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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
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May 21, 2018

The Honorable Rod J. Rosenstein
Deputy Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Deputy Attorney General Rosenstein:

On May 17, 2018, Chairman Grassley requested information about the ongoing special counsel investigation in a letter that could be interpreted as an effort to undermine the Special Counsel's investigation by calling into question the legal basis for the Special Counsel's appointment and scope of his work. As set forth below, existing law and Department of Justice regulations fully support the appointment and continued work of Special Counsel Mueller, and investigative information about his ongoing investigation should be protected.

The legal authority to appoint a special counsel derives from the Attorney General's (in this case, the Acting Attorney General's) obligation to supervise and manage the Department and ensure enforcement of the nation's laws. Congress has recognized and codified that authority, including in 28 U.S.C. §§ 509, 510, and 515. This same authority was used to appoint former special counsel Patrick Fitzgerald to investigate "the alleged unauthorized disclosure of a CIA employee's identity." The appointment in that case, which is attached to this letter, consisted of a single sentence.

The May 17, 2017, order appointing Special Counsel Mueller invokes this same legal authority. That order authorizes Mr. Mueller to conduct the investigation into Russian interference that Director Comey confirmed in congressional testimony, and related matters that might arise in the course of the investigation. As described by Director Comey, the investigation involves "the Russian Government's efforts to interfere in the 2016 Presidential election, which includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts. *As with any*

*counterintelligence investigation, this will also include an assessment of whether any crimes were committed.”*¹ Contrary to Chairman Grassley’s assertion, the investigation clearly contemplates possible criminal charges, as warranted by facts developed over the course of the investigation. Indeed, in a recent order dismissing former Trump campaign chairman Paul Manafort’s claim that Special Counsel Mueller has exceeded his authority, Judge Amy Berman Jackson stated that the Special Counsel’s criminal prosecution of Manafort “falls squarely within” the “order to investigate ‘any links and/or coordination between the Russian government and individuals associated with the campaign.’”²

The demand for additional information about the scope and other details regarding the Special Counsel’s ongoing investigation is similarly misplaced. Department regulations protect this type of information from disclosure to Congress for legitimate investigative and privacy reasons, and warrant protection of the information that Chairman Grassley has requested.

As the Department has explained to our Committee, providing “the public or Congress with information about non-public investigative activity could compromise the reputational or privacy rights of uncharged parties, undermine any ongoing investigations of those parties, and give the misimpression that the Department’s investigative steps are susceptible to political influence.”³ This is true of any investigation, but the risks are particularly acute where a special counsel investigation has been authorized.

Special counsel investigations involve conflicts and extraordinary circumstances that are often likely to implicate partisan political interests. That is acutely clear in this case, where the investigation involves possible “links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump” and “any matters that arose or may arise directly from the investigation.”⁴ In these circumstances, it is particularly important to ensure adequate protections against the possible leak of information that might help, or harm, one’s political allies or opponents, and to insulate the

¹ House Permanent Select Intelligence Committee, Hearing on Russian Election Tampering, Testimony of James B. Comey, Director, Federal Bureau of Investigation (May 20, 2017).

² Memorandum Opinion and Order, *United States v. Manafort*, Crim. No. 17-0201-01, at 2 (D.D.C. May 15, 2018).

³ Adam S. Hickey, Deputy Assistant Attorney General, U.S. Dept. of Justice, and E.W. Priestap, Assistant Director, Counterintelligence Division, Federal Bureau of Investigation, “Responses to Questions for the Record Arising from a Hearing Entitled ‘Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations,’” Hearing before Senate Committee on the Judiciary (July 26, 2017).

⁴ Attorney General Order No. 3915-2017, “Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters,” at (b)(i) and (b)(ii) (May 17, 2017).

Department from any misimpression that its work has been influenced by political pressure from either side.

While the Chairman's letter asserts that Congress can be trusted to act responsibly and safeguard Special Counsel Mueller's investigation, unfortunately, there have been examples already in this investigation where that has not occurred. In fact, in several recent instances, Congress was provided information about this investigation that was then leaked or was otherwise released to the press and public. For example, in July 2017, the Department allowed certain Members and staff to review former FBI Director James Comey's memos memorializing his interactions with President Trump. Within days, it was reported that some of these memos contained classified information.⁵

In another instance, certain members of Congress were granted access to FISA surveillance applications, subject to heightened security procedures due to the extraordinary sensitivity of these applications. House Intelligence Chairman Devin Nunes then prepared a misleading memo alleging "abuses" by the FBI and DOJ based on the applications' contents. Chairman Nunes sought to release classified information to the public by using an obscure congressional procedure that allows release unless the President objects. Over the strong objections of the FBI, which expressed "grave concerns about material omissions of fact that fundamentally impact the memo's accuracy,"⁶ the President declassified and released the Nunes memo.

While we agree that reporting and transparency are important, and that Congress has a constitutional right and obligation to conduct meaningful oversight of the executive branch, Congress should respect the need for secrecy during ongoing investigations and prosecutions and work with, not against, the Department to ensure that information is protected. The existing regulations achieve this goal by requiring notification that a special counsel has been appointed and reporting at the close of the investigation. These requirements are being met.

The May 17, 2017, appointment order provided ample notice to Congress that Mr. Mueller would be conducting the investigation. The Department regulations

⁵ See John Solomon, *Comey's private memos on Trump conversations contained classified material*, The Hill (July 9, 2017).

⁶ Adam Goldman and Nicholas Fandos, *FBI Condemns Push to Release Secret Republican Memo* (Jan. 31, 2018); see also *FBI Statement on HPSCI Memo*, FBI National Press Office (Jan. 31, 2018), <https://www.fbi.gov/news/pressrel/press-releases/fbi-statement-on-hpsci-memo>.

(specifically Section 600.4) require that the special counsel (not Congress) be provided with a “specific factual statement of the matter to be investigated.” This guidance was provided, including through the August 2017 memorandum that the Chairman now seeks in unredacted form. But Section 600.4, which establishes the jurisdiction of the Special Counsel, does not require that this information be provided to Congress. These requirements for guidance to the special counsel stand apart from the required notification to Congress of a special counsel’s appointment that are contained in Section 600.9.

Section 600.9 requires notification to the Chairman and Ranking Member of the Judiciary Committees “upon appointing a Special Counsel.” The regulations contain no requirement to provide particular details other than the fact of appointment, which was clearly met when the May 17, 2017, order appointing Special Counsel Mueller was issued. More importantly, no requirement exists for ongoing or periodic reporting during the course of the investigation, even as the scope of the investigation may necessarily change as further facts are uncovered.

Allowing the Special Counsel to complete his work, without interference or delay from the President or Congress, is the best way to bring this matter to its conclusion. During your confirmation hearing, you assured the Committee that that the integrity and independence of the Justice Department and the rule of law would be upheld. As you recognized, “[e]very investigation [the Justice Department] conduct[s] needs to be independent. And it does not matter who is the defendant, whether it is a prominent public official or just an average American citizen, it always needs to be conducted independently.”⁷ We ask that you uphold the integrity of Department of Justice investigations, as you stated you would in your confirmation hearing, and protect information regarding Special Counsel Mueller’s ongoing investigation.

Sincerely,



Dianne Feinstein
United States Senator

cc: The Honorable Charles E. Grassley
Enclosure

⁷ Senate Committee on the Judiciary, Hearing on Nominations, Testimony of Rod J. Rosenstein (March 7, 2017).



Office of the Deputy Attorney General
Washington, D.C. 20530

December 30, 2003

The Honorable Patrick J. Fitzgerald
United States Attorney
219 S. Dearborn Street
Chicago, IL 60604

Dear Patrick,

By the authority vested in the Attorney General by law, including 28 U.S.C. §§ 509, 510, and 515, and in my capacity as Acting Attorney General pursuant to 28 U.S.C. § 508, I hereby delegate to you all the authority of the Attorney General with respect to the Department's investigation into the alleged unauthorized disclosure of a CIA employee's identity, and I direct you to exercise that authority as Special Counsel independent of the supervision or control of any officer of the Department.

/s/ James B. Comey
James B. Comey
Acting Attorney General