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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

May 17, 2018

VIA ELECTRONIC TRANSMISSION

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

Dear Deputy Attorney General Rosenstein:

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

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

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)-(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.

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