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 statute[3] 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

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[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

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[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 recused[14]) have authority to assign matters to an Acting U.S. Attorney or any other Department

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[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/6b907a9b-4db3-481d-8202-76db89360ab3/?utm_term=.1736da7300e2; http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1999050700.

[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*

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[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

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

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[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.
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> 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.
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> 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....
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> 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

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[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.
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> 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

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[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.

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[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