bring a case is generally protected from civil liability by absolute immunity, even if the prosecutor had a malicious motive. *Yaselli v. Goff*, 275 U. S. 503 (1927), *aff'g* 12 F. 2d 396 (2d Cir. 1926). Even where some review is permitted, absent a claim of selective prosecution based on an impermissible classification, a court ordinarily will not look into the prosecutor's real motivations for bringing the case as long as probable cause existed to support prosecution. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Further, even when there is a claim of selective prosecution based on an impermissible classification, courts do not permit the probing of the prosecutor's subjective state of mind until the plaintiff has first produced objective evidence that the policy under which he has been prosecuted had a discriminatory effect. *United States v. Armstrong*, 517 U.S. 456 (1996). The same considerations undergird the Department's current position in *Hawaii v. Trump*, where the Solicitor General is arguing that, in reviewing the President's travel ban, a court may not look into the President's subjective motivations when the government has stated a facially legitimate basis for the decision. (*SG's Merits Brief* at 61).

In short, the President's exercise of its Constitutional discretion is not subject to review for "improper motivations" by lesser officials or by the courts. The judiciary has no authority "to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made" in the courts. *Marbury v. Madison, 1 Cranch (5 U.S.) 137, 170 (1803).*

2. Threatening criminal liability for facially-lawful exercises of discretion, based solely on the subjective motive, would impermissibly burden the exercise of core Constitutional powers within the Executive branch..

Mueller is effectively proposing to use the criminal obstruction law as a means of reviewing discretionary acts taken by the President when those acts influence a proceeding. Mueller gets to this point in three steps. First, instead of confining §1512(c)(2) to inherently wrongful acts of evidence impairment, he would now define the *actus reus* of obstruction as *any act* that influences a proceeding. Second, he would include within that category the official discretionary actions taken by the President or other public officials carrying out their Constitutional duties, including their authority to control all law enforcement matters. The net effect of this is that, once the President or any subordinate takes any action that influences a proceeding, he has completed the *actus reus* of the crime of obstruction. To establish guilt, all that remains is evaluation of the President's or official's subjective state of mind to divine whether he acted with an improper motive.

Wielding §1512(c)(2) in this way preempts the Framers' plan of political accountability and violate Article II of the Constitution by impermissibly burdening the exercise of the core discretionary powers within the Executive branch. The prospect of criminal prosecution based solely on the President's state of mind, coupled with the indefinite standards of "improper motive" and "obstruction," would cast a pall over a wide range of Executive decision-making, chill the exercise of discretion, and expose to intrusive and free-ranging examination the President's (or his subordinate's) subjective state of mind in exercising that discretion

Any system that threatens to punish discretionary actions based on subjective motivation naturally has a substantial chilling effect on the exercise of discretion. But Mueller's proposed regime would mount an especially onerous and unprecedented intrusion on Executive authority. The sanction that is being threatened for improperly-motivated actions is the most severe possible personal criminal liability. Inevitably, the prospect of being accused of criminal conduct, and possibly being investigated for such, would cause officials "to shrink" from making potentially controversial decisions and sap the vigor with which they perform their duties. *McDonnell v. United States*, 136 S.Ct. at 2372-73.

Further, the chilling effect is especially powerful where, as here, liability turns solely on the official's subjective state of mind. Because charges of official misconduct based on improper motive are "easy to allege and hard to disprove," *Hartman v. Moore*, 547 U.S. 250, 257-58 (2006), Mueller's regime substantially increases the likelihood of meritless claims, accompanied by the all the risks of defending against them. Moreover, the review contemplated here would be far more intrusive since it does not turn on an objective standard such as the presence in the record of a reasonable basis for the decision but rather requires probing to determine the President's actual subjective state of mind in reaching a decision. As the Supreme Court has observed, *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982), even when faced only with civil liability, such an inquiry is especially disruptive:

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of

> subjecting officials to the risks of trial distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. …[T]he judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables …frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery …. Inquiries of this kind can be peculiarly disruptive of effective government.

Moreover, the encroachment on the Executive function is especially broad due to the wide range of actors and actions potentially covered. Because Mueller defines the *actus reus* of obstruction as any act that influences a proceeding, he is including not just exercises of prosecutorial discretion directly deciding whether a case will proceed or not, but also exercises of any other Presidential power that might collaterally affect a proceeding, such as a removal, appointment, or grant of pardon. And, while Mueller's immediate target is the President's exercise of his discretionary powers, his obstruction theory reaches all exercises of prosecutorial discretion by the President's subordinates, from the Attorney General, down the most junior line prosecutor. It also necessarily applies to all personnel, management, and operational decision by those who are responsible for supervising and conducting litigation and enforcement matters -- civil, criminal or administrative -- on the President's behalf.

A fatal flaw with Mueller's regime and one that greatly exacerbates its chilling effect -- is that, while Mueller would criminalize any act "corruptly" influencing a proceeding, Mueller can offer no definition of "corruptly." What is the circumstance that would make an attempt by the President to influence a proceeding "corrupt?" Mueller would construe "corruptly" as referring to one's purpose in seeking to influence a proceeding. But Mueller provides no standard for determining what motives are legal and what motives are illegal. Is an attempt to influence a proceeding based on political motivations "corrupt?" Is an attempt based on self-interest? Based on personal career considerations? Based on partisan considerations? On friendship or personal affinity? Due process requires that the elements of a crime be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." *See McDonnell*, 136 S.Ct. at 2373. This, Mueller's construction of §1512(c)(2) utterly fails to do.

It is worth pausing on the word "corruptly," because courts have evinced a lot of confusion over it. It is an adverb, modifying the verbs "influence," "impede," etc. But few courts have deigned to analyze its precise adverbial mission. Does it refer to "how" the influence is accomplished *i.e.,* the means used to influence? Or does it refer to the ultimate purpose behind the attempt to influence? As an original matter, I think it was clearly used to described the means used to influence. As the D.C. Circuit persuasively suggested, the word was likely used in its 19th century transitive sense, connoting the turning (or corrupting) of something from good and fit for its purpose into something bad and unfit for its purpose hence, "corrupting" a magistrate; or "corrupting" evidence. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir.1991). Understood this way, the ideas behind the obstruction laws come more clearly into focus. The thing that is

corrupt is the means being used to influence the proceeding. They are inherently wrong because they involve the corruption of decision-makers or evidence. The culpable intent does not relate to the actor's ultimate motive for using the corrupt means. The culpable state of mind is merely the intent that the corrupt means bring about their immediate purpose, which is to sabotage the proceeding's truth-finding function. The actor's ultimate purpose is irrelevant because the means, and their immediate purpose, are dishonest and malign. Further, if the actor uses lawful means of influencing a proceeding such as asserting an evidentiary privilege, or bringing public opinion pressure to bear on the prosecutors then his ultimate motives are likewise irrelevant. *See Arthur Anderson*, 544 U.S. at 703-707. Even if the actor is guilty of a crime and his only reason for acting is to escape justice, his use of lawful means to impede or influence a proceeding are perfectly legitimate.

Courts have gotten themselves into a box whenever they have suggested that "corruptly" is not confined to the use of wrongful means, but can also refer to someone's ultimate motive for using lawful means to influence a proceeding. The problem, however, is that, as the courts have consistently recognized, there is nothing inherently wrong with attempting to influence or impede a proceeding. Both the guilty and innocent have the right to use lawful means to do that. What is the motive that would make the use of lawful means to influence a proceeding "corrupt?" Courts have been thrown back on listing "synonyms" like "depraved, wicked, or bad." But that begs the question. What is depraved the means or the motive? If the latter, what makes the motive depraved if the means are within one's legal rights? Fortunately for the courts, the cases invariably involve evidence impairment, and so, after stumbling around, they get to a workable conclusion. Congress has also taken this route. *Poindexter* struck down the omnibus clause of §1505 on the grounds that, as the sole definition of obstruction, the word "corruptly" was unconstitutionally vague. 951 F.2d at 377-86. Tellingly, when Congress sought to "clarify" the meaning of "corruptly" in the wake of *Poindexter*, it settled on even more vague language "acting with an improper motive" and then proceeded to qualify this definition further by adding, "including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. §1515(b). The fact that Congress could not define "corruptly" except through a laundry list of acts of evidence impairment strongly confirms that, in the obstruction context, the word has no intrinsic meaning apart from its transitive sense of compromising the honesty of a decision-maker or impairing evidence.

At the end of the day then, as long as §1512 is read as it was intended to be read *i.e.,* as prohibiting actions designed to sabotage a proceeding's access to complete and accurate evidence -- the term "corruptly" derives meaning from that context. But once the word "corruptly" is deracinated from that context, it becomes essentially meaningless as a standard. While Mueller's failure to define "corruptly" would be a Due Process violation in itself, his application of that "shapeless" prohibition on public officials engaged in the discharge of their duties impermissibly encroach on the Executive function by "cast[ing] the pall of potential prosecution" over a broad range of lawful exercises of Executive discretion. *McDonnell*, 136 S.Ct. at 2373-74.

The chilling effect is magnified still further because Mueller's approach fails to define the kind of impact an action must have to be considered an "obstruction." As long as the concept of obstruction is tied to evidence impairment, the nature of the actions being prohibited is discernable. But once taken out of this context, how does one differentiate between an unobjectionable

"influence" and an illegal "obstruction?" The actions being alleged as obstructions in this case illustrate the point. Assuming arguendo that the President had motives such that, under Mueller's theory, any direct order by him to terminate the investigation would be considered an obstruction, what action short of that would be impermissible? The removal of Comey is presumably being investigated as "obstructive" due to some *collateral* impact it could have on a proceeding. But removing an agency head does not have the natural and foreseeable consequence of obstructing any proceeding being handled by that agency. How does one gauge whether the collateral effects of one's actions could impermissibly affect a proceeding?

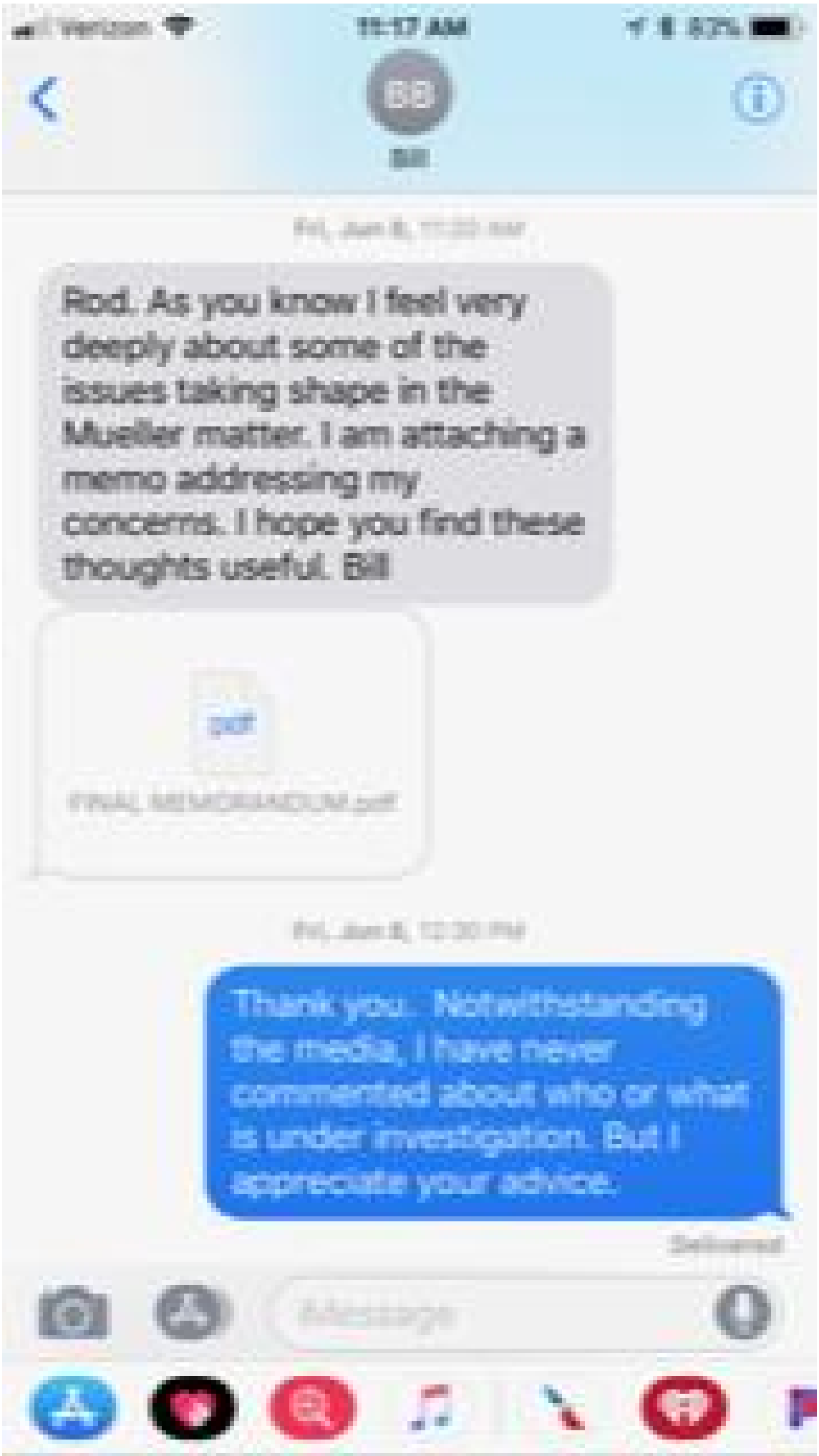
The same problem exists regarding the President's comments about Flynn. Even if the President's motives were such that, under Mueller's theory, he could not have ordered termination of an investigation, to what extent do comments short of that constitute obstruction? On their face, the President's comments to Comey about Flynn seem unobjectionable. He made the accurate observation that Flynn's call with the Russian Ambassador was perfectly proper and made the point that Flynn, who had now suffered public humiliation from losing his job, was a good man. Based on this, he expressed the "hope" that Comey could "see his way clear" to let the matter go. The formulation that Comey "see his way clear," explicitly leaves the decision with Comey. Most normal subordinates would not have found these comments obstructive. Would a superior's questioning the legal merit of a case be obstructive? Would pointing out some consequences of the subordinate's position be obstructive? Is something really an "obstruction" if it merely is pressure acting upon a prosecutor's psyche? Is the obstructiveness of pressure gauged objectively or by how a subordinate subjectively apprehends it?

The practical implications of Mueller's approach, especially in light of its "shapeless" concept of obstruction, are astounding. DOJ lawyers are always making decisions that invite the allegation that they are improperly concluding or constraining an investigation. And these allegations are frequently accompanied by a claim that the official is acting based on some nefarious motive. Under the theory now being advanced, any claim that an exercise of prosecutorial discretion was improperly motived could legitimately be presented as a potential criminal obstruction. The claim would be made that, unless the subjective motivations of the decision maker are thoroughly explored through a grand jury investigation, the putative "improper motive" could not be ruled out.

In an increasingly partisan environment, these concerns are by no means trivial. For decades, the Department has been routinely attacked both for its failure to pursue certain matters and for its decisions to move forward on others. Especially when a house of Congress is held by an opposing party, the Department is almost constantly being accused of deliberately scuttling enforcement in a particular class of cases, usually involving the environmental laws. There are claims that cases are not being brought, or are being brought, to appease an Administration's political constituency, or that the Department is failing to investigate a matter in order to cover up its own wrongdoing, or to protect the Administration. Department is bombarded with requests to name a special counsel to pursue this or that matter, and it is frequently claimed that his reluctance to do so is based on an improper motive. When a supervisor intervenes in a case, directing a course of action different from the one preferred by the subordinate, not infrequently there is a tendency for the subordinate to ascribe some nefarious motive. And when personnel changes are made as

for example, removing a U.S. Attorney there are sometimes claims that the move was intended to truncate some investigation.

While these controversies have heretofore been waged largely on the field of political combat, Mueller's sweeping obstruction theory would now open the way for the "criminalization" of these disputes. Predictably, challenges to the Department's decisions will be accompanied by claims that the Attorney General, or other supervisory officials, are "obstructing" justice because their directions are improperly motivated. Whenever the slightest colorable claim of a possible "improper motive" is advanced, there will be calls for a criminal investigation into possible "obstruction." The prospect of being accused of criminal conduct, and possibly being investigated for such, would inevitably cause officials "to shrink" from making potentially controversial decisions.



Bolitho, Zachary (ODAG)

From:	Bolitho, Zachary (ODAG)
Sent:	Tuesday, June 19, 2018 10:29 PM
To:	Rosenstein, Rod (ODAG)
Subject:	Cyber Report
Attachments:	CTFR Chapter 1 6-16-18.pdf

Sir,

You had asked for a copy of Chapter 1 of the Cyber Task Force report. It is attached.

Thanks,
Zac

Boyd, Stephen E. (OLA)

From:	Boyd, Stephen E. (OLA)
Sent:	Wednesday, June 20, 2018 5:31 PM
To:	Rosenstein, Rod (ODAG)
Cc:	Schools, Scott (ODAG); O'Callaghan, Edward C. (ODAG); Lasseter, David F. (OLA); Bolitho, Zachary (ODAG)
Subject:	SJC Meeting Tomorrow
Attachments:	5-17-18 Grassley Letter and Draft DAG Response.pdf; 2018-5-11 Flynn Transcript - Grassley #4030035.pdf

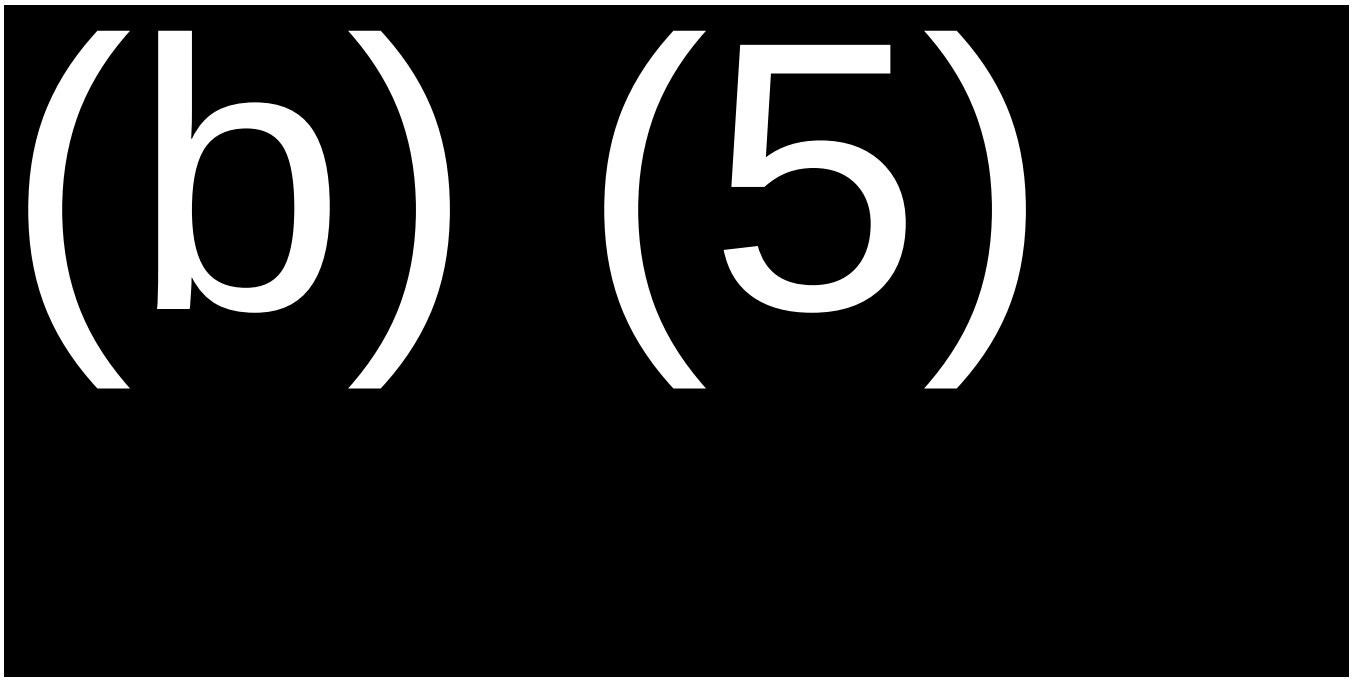
DAG:

Tomorrow morning, we are scheduled to meet with Chairman Grassley and Ranking Member Feinstein on the Hill. This meeting is at our request. Present from our side will be you, me, Ed, and Lasseter. I have asked they limit staff on their side to their most senior aides, the Staff Directors of the committee.

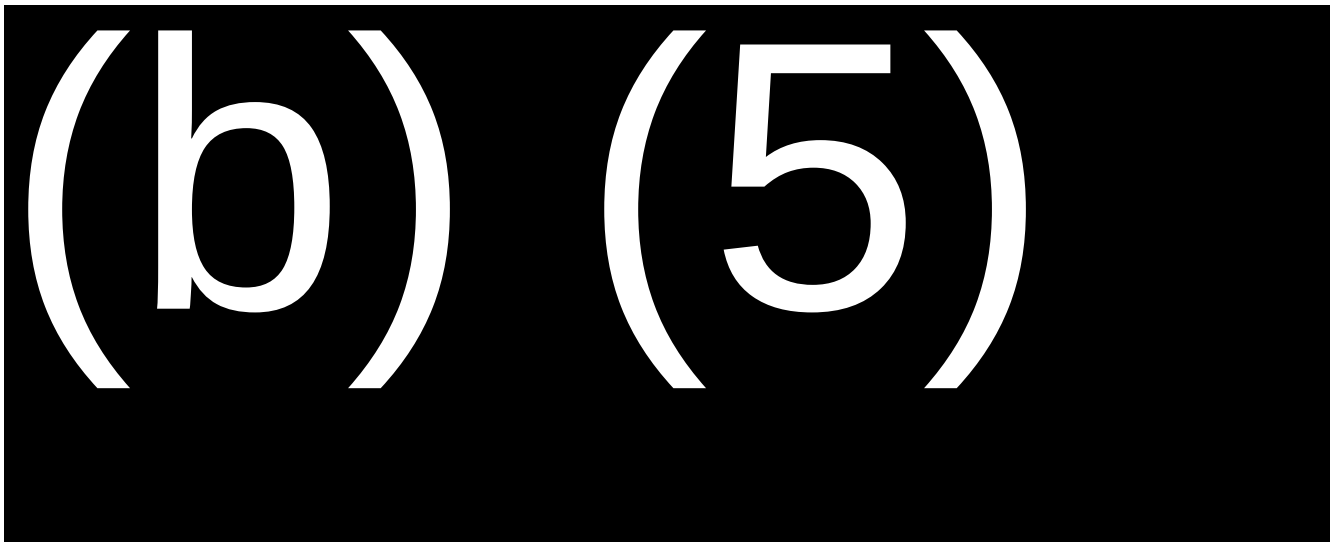
The impetus for requesting the meeting is two fold. Generally, it is good for you to continue to engage with top members of the judiciary committees and maintain an open dialogue. More specifically, Grassley sent you a lengthy letter on May 17, 2018, to which you drafted a long response. We discussed that it might be better to answer that letter in person. A PDF of the incoming letter and your draft response is attached for your review.

As with all meetings of this nature, we should expect that the Senators will come with a list of agenda items that they wish to discuss. The following represents our best guess on what those issues might be:

Other Grassley Topics:



Other Feinstein Topics



One last note: (b) (5)

Happy to jump on the phone to discuss any of these issues this evening, if necessary. We can also prep tomorrow before the meeting. I think it should be a pretty straightforward meeting less of a "mini hearing" than the Goodlatte/Nadler visit.

Thank you,

Stephen

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 17, 2018

VIA ELECTRONIC TRANSMISSION

The Honorable Rod J. Rosenstein
Deputy Attorney General
U.S. Department of Justice

Dear Deputy Attorney General Rosenstein:

The authority, independence, and accountability of independent counsels is a longstanding concern for jurists, lawmakers, and administrators of all political stripes. These investigations draw significant resources and operate to varying degrees independently from standard Department of Justice supervision. It is thus more likely that a special counsel investigation will evolve beyond its original parameters to capture additional, tangentially related matters. For example, a chief complaint against Kenneth Starr centered on the expanding scope of his investigation from one targeting real estate fraud to perjury about an affair.[1]

It is no surprise then that a federal judge in a May 8, 2018 hearing in the Eastern District of Virginia expressed some skepticism about a heavily redacted August 2017 memorandum that was drafted three months after you issued the Order appointing Robert Mueller as Special Counsel, and that you both now assert details the actual scope of his investigation.[2] The judge asked for, and the Special Counsel provided, an unredacted copy of the August Memorandum.[3] This Committee likewise should be permitted to review the true nature and scope of the Special Counsel's investigation. Like the Judiciary, Congress is a separate branch of government with its own constitutional duties that often require access to Executive Branch information. In this case the interests relate to both legislative and oversight responsibilities.

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[1] John Mintz & Toni Locy, *Starr's Probe Expansion Draws Support, Criticism*, THE WASHINGTON POST (Jan. 23, 1998) ("For years, critics have accused independent counsels of conducting costly and ever-expanding investigations that have resulted in the criminalization of American politics.").

[2] Tr. of Mots., *United States v. Paul J. Manafort, Jr.*, 1:18-cr-83 (E.D. Va. May 4, 2018) at 28 [hereinafter *Transcript of Motions*]; OFF DEPUTY ATT'Y GEN, Order No. 3915-2017, Appointment of Special Couns. to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017) [hereinafter *Appointment Order*]; Mem. Rod J. Rosenstein, Acting Att'y Gen., U.S. Dep't Justice to Robert S. Mueller, III, Special Couns., Doc. 244-3, *United States v. Paul J. Manafort, Jr.*, 1:17-cr-201 (D.D.C. Apr. 2, 2018) [hereinafter *August Memorandum*].

[3] *Transcript of Motions* at 15-16; Gov't Notice of Filing of Unredacted Memorandum, *United States v. Paul J. Manafort, Jr.*, 1:18-cr-83 (E.D. Va. May 17, 2018).

On April 26, 2018, the Senate Judiciary Committee reported a bill to the full Senate that would codify current Department of Justice regulations regarding the appointment, authority, and supervision of a special counsel. The legislation also would require additional reports to Congress about significant steps taken and conclusions reached in a special counsel investigation.[4] The draft legislation thus aims to ensure the independence and transparency of a special counsel's work—*any* special counsel's work.

Neither that bill nor this letter is intended to interfere in any way with Mueller's investigation. As I have said numerous times, that investigation should be free to follow the facts wherever they lead without any improper outside interference. However, that does not mean that it is immune from oversight or that information about the scope of its authority under existing Department regulations should be withheld from Congress. Further, as we consider legislative proposals based largely on the Department's current rules, it is vital that Congress has a clear understanding of how the Department is interpreting them.

As Judge Ellis stated in the hearing earlier this month, Americans do not support anyone in this country wielding unfettered power.[5] That is doubly true when it is wielded in secret, beyond the purview of any oversight authority. In the Starr investigation, the scope and changes made to it were transparent. In this case, the public, Congress, and the courts all thought the scope was one thing, and have now been informed it is something else. For that reason and others, it is unclear precisely how, or whether, the Department is following its own regulations, what the actual bounds of Mr. Mueller's authority are, and how those bounds have been established.

First, in your May 17, 2017 Order appointing Mr. Mueller as Special Counsel, you fundamentally relied on the Attorney General's general statutory authority to supervise the Department rather than the Department's special counsel regulations. The Appointment Order only cites portions of the special counsel regulations, specifically sections 600.4-600.10, while omitting others.[6] Section 600.4(a) is the provision which requires that "[t]he Special Counsel . . . be provided with a specific factual statement of the matter to be investigated." The Appointment Order authorizes Mr. Mueller "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."[7] That investigation includes:

(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

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[4] Statement of Charles E. Grassley, Chairman, U.S. Sen. Comm. on the Judiciary (Apr. 26, 2018), https://www.judiciary.senate.gov/meetings/04/26/2018/executive-business-meeting.
[5] *Transcript of Motions* at 12.
[6] *Appointment Order*. *See* 28 U.S.C. §§ 509, -10, -15; 528 C.F.R. § 600.(1)-(4).
[7] *Appointment Order*.

(iii) Any other matters within the scope of 28 C.F.R. § 600.4(a).[8]

Rather than the Appointment Order, however, you and the Special Counsel now point to the August Memorandum as the authority outlining the official statement of Mr. Mueller's investigation as required by 600.4(a).[9]

According to the public portions of the August Memorandum, the Appointment Order "was worded categorically in order to permit its public release without confirming specific investigations involving specific individuals."[10] During the May 4, 2018 hearing, the Special Counsel's counsel confirmed that the Appointment Order "is not" "the specific factual statement that's contemplated by the special counsel regulations."[11] Rather, the August Memorandum "provides a more specific description of [Mr. Mueller's] authority" and specifies "allegations [that] were within the scope of the Investigation at the time of [the] appointment and are within the scope of the [Appointment] Order."[12]

In other words, the factual statement of the matter to be investigated in the Appointment Order was made deliberately vague rather than "specific" as required by the regulation. The public, as well as Congress, only learned a fraction of the investigation's actual scope in April 2018—nearly a year after Mr. Mueller's appointment—when he filed a heavily redacted copy of the August Memorandum in federal court. From the small snippet we can see, the difference in the number and the nature of the details described in the Appointment Order and three months later in the August Memorandum is significant.[13] Even if there may be legitimate reasons to limit the public release of that information for a time, those reasons would not justify withholding the scope information from Congressional oversight committees.

Second, the Appointment Order omits sections 600.1-600.3 of the Department regulations. The omitted sections are: (1) grounds for appointing a Special Counsel, (2) alternatives available to the Attorney General, and (3) qualifications of the Special Counsel, including the requirement that the Assistant Attorney General for Administration ensure a detailed review of conflicts of interest issues. More specifically, section 600.1 states the Attorney General "will appoint a Special Counsel when he or she determines that *criminal* investigation of a person or matter is warranted."[14] The omitted regulations do not authorize counterintelligence investigations. However, the Appointment Order does not otherwise specify whether, to what extent, or on what basis Mr. Mueller has been granted *counterintelligence* authority.

These omissions, and the Department's decision to withhold a precise description of the scope of the special counsel investigation, obscures how the Department is spending very

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[8] *Id.*
[9] *August Memorandum.*
[10] *Id.*
[11] *Transcript of Motions* at 28.
[12] *August Memorandum.*
[13] *See Transcript of Motions* at 29-30.
[14] 28 C.F.R. § 600.1 (emphasis added).

significant amounts of taxpayer dollars[15] and leaves murky the actual jurisdictional limits on Mr. Mueller's authority as well as how those limits are determined. Most troubling, the Department's close hold of this information arises amidst multiple instances of the Department's resistance to transparency on the purported grounds of national security, even when the information sought to be restricted did not pose any legitimate security risk, or was already public.[16]

The Senate Judiciary Committee has well established authority pursuant to the Constitution and the Rules of the U.S. Senate to oversee the Department's activities, including its grant of authority to special counsels. Congress also has a responsibility to gather all relevant facts when deciding how, or whether, to legislate on a given topic. Moreover, despite much pontification to the contrary, it is *not true* that the Department always withholds information about ongoing investigations or other proceedings from Congress, particularly its oversight committees—nor should it.[17] In this very matter, Director Comey appropriately briefed Ranking Member Feinstein and me in March 2017 on the details of both the counterintelligence and criminal aspects of the various related probes as of that time. We used that information to conduct oversight in a responsible, nonpublic way for months, in order to preserve the integrity of the Executive Branch investigation. We would certainly do so in this case as well.

Accordingly, please provide an unredacted copy of the August Memorandum and any other documents delineating, describing, or supporting the jurisdiction and authority of the special counsel and respond in writing to the following questions by May 31, 2018:

1. The August Memorandum states that it addresses the special counsel's authorization as of the date he was appointed. Why was this memorandum not drafted until August 2017?

2. The regulations authorizing the appointment of a special counsel state that the Attorney General (or Acting Attorney General) may appoint a special counsel "when he or she determinations that *criminal investigation* of a person or matter is warranted."[18] The Appointment Order proscribes the Special Counsel's jurisdiction by citing specifically "the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017."[19] In his March 20 testimony, former Director Comey referred to "the investigation" as a counterintelligence investigation—not a criminal investigation.[20]

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[15] *Transcript of Motions* at 13, 37.
[16] *See* Andrew C. McCarthy, *Outrageous Redactions to the Russia Report,* NATIONAL REVIEW (May 7, 2018), https://www.nationalreview.com/2018/05/russia-report-redactions-cover-fbi-missteps/.
[17] ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., R42811, CONG. INVESTIGATIONS OF THE DEP'T OF JUST., 1920-2012: HISTORY, LAW, AND PRACTICE (Nov. 5, 2012).
[18] 28 C.F.R. § 600.1 (emphasis added).
[19] *Appointment Order.*
[20] *Open Hearing on Russian Active Measures Investigation Before the H. Comm. on Intelligence,* 115th Cong. (2017) (testimony of James B. Comey, Jr., Director, Federal Bureau of Investigation).

Please explain which portion of which regulation authorizes the appointment of a Special Counsel to conduct a counterintelligence investigation.

3. The Appointment Order does not cite to 28 C.F.R. § 600.1 through § 600.3. However, section 600.1 is the section that describes the grounds necessary to appoint a special counsel. It requires (1) a criminal predicate, and (2) that investigation or prosecution by a U.S. Attorney's office or litigating unit of DOJ would present a conflict of interest or other extraordinary circumstance.

    a. Why does the Order not cite to or rely on section 600.1? Does the August Memorandum reference section 600.1? If not, why not?

    b. What "criminal investigation of a person or matter" did you determine was warranted?

    c. Why did your Appointment Order not identify specific crimes to be investigated?

    d. What conflict of interest or extraordinary circumstance would have prevented a disinterested U.S. Attorney's office or litigating unit of the Department from investigating or prosecuting the matter(s) referred to in the Appoint Order and August Memorandum under your supervision?

    e. Did you exercise your authority, or consider exercising your authority under section 600.2(b) to "direct that an initial investigation, consisting of such factual inquiry or legal research . . . be conducted in order to better inform the decision?" If not, why not? If so, please describe in detail the scope, methodology, and results of the initial investigation.

    f. Did you exercise your authority, or consider exercising your authority under section 600.2(c) to have "the appropriate component of the Department . . . handle the matter" and "mitigate any conflicts of interest [through] recusal of particular officials?" If not, why not? If so, please describe in detail why that option was not considered or exercised.

    g. Did you comply with the requirements of section 600.3(b) that require the Attorney General to "consult with the Assistant Attorney General for Administration to ensure an appropriate method of appointment, and to ensure . . . a detailed review of ethics and conflicts of interest issues?" If not, why not? If so, please describe in detail the Assistant Attorney General for

Administration's involvement and the results of the ethics and conflicts of interest review.

4. The Appointment Order explicitly states that sections 600.4-600.10 apply to this Special Counsel despite the apparent failure to follow the appointment requirements in sections 600.1-600.3. The Order also cites section 600.4(a) which requires that "[t]he Special Counsel . . . be provided with a specific factual statement of the matter to be investigated." Again, under section 600.1 the "matter" is that which the Attorney General or Acting Attorney General determines "warrant[s]" a "criminal investigation." Is there a "specific factual statement of the matter" that warrants a criminal investigation described in the May 17 Order? In the August Memorandum? What is it?

5. The regulations cited in the Appointment Order authorize the Acting Attorney General to grant to a Special Counsel the powers of a U.S. Attorney.[21] To what extent have you considered whether that includes the authority to initiate, supervise, or participate in counterintelligence investigations?

6. Rather than the regulations, the Appointment Order appears to rely instead on general statutory authority of the Attorney General. The statute permits the Attorney General to exercise "all functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice,"[22] and the authority to delegate "any function of the Attorney General,"[23] and/or the authority to "conduct any kind of legal proceeding, civil or criminal."[24] Are those statutes, alone or in combination, in your opinion sufficient to authorize a counterintelligence investigation by a Special Counsel? Why or why not?

7. During an all-Senators briefing on May 18, 2017, you were asked by Senator Collins and Judiciary Committee staff whether you had delegated the Attorney General's FISA approval authority to Special Counsel Mueller. Have you delegated FISA approval authority to the Special Counsel? If so, on what date, and was the delegation done in writing? If it was in writing, please provide a copy to the Committee.

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[21] 28 C.F.R. § 600.6 ("Subject to the limitations in the following paragraphs, the Special Counsel shall exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.").
[22] 28 U.S.C. § 509.
[23] 28 U.S.C. § 510.
[24] 28 U.S.C. § 515.

8. What limits apply, if any, to the authority or jurisdiction of a Special Counsel whose appointment relies on general grants of authority to the Attorney General under the statutes, rather than on the regulations?

9. What restrictions generally apply to the use of counterintelligence investigative tools and techniques for the purpose of gathering information for use in a criminal investigation? To the extent that senior official approval is required, who is the senior official authorized to provide such approval for matters related to the Special Counsel's work, in light of the Attorney General's recusal?

10. Please explain whether and to what extent the Special Counsel has the ability to access information gathered by the Intelligence Community under national security authorities and to use that information in furtherance of his criminal investigation or in a criminal proceeding. What level of supervision or approval is required?

11. What jurisdictional limits apply to a counterintelligence investigation?

12. What jurisdictional limits apply to Special Counsel Mueller's investigation?

13. How were those jurisdictional limits determined?

14. Have the jurisdictional limits of the Special Counsel's investigation changed or expanded? If so, on what date(s) and what was the scope and basis for the expansion?

15. If so, what process or procedure was followed to ensure compliance with 28 C.F.R. § 600.4(b)?

16. What processes or procedures are in place to ensure appropriate accountability for the Special Counsel and his staff, as required by 28 C.F.R. § 600.7?

Please direct any questions you may have to DeLisa Lay of my committee staff at (202) 224-5225. Thank you for your cooperation in this important matter.

Sincerely,

Charles E. Grassley
Chairman

cc: The Honorable Dianne Feinstein
Ranking Member

Bolitho, Zachary (ODAG)

From:	Bolitho, Zachary (ODAG)
Sent:	Friday, June 22, 2018 9:10 PM
To:	Rosenstein, Rod (ODAG)
Cc:	O'Callaghan, Edward C. (ODAG)
Subject:	FW: Complete draft -- Cyber TF report
Attachments:	Introduction 6-20 -- 1035 AM.pdf; Chapter 1 6-20 1040 AM.pdf; Chapter 2 6-19 -- 430 pm.pdf; Chapter 3 6-19 915 PM.pdf; Chapter 4 6-20 -- 1040 AM.pdf; Chapter 5 6-20 1250 PM.pdf; Chapter 6 6-20 240 PM.pdf

Sir,

Attached is a draft of the cyber task force report. As Sujit explains below, this is a draft so you will notice some typos and formatting errors.

Thanks,
Zac

From: Raman, Sujit (ODAG)
Sent: Friday, June 22, 2018 9:06 PM
To: Bolitho, Zachary (ODAG [redacted]>
Subject: Fwd: Complete draft -- Cyber TF report

Here's the complete report as of a couple days ago. I'm hoping to get an updated (near-final) version later tonight from our formatter and will send it if I get it. The attached files have some obvious typos and formatting errors b/c I had gotten it straight from the formatter, so DAG should be assured that the current version has fixed all of the obvious errors. We'll do the final scrub over the next few days.