

Schools, Scott (ODAG)

From: Schools, Scott (ODAG)
Sent: Thursday, April 12, 2018 12:07 AM
To: Colborn, Paul P (OLC)
Subject: Draft letter to Meadows/Jordan
Attachments: 2018-04-12 Meadows Jordan letter.docx; 2018-04-09 Letter from Meadows and Jordan to Rod Rosenstein.pdf

Paul:

I would value your input on this draft. Incoming also attached.

Scott

MARK MEADOWS
11TH DISTRICT, NORTH CAROLINA

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
CHAIRMAN, SUBCOMMITTEE ON
GOVERNMENT OPERATIONS

COMMITTEE ON TRANSPORTATION
AND INFRASTRUCTURE

COMMITTEE ON FOREIGN AFFAIRS

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WASHINGTON, DC 20515
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www.house.gov/meadows

Congress of the United States
House of Representatives
Washington, DC 20515-3311

April 9, 2018

The Honorable Rod Rosenstein
Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Mr. Rosenstein,

Over the last week, reports have surfaced indicating it was your office, the office of the Deputy Attorney General, that explicitly authorized the Justice Department's special counsel, Robert Mueller, to investigate allegations of collusion between the Donald Trump campaign and the Russian government. As you can recall, you appointed Robert Mueller on May 17, 2017. In a memo you filed August 2, 2017 outlining the jurisdictional basis for the special counsel's investigation, you begin by noting "the following allegations were within the scope of the investigation at the time of your appointment and are within the scope of the order." As you can probably recall, nearly everything following the mention of those initial allegations is redacted. Since special counsel investigations are not warranted by the existence of mere allegations, and require there be facts evident warranting a "criminal investigation of a person or matter," this information raises grave concerns. The memo's status as a classified document, as well as its heavy redactions, also raise serious concerns the special counsel appointment began outside the scope of regulations for special counsel investigations by originating on a counterintelligence, rather than criminal, basis.

As such, we seek to gain a better understanding of the material facts contained in the redacted material.

Given our responsibility in Congress to conduct oversight of Department of Justice practices, it is critical we have access to the entirety of your memo authorizing the investigation. We are requesting to view the full, unredacted version of this memo this week by Thursday, April 12, 2018. Your attention to this matter is appreciated.

Sincerely,



Mark Meadows
Member of Congress



Jim Jordan
Member of Congress

Schools, Scott (ODAG)

From: Schools, Scott (ODAG)
Sent: Wednesday, April 18, 2018 12:15 PM
To: Engel, Steven A. (OLC)
Cc: Gannon, Curtis E. (OLC)
Subject: RE: (b) (5) per OLC draft
Attachments: (b) (5) per OLC Principles (4-17-18).docx

My suggested edits are in the attached. Overall, I think it's on point.

From: Engel, Steven A. (OLC)
Sent: Tuesday, April 17, 2018 7:34 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Gannon, Curtis E. (OLC) <(b) (6) per OLC >
Subject: (b) (6) per OLC draft

Scott: As discussed, attached is our draft effort to address, as best as we can, questions relating to (b) (5) per OLC. After you have had a chance to review, would be interested in your thoughts. Best, Steve

Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Office (b) (6) per OLC
[REDACTED]

Rosenstein, Rod (ODAG)

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, April 18, 2018 4:35 PM
To: Engel, Steven A. (OLC); Schools, Scott (ODAG); Lasseter, David F. (OLA); Boyd, Stephen E. (OLA)
Cc: O'Callaghan, Edward C. (ODAG); Flores, Sarah Isgur (OPA); Terwilliger, Zachary (ODAG)
Subject: RE: Front Burner Issues w/ Congress

And I think we should just say (b) (5)

[REDACTED]

[REDACTED]

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, April 18, 2018 4:31 PM
To: Engel, Steven A. (OLC) <[REDACTED] (b) (6)>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

How about (b) (5)

[REDACTED]

From: Engel, Steven A. (OLC)
Sent: Wednesday, April 18, 2018 4:08 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Attached are a few suggested redlines.

From: Schools, Scott (ODAG)
Sent: Wednesday, April 18, 2018 2:55 PM
To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Engel, Steven A. (OLC) <[REDACTED] (b) (6)>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Attached is the transmittal letter with SCO input, which I thought was good. Attached clean and redline with

comments.

From: Lasseter, David F. (OLA)
Sent: Wednesday, April 18, 2018 2:47 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Engel, Steven A. (OLC) <[\(b\)\(6\)@jmd.usdoj.gov](mailto:(b)(6)@jmd.usdoj.gov)>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: Re: Front Burner Issues w/ Congress

Regarding 'Comey memos'. (b) (5)

David F. Lasseter

On Apr 18, 2018, at 13:18, Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov> wrote:

All:

Summarizing a variety of email chains, I am providing a quick summary of some "front burner" issues that OLA seeks to take care of today or tomorrow FYSA.

SB

Issue/Matter	Status	Notes
Request for "Comey Memos"	(b) (5)	(b) (5)
IG Doc Request MOU	(b) (5)	(b) (5)
DeSantis Referral	(b) (5)	(b) (5)
"Scope Memo" Request	(b) (5)	(b) (5)

	(b) (5)	(b) (5)
DAG Letter to Meadows and Jordan re: principles of congressional oversight.	(b) (5)	(b) (5)

Stephen E. Boyd
Assistant Attorney General
U.S. Department of Justice
Washington, D.C.

202-514-4828

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Wednesday, April 18, 2018 5:20 PM
To: Rosenstein, Rod (ODAG); Schools, Scott (ODAG); Lasseter, David F. (OLA); Boyd, Stephen E. (OLA)
Cc: O'Callaghan, Edward C. (ODAG); Flores, Sarah Isgur (OPA); Terwilliger, Zachary (ODAG)
Subject: RE: Front Burner Issues w/ Congress

Agreed. (b) (5) per OLC

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, April 18, 2018 4:31 PM
To: Engel, Steven A. (OLC) (b) (6) per OLC >; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Duplicative Material (Document ID: 0.7.23922.40356)

Flores, Sarah Isgur (OPA)

From: Flores, Sarah Isgur (OPA)
Sent: Thursday, April 19, 2018 5:01 PM
To: Engel, Steven A. (OLC); Rosenstein, Rod (ODAG); Boyd, Stephen E. (OLA); Colborn, Paul P (OLC); Lasseter, David F. (OLA)
Cc: O'Callaghan, Edward C. (ODAG); Schools, Scott (ODAG); Terwilliger, Zachary (ODAG)
Subject: RE: Front Burner Issues w/ Congress

FYI: (b) (5)

Sarah Isgur Flores
Director of Public Affairs

(b) (6)

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 4:59 PM
To: Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) <pcolborn@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

(b) (5) per OLC

In terms of the edits to the other sentence, we would (b) (5) per OLC along the following lines:

(b) (5) per OLC

From: Rosenstein, Rod (ODAG)
Sent: Thursday, April 19, 2018 4:26 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) <pcolborn@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Engel, Steven A. (OLC) <seengel@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>

<sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>

Subject: RE: Front Burner Issues w/ Congress

Sorry to micromanage: I think we should (b) (5)

For the same reason, (b) (5)

(b) (5)

(b) (5)

From: Flores, Sarah Isgur (OPA)

Sent: Thursday, April 19, 2018 4:20 PM

To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC

Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Engel, Steven A. (OLC) (b) (6) per OLC

Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>

Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG)

<sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>

Subject: RE: Front Burner Issues w/ Congress

If we send this with the line (b) (5)

(b) (5)

xxxx

Sarah Isgur Flores

Director of Public Affairs

(b) (6)

From: Boyd, Stephen E. (OLA)

Sent: Thursday, April 19, 2018 4:10 PM

To: Colborn, Paul P (OLC) (b) (6) per OLC; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>;

Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Engel, Steven A. (OLC) (b) (6) per OLC;

Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>

Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG)

<sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>

Subject: RE: Front Burner Issues w/ Congress

Roger. Thanks for all the help on this. We're standing by. SB

From: Colborn, Paul P (OLC)

Sent: Thursday, April 19, 2018 4:06 PM

To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>;

Engel, Steven A. (OLC) (b) (6) per OLC; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>;

Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>

Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG)

<ecocallaghan@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

P.S. We are still waiting on [REDACTED] (b) (5)

From: Colborn, Paul P (OLC)
Sent: Thursday, April 19, 2018 4:04 PM
To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Engel, Steven A. (OLC) <[REDACTED] (b) (6) per OLC >; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Here are some edits from OLC. We agree with David's point [REDACTED] (b) (5) per OLC
and have suggested an edit for that. We also raise [REDACTED] (b) (5) per OLC

From: Lasseter, David F. (OLA)
Sent: Thursday, April 19, 2018 3:39 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Engel, Steven A. (OLC) <[REDACTED] (b) (6) per OLC >; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <[REDACTED] (b) (6) per OLC >
Subject: RE: Front Burner Issues w/ Congress

Attached version with SB adds in red. (b) (5)

From: Flores, Sarah Isgur (OPA)
Sent: Thursday, April 19, 2018 3:34 PM
To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Engel, Steven A. (OLC) <[REDACTED] (b) (6) per OLC >; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <[REDACTED] (b) (6) per OLC >
Subject: RE: Front Burner Issues w/ Congress

With my redlines for (b) (5)

xxxx
Sarah Isgur Flores
Director of Public Affairs
(b) (6)

From: Lasseter, David F. (OLA)
Sent: Thursday, April 19, 2018 3:28 PM
To: Engel, Steven A. (OLC) <[REDACTED] (b) (6) per OLC >; Rosenstein, Rod (ODAG)

<rosenstein@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: RE: Front Burner Issues w/ Congress

Attached is the latest draft of the transmittal letter. Please let me know of any other suggested changes.

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 3:23 PM
To: Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: RE: Front Burner Issues w/ Congress

(b) (5) per OLC
[Redacted]

From: Rosenstein, Rod (ODAG)
Sent: Thursday, April 19, 2018 12:47 PM
To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: RE: Front Burner Issues w/ Congress

(b) (5) [Redacted] let's meet to discuss. (b) (5)
[Redacted]

From: Lasseter, David F. (OLA)
Sent: Thursday, April 19, 2018 12:45 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: RE: Front Burner Issues w/ Congress

I also believe (b) (5)

From: Flores, Sarah Isgur (OPA)
Sent: Thursday, April 19, 2018 12:31 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Engel, Steven A. (OLC) (b) (6) per OLC >; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC >
Subject: RE: Front Burner Issues w/ Congress

(b) (5)

S

xxxx
Sarah Isgur Flores
Director of Public Affairs

(b) (6)

From: Boyd, Stephen E. (OLA)
Sent: Thursday, April 19, 2018 12:15 PM
To: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC >; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC >
Subject: RE: Front Burner Issues w/ Congress

Not sure where this question should be directed, but who is actually making the redactions and when will the redacted copy be available for transmittal?

From: Rosenstein, Rod (ODAG)
Sent: Thursday, April 19, 2018 11:50 AM
To: Engel, Steven A. (OLC) (b) (6) per OLC >; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC >

Subject: RE: Front Burner Issues w/ Congress

Based on justifiable concern about (b) (5)

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 11:47 AM
To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Cc: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>; Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

(b) (5) per OLC

From: Lasseter, David F. (OLA)
Sent: Thursday, April 19, 2018 9:57 AM
To: Engel, Steven A. (OLC) <(b) (6) per OLC>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Cc: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>; Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Good morning all. Any status update on this?

From: Engel, Steven A. (OLC)
Sent: Wednesday, April 18, 2018 8:27 PM
To: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Cc: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>; Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

(b) (5) per OLC

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, April 18, 2018 8:22 PM

Sent: Wednesday, April 18, 2018 8:22 PM

To: Engel, Steven A. (OLC) (b) (6) per OLC >

Cc: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC >; Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>

Subject: Re: Front Burner Issues w/ Congress

(b) (5)

On Apr 18, 2018, at 8:10 PM, Engel, Steven A. (OLC) (b) (6) per OLC > wrote:

(b) (5) per OLC

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, April 18, 2018 7:51 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: Engel, Steven A. (OLC) (b) (6) per OLC >; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC >; Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: Re: Front Burner Issues w/ Congress

(b) (5)

On Apr 18, 2018, at 7:29 PM, Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov> wrote:

Having considered the options, I argue in favor of (b) (5)

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, April 18, 2018 7:12 PM
To: Engel, Steven A. (OLC) (b) (6) per OLC >; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG)

<sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG)
<zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC >;
Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Let's consider that as a reasonable option. (b) (5)

From: Engel, Steven A. (OLC)
Sent: Wednesday, April 18, 2018 6:57 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA)
<dlasseter@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C.
(ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA)
<siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>;
Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC)
<(b) (6) per OLC >; Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

(b) (5) per OLC

From: Boyd, Stephen E. (OLA)
Sent: Wednesday, April 18, 2018 4:06 PM
To: Engel, Steven A. (OLC) <(b) (6) per OLC >; Lasseter, David F. (OLA)
<dlasseter@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C.
(ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA)
<siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>;
Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC)
<(b) (6) per OLC >
Subject: RE: Front Burner Issues w/ Congress

From my perspective, we should (b) (5)

SB

From: Engel, Steven A. (OLC)
Sent: Wednesday, April 18, 2018 4:04 PM
To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Boyd, Stephen E. (OLA)
<seboyd@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C.

(ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC >
Subject: RE: Front Burner Issues w/ Congress

(b) (5) per OLC
[Redacted]

From: Lassetter, David F. (OLA)
Sent: Wednesday, April 18, 2018 2:47 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC >; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: Re: Front Burner Issues w/ Congress

Duplicative Material (Document ID: 0.7.23922.40356)



Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 5:18 PM
To: Schools, Scott (ODAG)
Subject: RE: Front Burner Issues w/ Congress

Yes, apparently. Will forward shortly on the high side.

From: Schools, Scott (ODAG)
Sent: Thursday, April 19, 2018 5:09 PM
To: Engel, Steven A. (OLC) <(b) (6) per OLC >
Subject: RE: Front Burner Issues w/ Congress

Are we still waiting on classification review? Are they going to communicate back through you?

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 4:59 PM
To: Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC >; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Duplicative Material (Document ID: 0.7.23922.5827)

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 5:41 PM
To: Schools, Scott (ODAG); Lasseter, David F. (OLA); O'Callaghan, Edward C. (ODAG);
Rosenstein, Rod (ODAG)
Cc: Flores, Sarah Isgur (OPA); Boyd, Stephen E. (OLA); Colborn, Paul P (OLC);
Terwilliger, Zachary (ODAG)
Subject: RE: Front Burner Issues w/ Congress

Since NSC sent it on the TS system, I can't send it to sgov.gov. I have circulated the classified version and the redacted version to Ed, Scott, and David on the TS system. NSC Legal is going to send me the redacted version on the low side, and I will circulate that once I get it.

From: Schools, Scott (ODAG)
Sent: Thursday, April 19, 2018 5:32 PM
To: Engel, Steven A. (OLC) (b) (6) per OLC >; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>;
O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Rosenstein, Rod (ODAG)
<rrosenstein@jmd.usdoj.gov>
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>;
Colborn, Paul P (OLC) (b) (6) per OLC >; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Can you send them to me at (b) (6) >

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 5:28 PM
To: Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG)
<ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Rosenstein, Rod (ODAG)
<rrosenstein@jmd.usdoj.gov>
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>;
Colborn, Paul P (OLC) (b) (6) per OLC >; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

I have both versions. But the .pdfs are on the classified system.

From: Lasseter, David F. (OLA)
Sent: Thursday, April 19, 2018 5:27 PM
To: Engel, Steven A. (OLC) (b) (6) per OLC >; O'Callaghan, Edward C. (ODAG)
<ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Rosenstein, Rod (ODAG)
<rrosenstein@jmd.usdoj.gov>
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>;
Colborn, Paul P (OLC) (b) (6) per OLC >; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Do we have even have a redacted version or are we delivering one version now?

From: Engel, Steven A. (OLC)

Sent: Thursday, April 19, 2018 5:25 PM

To: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

I have forwarded the .pdfs of the memos to Scott and Ed on the TS system. Let me know if you want me to print them out, or if I should forward them to someone else.

From: O'Callaghan, Edward C. (ODAG)
Sent: Thursday, April 19, 2018 5:13 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Engel, Steven A. (OLC) (b) (6) per OLC
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Steve is retrieving the WH counsel cleared memos from his classified account now.

Edward C. O'Callaghan
202-514-2105

From: Schools, Scott (ODAG)
Sent: Thursday, April 19, 2018 5:10 PM
To: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Engel, Steven A. (OLC) (b) (6) per OLC
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

From: Rosenstein, Rod (ODAG)
Sent: Thursday, April 19, 2018 5:09 PM
To: Engel, Steven A. (OLC) (b) (6) per OLC
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: Re: Front Burner Issues w/ Congress

This paragraph looks OK to me. I think some of us discussed earlier that there could be a (b) (5)

On Apr 19, 2018, at 4:59 PM, Engel, Steven A. (OLC) (b) (6) per OLC wrote:

Duplicative Material (Document ID: 0.7.23922.5827)

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 5:49 PM
To: Rosenstein, Rod (ODAG)
Subject: RE: Front Burner Issues w/ Congress

(b) (5) per OLC

From: Rosenstein, Rod (ODAG)
Sent: Thursday, April 19, 2018 5:09 PM
To: Engel, Steven A. (OLC) (b) (6) per OLC >
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) (b) (6) per OLC; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: Re: Front Burner Issues w/ Congress

Duplicative Material (Document ID: 0.7.23922.5848)

Rosenstein, Rod (ODAG)

From: Rosenstein, Rod (ODAG)
Sent: Thursday, April 19, 2018 7:02 PM
To: Engel, Steven A. (OLC); Schools, Scott (ODAG); Lasseter, David F. (OLA); O'Callaghan, Edward C. (ODAG)
Cc: Flores, Sarah Isgur (OPA); Boyd, Stephen E. (OLA); Colborn, Paul P (OLC); Terwilliger, Zachary (ODAG)
Subject: RE: Front Burner Issues w/ Congress

Will this be resolved today?

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 6:08 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Here is the redacted version from NSC.

From: Schools, Scott (ODAG)
Sent: Thursday, April 19, 2018 5:32 PM
To: Engel, Steven A. (OLC) <(b) (6) per OLC>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Duplicative Material (Document ID: 0.7.23922.5848)

O'Callaghan, Edward C. (ODAG)

From: O'Callaghan, Edward C. (ODAG)
Sent: Thursday, April 19, 2018 7:11 PM
To: Flores, Sarah Isgur (OPA); Engel, Steven A. (OLC)
Cc: Schools, Scott (ODAG); Lasseter, David F. (OLA); Rosenstein, Rod (ODAG); Boyd, Stephen E. (OLA); Colborn, Paul P (OLC); Terwilliger, Zachary (ODAG)
Subject: RE: Front Burner Issues w/ Congress

Stephen has the unclassified version which will be delivered forthwith under the language of the final cover letter that was circulated. Congress had closed their SCIFs at this point of day, so the classified version needs to be delivered tomorrow. These circumstances are explained in the cover letter.

Edward C. O'Callaghan
202-514-2105

-----Original Message-----

From: Flores, Sarah Isgur (OPA)
Sent: Thursday, April 19, 2018 7:03 PM
To: Engel, Steven A. (OLC) <(b) (6) per OLC >
Cc: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC >; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: Re: Front Burner Issues w/ Congress

W Boyd. Momentarily

> On Apr 19, 2018, at 6:07 PM, Engel, Steven A. (OLC) <(b) (6) per OLC > wrote:

Duplicative Material (Document ID: 0.7.23922.6042)

Engel, Steven A. (OLC)

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 7:11 PM
To: Schools, Scott (ODAG)
Subject: RE: Front Burner Issues w/ Congress

No problem.

From: Schools, Scott (ODAG)
Sent: Thursday, April 19, 2018 7:10 PM
To: Engel, Steven A. (OLC) <(b) (6) per oLC >
Subject: RE: Front Burner Issues w/ Congress

My confusion. I saw your email re the pdfs, and hadn't read the email that said they had been sent on the TS system.

From: Engel, Steven A. (OLC)
Sent: Thursday, April 19, 2018 5:34 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

No, unfortunately, they sent it to me on the TS system. So I can't send it to the sgov.gov email. I can walk down a hard copy?

From: Schools, Scott (ODAG)
Sent: Thursday, April 19, 2018 5:32 PM
To: Engel, Steven A. (OLC) <(b) (6) per oLC >; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per oLC >; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Front Burner Issues w/ Congress

Duplicative Material (Document ID: 0.7.23922.5848)

Schools, Scott (ODAG)

From: Schools, Scott (ODAG)
Sent: Wednesday, May 2, 2018 5:14 PM
To: Colborn, Paul P (OLC)
Subject: Draft Letter - Nunes Classified Request - 05.02.18 v2
Attachments: Draft Letter - Nunes Classified Request - 05.02.18 v2.docx

Schools, Scott (ODAG)

From: Schools, Scott (ODAG)
Sent: Friday, May 18, 2018 2:26 PM
To: Colborn, Paul P (OLC)
Subject: 2018-05-17 CEG to DOJ (scope of special counsel investigation) (002).pdf
Attachments: 2018-05-17 CEG to DOJ (scope of special counsel investigation) (002).pdf

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

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.

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

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(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

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 dollars¹⁵ 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 determines 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

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.

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.

Deputy Attorney General Rosenstein and Director Wray

May 17, 2018

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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

O'Callaghan, Edward C. (ODAG)

From: O'Callaghan, Edward C. (ODAG)
Sent: Friday, June 8, 2018 11:43 AM
To: Schools, Scott (ODAG); Engel, Steven A. (OLC); Gauhar, Tashina (ODAG)
Subject: FW: note from Bill Barr
Attachments: FINAL MEMORANDUM.pdf

Thanks, Steve. Scott, what do you think about forwarding to DAG?

Edward C. O'Callaghan
202-514-2105

-----Original Message-----

From: Engel, Steven A. (OLC)
Sent: Friday, June 8, 2018 11:32 AM
To: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>
Subject: FW: note from Bill Barr

FYI. Bill may well be sending this memo to Rod directly. But I forward it to you, if you think it appropriate to pass along.

-----Original Message-----

From: William Barr <(b) (6)>
Sent: Friday, June 8, 2018 11:28 AM
To: Engel, Steven A. (OLC) <(b) (6) per OLC>
Subject: note from Bill Barr

Steve

As you know I feel very strongly about some of the issues emerging in the Mueller matter. I have taken the liberty of putting them in a memo to you and Rod, which I am attaching. Without the legal support I usually have, it is a bit rough, but I hope you find it useful.

Bill Barr

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 he 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 unmentioned 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. Burrell, 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 its 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 excise 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. Burrell, 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 describe 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 motivated 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.

Rosenstein, Rod (ODAG)

From: Rosenstein, Rod (ODAG)
Sent: Tuesday, June 26, 2018 10:31 AM
To: O'Callaghan, Edward C. (ODAG); Bolitho, Zachary (ODAG); Flores, Sarah Isgur (OPA); Boyd, Stephen E. (OLA); Lasseter, David F. (OLA); Engel, Steven A. (OLC); Schools, Scott (ODAG)
Cc: Colborn, Paul P (OLC)
Subject: Draft Letter
Attachments: Revised.Draft.Response.Grassley.2018.05.17.docx
Importance: High

I plan to send this letter tomorrow, prior to the Thursday hearing. (b) (5)

I would appreciate OLC's advice about the legal issues. The citations are not in proper form, but this is not a brief.

Let's discuss at the 4:30 meeting.

Bolitho, Zachary (ODAG)

From: Bolitho, Zachary (ODAG)
Sent: Wednesday, June 27, 2018 12:44 AM
To: Engel, Steven A. (OLC)
Cc: Rosenstein, Rod (ODAG); Gannon, Curtis E. (OLC); O'Callaghan, Edward C. (ODAG); Flores, Sarah Isgur (OPA); Boyd, Stephen E. (OLA); Lasseter, David F. (OLA); Schools, Scott (ODAG); Colborn, Paul P (OLC)
Subject: RE: Draft Letter
Attachments: Revised.Draft.Response.Grassley.2018.05.17 + sae+zcb.docx

I've made some suggested edits on top of Steve's in the attached document. I will have the paralegals add cites to the attached version and then re-circulate for review.

Thanks,
Zac

From: Engel, Steven A. (OLC)
Sent: Tuesday, June 26, 2018 11:37 PM
To: Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>
Cc: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Gannon, Curtis E. (OLC) <(b) (6) per OLC>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Schools, Scott (ODAG) <ssschools@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: Re: Draft Letter

Works for me. Thanks.

Sent from my iPhone

On Jun 26, 2018, at 11:29 PM, Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov> wrote:

Unless Steve objects, we can handle the citations tomorrow morning here in ODAG. I will have one of our paralegals get them in proper *Bluebook* format.

From: Rosenstein, Rod (ODAG)
Sent: Tuesday, June 26, 2018 11:24 PM
To: Engel, Steven A. (OLC) <(b) (6) per OLC>
Cc: Gannon, Curtis E. (OLC) <(b) (6) per OLC>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Schools, Scott (ODAG) <ssschools@jmd.usdoj.gov>; Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: Re: Draft Letter

Thank you. Can you have someone add the citations to this version?

On Jun 26, 2018, at 11:20 PM, Engel, Steven A. (OLC) <(b) (6) per OLC> wrote:

I attach some additional comments/suggested edits for your consideration. Best, Steve

Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Office (b) (6) per OLC
(b) (6) per OLC

From: Rosenstein, Rod (ODAG)
Sent: Tuesday, June 26, 2018 6:38 PM
To: Gannon, Curtis E. (OLC) (b) (6) per OLC; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Engel, Steven A. (OLC) (b) (6) per OLC >; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) <(b) (6) per OLC >
Subject: RE: Draft Letter

Thank you very much. Here is a revised draft. I am reconsidering (b) (5)
Can we arrange for a paralegal to add proper citations, but also maintain the hyperlinks?

Scott – Please consult with the SC and see whether they have any concerns about this draft.

From: Gannon, Curtis E. (OLC)
Sent: Tuesday, June 26, 2018 3:15 PM
To: Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC >; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) <(b) (6) per OLC >
Subject: RE: Draft Letter

Thanks for the chance to review this. Here are some comments from OLC. (Note that Steve has not yet had a chance to review, so we might have additional comments later.)

Curtis

From: Rosenstein, Rod (ODAG)
Sent: Tuesday, June 26, 2018 10:31 AM
To: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Bolitho,

Zachary (ODAG) <zboiitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseeter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: Draft Letter
Importance: High

Duplicative Material (Document ID: 0.7.23922.14802)



Schools, Scott (ODAG)

From: Schools, Scott (ODAG)
Sent: Wednesday, June 27, 2018 9:00 AM
To: O'Callaghan, Edward C. (ODAG); Engel, Steven A. (OLC); Rosenstein, Rod (ODAG); Gannon, Curtis E. (OLC); Bolitho, Zachary (ODAG); Flores, Sarah Isgur (OPA); Boyd, Stephen E. (OLA); Lasseter, David F. (OLA)
Cc: Colborn, Paul P (OLC)
Subject: RE: Draft Letter
Attachments: Revised.Draft.Response.Grassley.2018.05.17 + sae+zcb+sns.docx

I inserted some comments in this version on top of Steve's and Zac's edits.

From: O'Callaghan, Edward C. (ODAG)
Sent: Wednesday, June 27, 2018 8:33 AM
To: Engel, Steven A. (OLC) <(b) (6) per OLC>; Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Gannon, Curtis E. (OLC) <(b) (6) per OLC>; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: RE: Draft Letter

I have a couple of suggested edits that I can include in a new version, but a general question I have is

(b) (5)

Edward C. O'Callaghan
202-514-2105

From: Engel, Steven A. (OLC)
Sent: Tuesday, June 26, 2018 11:20 PM
To: Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Gannon, Curtis E. (OLC) <(b) (6) per OLC>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) <(b) (6) per OLC>
Subject: RE: Draft Letter

Duplicative Material (Document ID: 0.7.23922.15846)

Rosenstein, Rod (ODAG)

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, June 27, 2018 9:42 PM
To: Schools, Scott (ODAG); O'Callaghan, Edward C. (ODAG); Engel, Steven A. (OLC); Gannon, Curtis E. (OLC); Bolitho, Zachary (ODAG); Flores, Sarah Isgur (OPA); Boyd, Stephen E. (OLA); Lasseter, David F. (OLA)
Cc: Colborn, Paul P (OLC); Gauhar, Tashina (ODAG)
Subject: RE: Draft Letter
Attachments: 2018.06.27.Speaker.Ryan.pdf; 2018.06.27.Chairman.Grassley.pdf

Thanks to Zac for his help creating these pdf versions with working hyperlinks. (They should be stripped of any metadata.) Instead of sending another late-night missive, let's plan to email them to the Hill in the morning.

(b) (5)

I will initial an official final version for our file.

From: Rosenstein, Rod (ODAG)
Sent: Wednesday, June 27, 2018 7:48 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC >; Gannon, Curtis E. (OLC) <(b) (6) per OLC >; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) <(b) (6) per OLC >
Subject: RE: Draft Letter

I think I am finished editing this. Thank you for your help! If there is a way to send the final version on letterhead with a signature and clickable hyperlinks, that would be ideal.

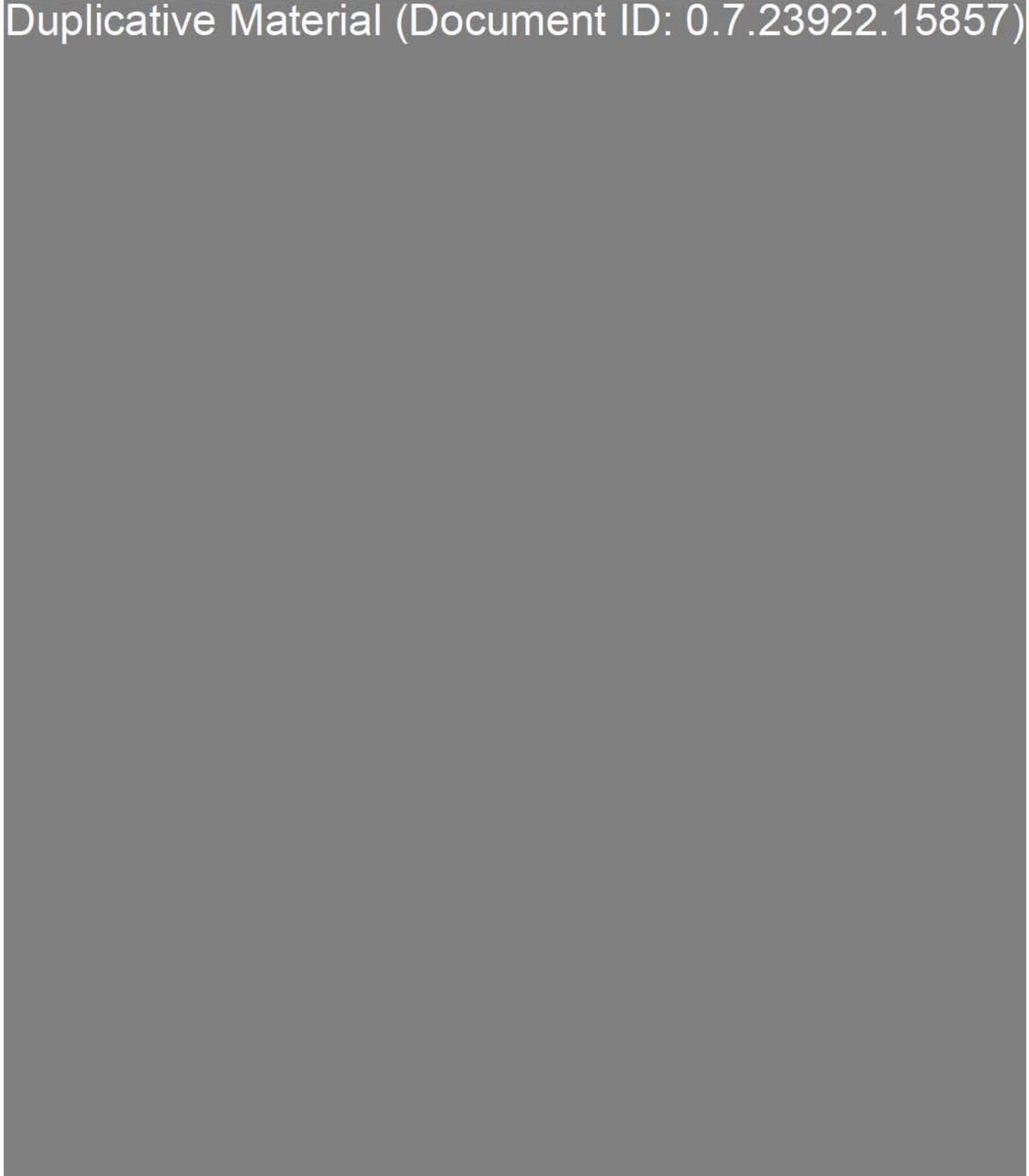
From: Schools, Scott (ODAG)
Sent: Wednesday, June 27, 2018 9:32 AM
To: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Engel, Steven A. (OLC) <(b) (6) per OLC >; Rosenstein, Rod (ODAG) <rosenstein@jmd.usdoj.gov>; Gannon, Curtis E. (OLC) <(b) (6) per OLC >; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) <(b) (6) per OLC >
Subject: RE: Draft Letter

Apologies, but I added one other suggested edit and two comments.

From: O'Callaghan, Edward C. (ODAG)
Sent: Wednesday, June 27, 2018 8:33 AM

To: Engel, Steven A. (OLC) (b) (6) per OLC >; Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>; Gannon, Curtis E. (OLC) (b) (6) per OLC >; Bolitho, Zachary (ODAG) <zbolitho@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Lasseter, David F. (OLA) <dlasseter@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Colborn, Paul P (OLC) (b) (6) per OLC >
Subject: RE: Draft Letter

Duplicative Material (Document ID: 0.7.23922.15857)





U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 27, 2018

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Chairman Grassley:

Thank you for your letter of May 17, 2018, and for meeting with me last Thursday, along with Ranking Member Feinstein. I appreciate your commitment to allow the Special Counsel investigation “to follow the facts wherever they lead without any improper outside interference.”

I know that you and Ranking Member Feinstein share my commitment to protecting the integrity of federal investigations. Agents and prosecutors must base each decision on neutral standards and credible evidence. As we seek to do in all cases, the Department of Justice will complete the Special Counsel investigation as promptly as is feasible. When the investigation is finished, I anticipate that any objective and nonpartisan review will conclude that the Department consistently sought to make reasonable decisions and to comply with applicable laws, regulations, policies, and practices.

Legal, ethical, and policy obligations often prevent prosecutors from responding to criticism. As Attorney General Robert Jackson observed in 1940, prosecutors have a duty “to face any temporary criticism” and “maintain a dispassionate, disinterested, and impartial enforcement of the law.”¹ The Inspector General’s report addresses the consequences of trying to preempt criticism by disregarding principles that prohibit public statements, leaks to the media, and improper disclosures to the Congress about criminal investigations. Department officials must defend those principles in order to ensure that all investigations remain independent of partisan politics. We do not compete to win the hourly news cycle.

Special Counsel Appointment and Authority

Your May 17 letter asks a series of questions concerning the scope of the Special Counsel’s authority. The current Special Counsel differs from an “independent counsel” and

¹ Robert H. Jackson, Attorney General of the United States, Twentieth Anniversary Dinner of the Federal Bar Association, Jan. 20, 1940, available at https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/01_20_1940.pdf.

some previous “special counsels,” because Special Counsel Mueller was appointed by the Department of Justice and remains subject to ongoing supervision.

The Attorney General retains the general authority to designate or name individuals as “special counsels” to conduct investigations or prosecutions of particular matters or individuals on behalf of the United States. Under regulations issued by the Attorney General in 1999, the Attorney General may appoint a “special counsel” from outside of the Department of Justice who acts as a special employee of the Department of Justice under the direction of the Attorney General. The Attorney General, however, may also appoint an individual as a special counsel, and may invest that individual with a greater degree of independence and autonomy to conduct investigations and prosecutions, regardless of any “special counsel” regulations, as Attorneys General did in 1973, 1994, and 2003.²

What a prosecutor is *called* including “independent” or “special” is a separate question from whether that prosecutor is subject to supervision by the Attorney General. Under the terms of his appointment, both by statute³ and by regulation,⁴ Special Counsel Mueller remains accountable like every other subordinate Department official.⁵

Special Counsels have been appointed for a variety of matters throughout history. For example, Attorney General William Barr appointed three Special Counsels from outside the Department of Justice during his 14-month tenure: (1) Nicholas Bua to investigate an array of allegations related to the “Inslaw Affair,” on November 7, 1991; (2) Malcolm Wilkey to investigate the House Bank controversy, on March 20, 1992; and (3) Frederick Lacey to investigate the Bush Administration’s handling of a bank fraud case involving loans to Iraq, on October 17, 1992.⁶

Attorney General Janet Reno appointed Robert Fiske as a Special Counsel to investigate the Whitewater land deal and other matters on January 20, 1994. Mr. Fiske explained that the appointment order was “deliberately drafted broadly ... to give me total authority to look into all appropriate matters relating to the events” For example, Mr. Fiske investigated a suicide in order to determine whether it might involve a crime related to his investigation it did not and prosecuted a fraud case with no obvious connection to Whitewater. Federal agents and

² Congressional Research Service, “Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress,” Summary (June 20, 2013), available at <https://fas.org/sgp/crs/misc/R43112.pdf>.

³ 28 U.S.C. § 515, available at <https://www.law.cornell.edu/uscode/text/28/515>.

⁴ 28 CFR § 600.7, available at <https://www.law.cornell.edu/cfr/text/28/600.7>.

⁵ Many Department officials exercise authority to conduct criminal investigations without Senate confirmation. In the absence of a confirmed U.S. Attorney or Assistant Attorney General, non Senate confirmed attorneys routinely lead U.S. Attorney’s Offices and Department Divisions. Congress has authorized the Attorney General and federal judges to appoint persons to serve as U.S. Attorneys in the absence of Senate confirmed officials. Assistant Attorneys General (confirmed, Presidentially appointed, or acting) and U.S. Attorneys (confirmed, Attorney General appointed, court appointed, or acting) delegate authority to attorneys under their supervision. When conflicts arise, other Department officials may be designated to exercise the authority of a U.S. Attorney. Each of those prosecutors faces varying degrees of oversight, but they are all accountable to the Attorney General and the Deputy Attorney General, who retain authority to overrule them.

⁶ Congressional Research Service, Independent Counsel Law Expiration and the Appointment of “Special Counsels” 3 4 (Jan. 15, 2002).

prosecutors already were investigating crimes when Mr. Fiske was appointed, but the appointment order did not mention the crimes. When asked about supervision of Mr. Fiske, Attorney General Reno said, “I do not expect him to report to me, . . . and I do not expect to monitor him.”⁷ That is not true of Special Counsel Mueller.

Then-Deputy Attorney General James Comey took a different approach in 2003, when he invoked his authority as Acting Attorney General to appoint Patrick Fitzgerald as a special prosecutor to investigate the Valerie Plame matter. Mr. Comey did not make that appointment under the Department’s Special Counsel regulation. Instead, he delegated to the special prosecutor “all the authority of the Attorney General . . . independent of the supervision or control of any officer of the Department.” Mr. Comey followed up with a letter reinforcing that his delegation was “plenary.”⁸ That is not true of Special Counsel Mueller’s appointment.

The Ethics in Government Act allowed several statutory Independent Counsels to be appointed in the absence of probable cause that a crime had occurred, and some of those appointments were not publicized. Even under the Act, when prosecutors were under much less supervision than Special Counsels are under the Department’s regulation, Congress did not interfere in the investigations. The statute required the Independent Counsel to submit an annual report to the Congress, but it allowed him to “omit any matter that in the judgment of the independent counsel should be kept confidential.”⁹

Because the Attorney General’s authority over Independent Counsels was limited, the judicial orders appointing them were a principal way to cabin their jurisdiction. Nonetheless, appointments often were made with “a broadly worded charter.”¹⁰ For example, the appointment order for Whitewater Independent Counsel Kenneth Starr gave him authority to investigate “whether any individuals or entities have committed a violation of any federal criminal law . . . relating in any way to James B. McDougal’s, President William Jefferson Clinton’s, or Mrs. Hillary Rodham Clinton’s relationships with Madison Guaranty Savings & Loan Assn., Whitewater Development Corp., or Capital Management Services Inc.”¹¹ McDougal owned and managed Madison Guaranty, so that charter provided vast discretion to investigate essentially any crime committed by any person that involved the savings and loan association. The Independent Counsel identified other unrelated matters of investigative interest, and he obtained orders from the court expanding his mandate, including “Travelgate,” “Filegate,” and the

⁷ Transcript of Weekly Press Briefing With Attorney General and Robert B. Fiske Jr., Former U.S. Attorney General in New York and Independent Prosecutor, Jan. 20, 1994, *available at* https://www.justice.gov/archive/ag/speeches/1994/01_20_1994.pdf.

⁸ Exhibit A, Letter from Deputy Attorney General James B. Comey to Patrick J. Fitzgerald (Dec. 30, 2003); Exhibit B, Letter from Deputy Attorney General James B. Comey to Patrick J. Fitzgerald (Feb. 6, 2004); Exhibit C, Letter from Deputy Attorney General James B. Comey to Associate Deputy Attorney General David Margolis (Aug. 12, 2005); Exhibit D, Deputy Attorney General James Comey, Department of Justice Press Conference (Dec. 30, 2003), *available at* https://www.justice.gov/archive/osc/documents/2006_03_17_exhibits_a_d.pdf.

⁹ 28 U.S.C. § 595, *available at* <https://www.law.cornell.edu/uscode/text/28/595>.

¹⁰ Stephen Labaton, *The Whitewater Inquiry: The Decision; Judges Appoint New Prosecutor For Whitewater*, New York Times, Aug. 6, 1994, *available at* <https://www.nytimes.com/1994/08/06/us/the-whitewater-inquiry-the-decision-judges-appoint-new-prosecutor-for-whitewater.html>.

¹¹ *Text of Order Appointing Starr*, Los Angeles Times, Aug. 6, 1994, *available at* <http://articles.latimes.com/1994/08/06/news/mn-24149-1-independent-counsel>.

Lewinsky matter.¹² The Attorney General did not supervise or control the Independent Counsel's decisions about which crimes and subjects to investigate within his broad mandates, or which persons to prosecute.

When the Independent Counsel statute expired, the Department adopted the current Special Counsel regulation as an internal policy concerning the appointment and management of Special Counsels. The regulation provides for congressional notification when an appointment is made and when it concludes. At the conclusion of the investigation, it requires notification to Congress of instances when the Attorney General concluded that a proposed action by the Special Counsel should not be pursued. The regulation contemplates ongoing consultation with Department components and continuing oversight by the Attorney General (or the Acting Attorney General), who remains accountable as in all other cases handled by the Department of Justice. The regulation achieves the objective of conducting an independent investigation while following normal Department policies, including supervision by a Senate-confirmed officer.

There is no statutory requirement to identify criminal violations before appointing a Special Counsel from outside the Department, and there is no requirement to publicize suspected violations in the appointment order under the Special Counsel regulation. Only one previous Special Counsel was appointed under the current regulation: John Danforth, to investigate the Waco matter, on September 9, 1999. As with Special Counsel Mueller, Mr. Danforth's appointment order did not publicly specify a crime or identify anyone as a subject.¹³

Special Counsel Mueller's Appointment and Delegated Authority

I determined that the appointment of Special Counsel Mueller to take charge of criminal matters that were already under investigation by federal agents and prosecutors was warranted under the Special Counsel regulation. The appointment order mentions 28 C.F.R. §§ 600.4 to 600.10 because they bear on the authority and duties of the Special Counsel. The public order did not identify the crimes or subjects because such publicity would be wrong and unfair, just as it would have been wrong and unfair to reveal that information prior to Special Counsel's appointment, and just as it would be wrong and unfair in other cases handled by a U.S. Attorney or Assistant Attorney General.

So long as the Attorney General or the Acting Attorney General remains accountable, there is federal statutory and regulatory authority to assign matters to a Special Counsel, just as the Attorney General and the Deputy Attorney General (even when the Attorney General is not recused¹⁴) have authority to assign matters to an Acting U.S. Attorney or any other Department

¹² John Mintz & Toni Locy, *Starr's Probe Expansion Draws Support, Criticism*, Washington Post, Jan. 23, 1998, available at https://www.washingtonpost.com/archive/politics/1998/01/23/starrs_probe_expansion_draws_support_criticism/6b907a9b4db3481d820276db89360ab3/?utm_term=.1736da7300e2;http://library.cqpress.com/cqresearcher/document.php?id=cqresre1999050700.

¹³ When asked, "Do you consider this a criminal review or an administrative review?" Danforth replied, "I don't know." Transcript of Press Conference with Attorney General Janet Reno Re: Appointment of Former Senator John Danforth to head Waco Probe, Sept. 9, 1999, available at <https://www.justice.gov/archive/ag/speeches/1999/agwaco9999.htm>.

¹⁴ 28 CFR § 0.1, available at <https://www.law.cornell.edu/cfr/text/28/0.15>.

official.¹⁵ The U.S. District Court for the District of Columbia recognized as much in its opinion in *Manafort v. United States*.¹⁶

When Special Counsel Mueller was appointed, he received comprehensive briefings about the relevant allegations and documents that described them in considerable detail, as with previous special counsel appointments. Some of the FBI agents who were investigating those matters continued to do so. The Department assigned a team of career and non-career officials to provide supervision and assist the Acting Attorney General in determining which leads should be handled by the Special Counsel and which by other Department prosecutors, and to review any proposed indictments in conjunction with Department components that ordinarily would review them.

The regulation states that the Special Counsel has the powers and authority of a U.S. Attorney (who may or may not be Senate-confirmed) and must follow Department policies and procedures.¹⁷ Under those policies and procedures, the Department should reveal information about a criminal investigation only when it is necessary to assist the criminal investigation or to protect public safety.¹⁸

In August 2017, Special Counsel Mueller received a written internal memorandum from the Acting Attorney General. The memorandum eliminated the ability of any subject, target, or defendant to argue that the Special Counsel lacked delegated authority under 28 U.S.C. § 515 to represent the United States. The names of the subjects were already in Department files, but we did not publicly disclose them because to do so would violate the Department's confidentiality policies.

Many of the questions raised in your letter concern the distinction between a counterintelligence investigation and a criminal investigation. The primary goal of a counterintelligence investigation is to protect against national security threats by, among other things, collecting intelligence information and disrupting foreign influence operations. The goal of a criminal investigation is to determine whether there is sufficient evidence to prosecute a criminal suspect in federal court. There was a "wall" between the two prior to September 11, 2001. There is no longer a wall, but agents and prosecutors are mindful that counterintelligence investigations may be broader than any criminal prosecutions that they generate.

The public announcement of the Special Counsel's appointment purposefully included no details beyond what Director Comey had disclosed at a public House Permanent Select Committee on Intelligence hearing on March 20, 2017. Director Comey revealed that:

the FBI, as part of our counterintelligence mission, is investigating the Russian government's efforts to interfere in the 2016 presidential election, and that includes *investigating the nature of any links between individuals associated with the Trump campaign and the Russian government, and whether there was any coordination*

¹⁵ 28 U.S.C. § 515, available at <https://www.law.cornell.edu/uscode/text/28/515>.

¹⁶ Manafort v. U.S. Department of Justice et al, Memorandum Opinion, No. 37, Apr. 27, 2018, available at https://docs.justia.com/cases/federal/district_courts/district_of_columbia/dcdce/1:2018cv00011/192498/37.

¹⁷ 28 CFR § 600.6, available at <https://www.law.cornell.edu/cfr/text/28/600.6>.

¹⁸ U.S. Attorneys' Manual § 1 7.100, available at https://www.justice.gov/usam/usam_1_7000_media_relations#1_7.110; *Id.* § 1 7.400, available at https://www.justice.gov/usam/usam_1_7000_media_relations#1_7.110.

*between the campaign and Russia's efforts. As with any counterintelligence investigation, this will also include an assessment of whether any crimes were committed. Because it is an open, ongoing investigation, and is classified, I cannot say more about what we are doing and whose conduct we are examining. At the request of congressional leaders, we have taken the extraordinary step ... of briefing this Congress's leaders, including the leaders of this Committee, in a classified setting, in detail about the investigation.*¹⁹

As is now publicly known, the Department of Justice and the FBI were conducting several investigations with potential relevance to Russian interference in the 2016 election when Special Counsel Mueller was appointed in May 2017. The public order explained that the Special Counsel will “ensure a full and thorough investigation of the Russian government’s efforts to interfere in the 2016 presidential election.”²⁰ Special Counsel Mueller is authorized to investigate potential criminal offenses. Counterintelligence investigations involving any current or future Russian election interference are not the Special Counsel’s responsibility.

Congressional Oversight Requests

Department of Justice and FBI personnel are working diligently and in good faith to provide an unprecedented level of congressional access to information that members of Congress believe may be relevant. Our responses to the many related and overlapping congressional inquiries are consistent with longstanding best practices. We respond as quickly as possible to the inquiries and accommodate requests when possible. We cannot fulfill requests that would compromise the independence and integrity of investigations, jeopardize intelligence sources and methods, or create the appearance of political interference. We need to follow the rules.

In 2016 and 2017, then-Director Comey made disclosures to the public and to Congress that he has acknowledged would not have been appropriate under regular order. He maintains that his 2016 statements to the public and to the Congress about the Hillary Clinton email investigation were justified by unique circumstances comparable to a “500-year flood.”²¹ He further believes that his 2017 disclosures about the investigation of alleged links between the Russian government agents who interfered in the election and persons associated with the Trump campaign were an “extraordinary step” justified by “unusual circumstances.”²²

It is important for the Department of Justice to follow established policies and procedures, especially when the stakes are high. It may seem tempting to depart from Department policies and traditions in an effort to deflect short-term criticism, but such deviations

¹⁹ House Permanent Select Committee on Intelligence (HPSCI), “Written Statement of James Comey to HPSCI Hearing Titled Russian Active Measures Investigation” March 20, 2017, *available at* <https://www.fbi.gov/news/testimony/hpsci-hearing-titled-russian-active-measures-investigation>.

²⁰ Press Release, Office of the Deputy Attorney General, Appointment of Special Counsel to Investigate Russian Interference With The 2016 Presidential Election and Related Matters, May 17, 2017, *available at* <https://www.justice.gov/opa/press-release/file/967231/download>.

²¹ Carrie Johnson, *James Comey Says FBI ‘Would Be Worse Today’ If Not For His Actions*, WAMU 88.5 American University, Apr. 17, 2018, *available at* <https://wamu.org/story/18/04/17/james-comey-says-fbi-would-be-worse-today-if-not-for-his-actions/>.

²² House Permanent Select Committee on Intelligence (HPSCI), “Written Statement of James Comey to HPSCI Hearing Titled Russian Active Measures Investigation” March 20, 2017, *available at* <https://www.fbi.gov/news/testimony/hpsci-hearing-titled-russian-active-measures-investigation>.

ultimately may cause a loss of public confidence in the even-handed administration of justice. We should be most on guard when we believe that our own uncomfortable present circumstances justify ignoring timeless principles respected by our predecessors. I urge you and your colleagues to support us in following the rules.

At my confirmation hearing, I promised that Department employees would conduct ourselves “with deep respect for the institution and employees of the Department of Justice, with acute understanding of our role in the constitutional structure, and with profound appreciation of our weighty responsibilities.”²³ My commitment to the Department’s longstanding traditions carries with it an obligation to ensure that we keep pending law enforcement matters separate from the sphere of politics and that there be no perception that our law enforcement decisions are influenced by partisan politics or pressure from legislators.

Regardless of political affiliation, thoughtful former Department leaders recognize that departures from our confidentiality policies pose an extraordinary threat to the Department’s independence and integrity. Former Deputy Attorneys General Larry Thompson and Jamie Gorelick explained that the Department of Justice “operates under long-standing and well-established traditions limiting disclosure of ongoing investigations to the public and even to Congress.... These traditions protect the integrity of the department” Violating those policies and disclosing information about criminal investigations constitutes “real-time, raw-take transparency taken to its illogical limit, a kind of reality TV of federal criminal investigation” that is “antithetical to the interests of justice.”²⁴

Punishing wrongdoers through judicial proceedings is only one part of the Department’s mission. We also have a duty to prevent the disclosure of information that would unfairly tarnish people who are not charged with crimes. In 1941, Attorney General Robert Jackson explained that disclosing information about federal investigations to Congress could cause “the grossest kind of injustice to innocent individuals,” and create “serious prejudice to the future usefulness of the Federal Bureau of Investigation.” It is useful to quote at length from the Attorney General’s letter:

[W]e have made extraordinary efforts to see that the results of counterespionage activities and intelligence activities of this Department involving those elements are kept within the fewest possible hands. A catalogue of persons under investigation or suspicion, and what we know about them, would be of inestimable service to foreign agencies; and information which could be so used cannot be too closely guarded.

Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. As you

²³ United States Senate Committee On The Judiciary, “Written Statement Of Rod J. Rosenstein Nominee To Serve As Deputy Attorney General” March 7, 2017, available at https://www.judiciary.senate.gov/imo/media/doc/03_07_17%20Rosenstein%20Testimony.pdf.

²⁴ Jamie Gorelick and Larry Thompson, *James Comey is damaging our democracy*, The Washington Post, October 29, 2016, available at https://www.washingtonpost.com/opinions/james-comey-is-damaging-our-democracy/2016/10/29/894d0f5e-9e49-11e6-a0ed-ab0774c1eaa5_story.html?noredirect=on&utm_term=.81fcfa641bdd.

probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants -- sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency.

Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.

In concluding that the public interest does not permit general access to Federal Bureau of Investigation reports for information by the many congressional committees who from time to time ask it, I am following the conclusions reached by a long line of distinguished predecessors in this office who have uniformly taken the same view....

Since the beginning of the Government, the executive branch has from time to time been confronted with the unpleasant duty of declining to furnish to the Congress and to the courts information which it has acquired and which is necessary to it in the administration of statutes.²⁵

Attorney General Jackson's letter mentioned that the pending congressional request was "one of the many made by congressional committees." He understood the profoundly harmful consequences of proceeding down a road that would empower congressional members and staffers to choose which federal investigations should be publicized.

Congressional leaders respected Attorney General Jackson's obligation to do the job he swore an oath to perform "well and faithfully execute the duties of the office" by preserving the independence of federal law enforcement and protecting it from political influence. President Eisenhower later agreed, finding that "it is essential to the successful working of our system that the persons entrusted with power in any of the three great branches of government shall not encroach upon the authority confided to the others."²⁶

Requiring the Department of Justice to disclose details about criminal investigations would constitute a dangerous departure from important principles. Criminal *prosecutions* should be relatively transparent because the public should know the grounds for finding a citizen guilty of criminal offenses and imposing punishment but criminal *investigations* emphatically are not supposed to be transparent. In fact, disclosing uncharged allegations against American

²⁵ 40 Op. Att'y Gen. 45, 46 48 (1941), http://pogoblog.typepad.com/1941_Atty_Gen_Op_FBI_files.htm.

²⁶ Dwight D. Eisenhower, President of the United States, "Letter to the Secretary of Defense Directing Him To Withhold Certain Information from the Senate Committee on Government Operations," May 17, 1954, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9890>.

citizens without a law-enforcement need is considered to be a violation of a prosecutor's trust.²⁷ As stated in the Department's Principles of Federal Prosecution:

In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-parties. In the context of public plea and sentencing proceedings, this means that, *in the absence of some significant justification, it is not appropriate to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue.* In the unusual instance where identification of an uncharged third-party wrongdoer during a plea or sentencing hearing is justified, the express approval of the United States Attorney and the appropriate Assistant Attorney General should be obtained prior to the hearing absent exigent circumstances. . . . In other less predictable contexts, *federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third-parties.* With respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally should seek leave to file such documents under seal. Prosecutors shall comply, however, with any court order directing the public filing of a bill of particulars.

As a series of cases makes clear, *there is ordinarily "no legitimate governmental interest served" by the government's public allegation of wrongdoing by an uncharged party,* and this is true "[r]egardless of what criminal charges may . . . b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future." In re Smith, 656 F.2d 1101, 1106-07 (5th Cir. 1981). Courts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings. . . .

In most cases, any legitimate governmental interest in referring to uncharged third-party wrongdoers can be advanced through means other than those condemned in this line of cases. For example, in those cases where the offense to which a defendant is pleading guilty requires as an element that a third-party have a particular status (e.g., 18 U.S.C. § 203(a)(2)), the third-party can usually be referred to generically ("a Member of Congress"), rather than identified specifically ("Senator X"), at the defendant's plea hearing. Similarly, when the defendant engaged in joint criminal conduct with others, generic references ("another individual") to the uncharged third-party

²⁷ 24 J. Am. Jud. Soc'y 18 (1940), 31 J. Crim. L. 3 (1940), "Address at Conference of United States Attorneys, Washington, D.C." (April 1, 1940), available at <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>.

wrongdoers can be used when describing the factual basis for the defendant's guilty plea.²⁸

Even when we file federal charges, Department policy strongly counsels us not to implicate by name any person who is not officially charged with misconduct.

The recent Inspector General report emphasizes the solemn duty of federal law enforcement officials to defend the confidentiality of federal investigations. I hope you and your colleagues in the Senate and House will support us in restoring those principles. The Department of Justice must not proceed along the unhappy road to being perceived as a partisan actor, deciding what information to reveal and what information to conceal based on the expected impact on the personal or political interests of its temporary leaders and congressional allies.

The current investigation of election interference is important, but there are also thousands of other important investigations pending in the Department of Justice and the FBI. Every investigation is important to the persons whose reputations may be irreparably damaged or whose careers may be permanently disrupted. No matter who an investigation involves — an ordinary citizen, a local or state politician, a campaign official, a foreign agent, or an officer of the federal legislative, executive, or judicial branch — agents and prosecutors are obligated to protect its confidentiality and preserve the Department's independence from political influence.

Throughout American history, wise legislators have worked with Department officials to limit oversight requests in order to respect the Department's duty to protect national security, preserve personal privacy, and insulate investigations from the appearance of interference.²⁹ For instance, the Department sent a letter to a House committee chair in 2000, describing the Department's policies on responding to congressional oversight requests. The letter explains:

Such inquiries inescapably create the risk that the public and the courts will perceive undue political and Congressional influence over law enforcement and litigation decisions. Such inquiries also often seek records and other information that our responsibilities for these matters preclude us from disclosing.³⁰

The letter quotes President Ronald Reagan, who wrote that a “tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.” Regardless of whether an inter-branch information request is made by letter or subpoena, the relationship between the branches gives rise to “an implicit constitutional mandate,”³¹ to “reach an accommodation short of full-scale confrontation.”³² It must not be the case that the Department

²⁸ United States Attorneys' Manual, 9 27.760 — Limitation on Identifying Uncharged Third Parties Publicly, available at https://www.justice.gov/usam/usam_9_27000_principles_federal_prosecution#9_27.760.

²⁹ The Department of Justice is created and funded by legislation — just like the lower federal courts — but the Department of Justice is a central component of the executive branch, a coequal partner with the legislative branch and the judicial branch in our constitutional structure.

³⁰ Robert Raben, Assistant Attorney General, “DOJ View Letters on Subcommittee on Rules and Organization of the House testimony on ‘Cooperation, Comity, and Confrontation: Congressional Oversight of the Executive Branch’” July 15, 1999, available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/linder.pdf>.

³¹ *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977).

³² Bradley & Goldsmith, *Foreign Relations Law* (4th ed. 2017).

is required to risk damage to reputations, put cases and lives at risk, and invite political interference by opening sensitive files to congressional staff without restriction.

Tension between Congress's oversight interests and the Department's solemn responsibility to protect law enforcement information is unavoidable. In 1989, then-Assistant Attorney General William Barr wrote that misunderstandings often arise because congressional investigations, by their nature, are usually adversarial and unbounded by the rules of evidence.³³ In another 1989 opinion, the Department's Office of Legal Counsel explained that "the executive branch has ... consistently refused to provide confidential information" to "congressional committees with respect to open cases."³⁴

Sometimes there is a strong temptation to seek short-term benefit at the cost of long-term values. But departures from Department traditions contribute to a loss of public confidence. We can build public confidence if we stick to the principle that the prosecutor is "the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."³⁵

Approval of Foreign Intelligence Surveillance Act Applications

Finally, you asked whether I delegated approval authority under the Foreign Intelligence Surveillance Act. Such approval authority is not delegable beyond the approving officials designated in the Foreign Intelligence Surveillance Act. FISA affidavits are written and sworn under oath by career federal agents who verify that they are true and correct. They are reviewed by investigative agency supervisors and attorneys, and by Department of Justice attorneys and supervisors. Before filing, they must be approved by an intelligence agency leader, usually the FBI Director, and by either the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the National Security Division. In every case, the ultimate decision on whether to allow surveillance is made by a federal judge who independently determines whether the evidence provided under oath by the federal agent meets the requisite legal standard.

³³ Congressional Requests for Confidential Executive Branch Information, Memorandum Opinion for the General Counsel's Consultative Group, June 19, 1989, *available at* <https://www.justice.gov/file/24236/download>.

³⁴ Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations, Memorandum Opinion for the Chairman Investigations/Law Enforcement Committee President's Council on Integrity and Efficiency, March 24, 1989, *available at* <https://www.justice.gov/file/24181/download>.

³⁵ *Berger v. United States*, 295 U.S. 78 (1935), *available at* <https://supreme.justia.com/cases/federal/us/295/78/case.html>.

Conclusion

I hope that you find this information helpful. I regret that the many duties of my office preclude me from responding personally to every congressional inquiry. I am deeply grateful to have the support of a talented and dedicated team that understands our obligation to work cooperatively with the Congress to protect the American people and preserve the rule of law.

Sincerely,

/s/

Rod J. Rosenstein
Deputy Attorney General

cc: Ranking Member Feinstein
Chairman Goodlatte
Ranking Member Nadler



U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 27, 2018

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Speaker Ryan:

I understand that the House Judiciary Committee passed a resolution directing the Department of Justice to comply with certain document requests, and some Members are seeking to bring the resolution before the full House. The resolution fails to acknowledge the extraordinary and unprecedented efforts that Trump Administration officials and other Department employees are making to comply with a considerable volume of oversight requests.

Movement on this resolution would be contrary to the spirit of accommodation that was present in our productive meeting with Federal Bureau of Investigation Director Chris Wray and Director of National Intelligence Dan Coats on June 15. Many Department employees are working tirelessly to produce documents to your Members.

During the House Judiciary Committee hearing on Thursday, Director Wray and I hope to make clear that the Department has produced a remarkable volume of documents and is working in good faith to comply with all requests. We also look forward to discussing the Inspector General's report.

The enclosed letter provides more details about the Department's responses to congressional oversight, and other matters. I hope the information is helpful, and I encourage you to share it with your Members.

Thank you for your professionalism in working with the Department of Justice.

Sincerely,

/s/

Rod J. Rosenstein
Deputy Attorney General

Enclosure