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The Smear Campaign Against Mueller: Debunking the Nunes Memo and the Other Attacks on the Russia Investigation

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This memorandum was prepared for the Presidential Investigation Education Project, a joint initiative by ACS and CREW to promote informed public evaluation of the investigations by Special Counsel Robert Mueller and others into Russian interference in the 2016 election and related matters. This effort includes developing and disseminating legal analysis of key issues that emerge as the inquiries unfold and connecting members of the media and public with ACS and CREW experts and other legal scholars who are writing on these matters.

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Introduction

When Robert Mueller was appointed Special Counsel in May 2017 to lead the inquiry into Trump campaign ties to Russia, leading Republican voices sang his praises, calling him a man of “uncompromising integrity,”² with a “stellar” reputation³ and the “right credentials for this job,”⁴ who will conduct a “thorough and fair”⁵ investigation with “trust and confidence of the American people.”⁶ As Senate Majority Whip John Cornyn stated, “Robert Mueller is perhaps the single-most qualified individual to lead such an investigation...and he’s certainly independent.”⁷

Just a few months later, that attitude has changed. After the Special Counsel’s office (SCO) had secured guilty pleas from individuals including former national security advisor Michael Flynn, and indictments from individuals including top Trump campaign official Paul Manafort, the White House and its allies escalated efforts to publicly discredit the Special Counsel. Now that he is turning his attention to interviewing the President, those efforts are reaching a crescendo. According to these critics, the SCO’s work, and related efforts at the Department of Justice and the Federal Bureau of Investigation, are politicized, unfair, and rife with misconduct – the antithesis of the professionalism for which Mueller has been recognized throughout his career. If these critics are correct, a veteran prosecutor long known for following the rules is now acting as a rogue partisan hack. He is not.

This report examines the facts and law relating to seven major allegations regarding SCO conduct: (1) Mueller has conflicts of interest that disqualify him from the investigation; (2) Mueller’s team has conflicts of interest that disqualify them; (3) Department of Justice (DOJ) actions regarding two career government officials, Peter Strzok and Bruce Ohr, are grounds for disqualifying Mueller; (4) the Special Counsel’s office gained unauthorized access to privileged Trump transition office data; (5) the Special Counsel’s inquiry is predicated on unreliable Clinton campaign opposition research; (6) the inquiry,

² Sen. Lisa Murkowski, Murkowski Statement on Special Counsel Appointment, May 18, 2017, available at <https://www.murkowski.senate.gov/press/release/murkowski-statement-on-special-counsel-appointment>.

³Eli Watkins, Rubio: Trump firing Mueller “not going to happen”, *CNN*, Jun. 18, 2017, available at <http://www.cnn.com/2017/06/18/politics/marco-rubio-robert-mueller/index.html>.

⁴ Sen. Chuck Grassley, Grassley Statement on the Appointment of Special Counsel in Russian Interference Probe, May 17, 2017, available at <https://www.grassley.senate.gov/news/news-releases/grassley-statement-appointment-special-counsel-russian-interference-probe>.

⁵ House Judiciary Committee, Goodlatte Statement on Appointment of Special Counsel, May 17, 2017, available at <https://judiciary.house.gov/press-release/goodlatte-statement-appointment-special-counsel/>.

⁶ Sarah D. Wire, Republicans and Democrats in California’s congressional delegation praise special counsel pick Robert Mueller, *L.A. Times*, May 17, 2017, available at <http://beta.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-s-delegation-praises-special-1495066996-htmlstory.html>.

⁷ Sen. John Cornyn, Cornyn on Appointment of Special Counsel in Russia Investigation, May 18, 2017, available at <https://www.cornyn.senate.gov/content/news/cornyn-appointment-special-counsel-russia-investigation>.

and particularly the SCO's supervisor, Deputy Attorney General Rod Rosenstein, are compromised by intelligence-gathering abuses to be revealed in the so-called "Nunes memo"; and (7) a fair inquiry requires appointment of an additional Special Counsel to review FBI and DOJ conduct.

Individually, these allegations are unfounded, as we detail below. Collectively, they amount to one of the most sustained smear campaigns against honest government officials since Senator Joe McCarthy's attacks of the 1950's. We address them collectively in this report because a pattern has emerged of the President and/or his enablers making wild allegations, dominating a media cycle, then pivoting away as the falsity of the claims emerge. Rather than defending the spurious attacks, after a short interval, a new and baseless charge is launched, and the vicious cycle is repeated. We think the pattern is highly relevant to the credibility of each new charge relating to the SCO—the latest coming in the form of the Nunes memo—and that it is important for a rebuttal of them all to be on the record.

That said, this analysis can only offer an assessment based on the public record facts that are currently available. It does not purport to draw definitive final conclusions, as additional facts are likely to emerge as the inquiry unfolds, and DOJ rules limiting comment by prosecutors during ongoing inquiries prevent the SCO from providing relevant facts to the public record for the time being. Based on what is publicly known, however, this analysis concludes that the Special Counsel to date has conducted an inquiry that fully complies with relevant laws, rules, and guidelines – and that is wholly consistent with Mueller's reputation for playing by the book.

Following is an executive summary of the report's findings on each of the seven allegations, and a more detailed analysis of the facts and law follows in the body of the report.

Executive Summary

Myth #1: Robert Mueller has potential conflicts of interest that should disqualify him from being Special Counsel, based on (1) his relationship with former FBI Director James Comey; (2) his former employment with WilmerHale; and (3) his status as FBI Director during part of the Uranium One investigation; (4) a membership fee dispute at a Trump golf club; and (5) the fact that he was interviewed by the President to replace Comey.

The Facts: Mueller does not have conflicts of interest under the applicable rules and regulations because (1) his relationship with Comey does not appear to constitute a “close and substantial connection”; (2) he did not personally represent WilmerHale clients Jared Kushner or Paul Manafort while at WilmerHale and does not appear to have had access to any confidential information relating to those representations; (3) the FBI review of Uranium One during Mueller’s tenure is unrelated to the issues that are the subject of the Special Counsel’s investigation; (4) Mueller’s spokesman has challenged the golf fee dispute allegation and in any event this issue is not remotely relevant to the subjects of the Special Counsel inquiry; and (5) a job interview does not constitute a prohibited political relationship under the relevant ethics regulations.

Myth #2: Members of Mueller’s current team have conflicts of interest that disqualify them from work on the investigation because (1) some made contributions to Democratic candidates; and (2) SCO counsel Andrew Weissmann in January 2016 sent a congratulatory email to then-Acting Attorney General Sally Yates about her position on the travel ban.

The Facts: Members of the Special Counsel investigative team are not disqualified from participating in the inquiry as the rules governing the conduct of executive branch employees generally and DOJ investigators specifically expressly permit them to make campaign contributions, and none served as an adviser to or official of the Clinton campaign. Nor would the Special Counsel have been permitted under applicable law to inquire about his staff’s political contributions. The Weissmann email to Yates also does not establish a violation of conflict of interest rules because it shows no bias with respect to the subject matter of the Special Counsel’s investigation.

Myth #3: Mueller’s inquiry is partisan and tainted because of actions by two DOJ employees: (1) investigator Peter Strzok, who worked on the Special Counsel investigation until July 2017, sent personal texts critical of the President to a co-worker; and (2) former associate deputy attorney general Bruce Ohr, a career attorney at DOJ who was reportedly reassigned in December after it was revealed that he had failed to disclose his contacts with Fusion GPS, a consulting company that employed his wife and that the Clinton campaign had commissioned for research on Trump.

The Facts: There is no basis for concluding the investigation has been tainted by political bias of either Strzok or Ohr. In fact, Strzok has not worked on the investigation since last July, and we know of no evidence that Ohr ever worked on the investigation. When Mueller learned of Strzok’s texts he immediately acted to remove him from the

investigation, a step consistent with applicable DOJ regulations that appears to reflect Mueller's sound judgment and ability to act decisively to reinforce an ethic of impartiality in his inquiry.

Myth #4: The Trump presidential transition organization Trump for America (TFA) claims the General Services Administration (GSA) provided the SCO "unauthorized" access to transition team data concerning information subject to the presidential communications, deliberative process, and attorney-client privileges.

The Facts: TFA and GSA have offered opposing accounts of their understanding on responding to investigative requests. GSA's position is the more well-founded. The transition materials appear to raise at best minimal privilege concerns, as neither presidential communications nor deliberative process privileges likely apply to transition records and only a limited range of documents would likely be subject to attorney-client privilege.

Myth #5: The Special Counsel's inquiry is partisan and tainted because it was premised on Clinton campaign-funded and unreliable reports known as the "Steele Dossier."

The Facts: The hack of Democratic Party emails and a report from Australian intelligence that Trump campaign staff may have knowledge of the hack were reportedly "driving factors" in the FBI's decision to open an investigation into Russian interference in the 2016 election. Further, as early as late 2015 British and Dutch intelligence reportedly provided the U.S. government reports on Trump associate contacts with Russia, so it is not at all clear the Steele dossier played a major role propelling the investigation. The dossier was compiled by former intelligence professional Christopher Steele, on behalf of research firm Fusion GPS, which first was engaged by Republican clients opposing Trump in the primaries and then by representatives of the Clinton campaign. When Steele reportedly became concerned that Trump may be vulnerable to blackmail, he approached the FBI as a matter of "citizenship" without consulting with the Clinton campaign. There is no evidence that the DOJ improperly certified the veracity of any evidence it relied on to obtain an electronic surveillance warrant—including, potentially, the Steele dossier.

Myth #6: The Special Counsel's inquiry and its supervisor, Deputy Attorney General Rod Rosenstein, are compromised by intelligence-gathering abuses discussed in an as-yet unreleased memo compiled by Representative Devin Nunes.

The Facts: Representative Devin Nunes, Chairman of the House Intelligence Committee and a former executive committee member of the Trump transition, has prepared a four-page report about Foreign Intelligence Surveillance Act (FISA) warrants obtained by the FBI as part of its Trump-Russia investigation. Representative Nunes has refused to provide the memo to the Republican Chair of the Senate Intelligence Committee, and the House Intelligence Committee Republicans voted against allowing the FBI and DOJ to brief the Committee and House on the report. Although it is challenging to analyze the memo because neither it nor the underlying documents have been released, there are

multiple reasons to doubt its credibility. It appears that Representative Nunes and the other members of the House Intelligence Committee have not actually reviewed the classified source materials that were used to support FISA warrant applications. Any warrant for electronic surveillance would have been required to meet statutory requirements and withstand scrutiny from a judge. The memo is reported to be part of the effort to obstruct the Mueller investigation by discrediting and laying the groundwork to replace its supervisor DAG Rosenstein, and Rep. Nunes has consistently sought to discredit the investigation and bolster the President.

Myth #7: To ensure fairness, an additional Special Counsel is necessary to examine issues relating to the 2016 election that do not appear to be under review by Mueller, including allegations that Hillary Clinton engaged in a quid pro quo with a Russian company with uranium interests in the United States, and various claims about DOJ and FBI misconduct in the inquiry into Clinton's use of a private email server and the Mueller inquiry.

The Facts: DOJ regulations establish three criteria for appointing a Special Counsel: that (1) a "criminal investigation" of a person or matter is warranted; (2) such an investigation or prosecution by a U.S. Attorney's Office or litigating division of DOJ would "present a conflict of interest" for DOJ or "other extraordinary circumstances"; and (3) it is "in the public interest." Most of the subject matters floated as the basis for new Special Counsel inquiries fail to meet any of the three criteria, and none presents a credible allegation of criminal wrongdoing.

I. Mueller Does Not Have Conflicts of Interest that Disqualify Him from Being Special Counsel

Critics of the Special Counsel claim Robert Mueller has conflicts of interest that disqualify him from leading the Russia interference inquiry based on five grounds: (1) Mueller's relationship with James Comey, (2) representation by his former firm WilmerHale of individuals implicated in the investigation, (3) his former role as FBI director in 2010 during Obama Administration consideration of a petition by a Russian company that some claim was engaged in illicit dealings with Hillary Clinton, (4) a membership fee dispute between Mueller and a Trump golf club, and (5) the fact that he was interviewed by the president to replace Comey..

For all the alleged conflicts of interest for Mueller, a review of the known facts shows that Mueller's conduct comports with the applicable professional rules of conduct, ethics regulations, and guidance. As a starting point, it is important to remember that at the outset of his appointment as Special Counsel, Mueller underwent a comprehensive DOJ ethics review pursuant to 28 C.F.R. § 600.3(b), and was cleared.⁸ This section describes the applicable rules and addresses each of the five alleged conflicts in turn.

Because Special Counsel Mueller is admitted to practice law in the District of Columbia and much, if not all, of the conduct in question likely occurred in the District, he is subject to the District of Columbia Rules of Professional Conduct ("D.C. Rules").⁹ As a DOJ employee, Mueller is also subject to DOJ rules and regulations governing ethics and conflict of interest.¹⁰ Since Mueller as Special Counsel is vested with the powers of a U.S. Attorney,¹¹ this paper references the U.S. Attorney's Manual ("USAM") as a third source of guidance, and a final authority is the ABA Model rules that serve as a point of reference for all attorneys.

⁸ See Matt Zapposky and Matea Gold, [Justice Department Ethics Experts Clear Mueller to Lead Russia Probe](https://www.washingtonpost.com/world/national-security/justice-dept-ethics-experts-approve-muellers-leadership-of-russia-probe/2017/05/23/3e19cf46-3fc4-11e7-adba-394ee67a7582_story.html), *Washington Post* (May 23, 2017), available at https://www.washingtonpost.com/world/national-security/justice-dept-ethics-experts-approve-muellers-leadership-of-russia-probe/2017/05/23/3e19cf46-3fc4-11e7-adba-394ee67a7582_story.html.

⁹ D.C. Rules of Prof'l Conduct R. 8.5, available at <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule8-05.cfm>.

¹⁰ Before beginning an investigation, a Special Counsel must undergo "an appropriate background investigation and a detailed review of ethics and conflicts of interest issues" (28 C.F.R. § 600.3(b)), and once cleared, the "Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice" and "shall consult with appropriate offices . . . for guidance with respect to . . . ethics." *Id.* § 600.7(a).

¹¹ 28 C.F.R. § 600.6 (stating the "Special Counsel shall exercise . . . the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney").

A. Mueller’s Relationship with James Comey Does Not Pose a Conflict of Interest

Critics argue that Mueller has a conflict of interest because of an alleged friendship with former FBI Director James Comey.¹² This notion can be traced to a 2013 article published by the *Washingtonian*,¹³ which describes how the two men were both mentored by Eric Holder in the 1990s and bonded over their roles “in the crucible of the highest levels of the national security apparatus after the 9/11 attacks.”¹⁴ As evidence of this friendship, the article cites general similarities including attendance at “Virginia universities with a strong public service tradition,” early success at DOJ, and a view that life at private law firms was unfulfilling that drove each to give up lucrative firm jobs “to return to the trenches of prosecuting criminals.”¹⁵ Their friendship was cemented, the article argues, when they both threatened to resign in 2004, because they believed that the Bush Administration’s post-9/11 domestic wiretapping was unconstitutional.¹⁶

As a factual matter, this article likely overstates the closeness of the professional relationship between Mueller and Comey, as they never worked in the same office at DOJ simultaneously,¹⁷ and in threatening to resign in 2004 Mueller and Comey were not a unique duo but rather two among a number of DOJ employees who took the same position.¹⁸ Further, there is little specific evidence in this *Washingtonian* article or elsewhere indicating that Mueller and Comey have a close *personal* relationship, and the facts publicly known indicate that they don’t. Comey’s attorney has stated outright that

¹² See, e.g., Daniel J. Flynn, Bob Mueller ‘Has A Huge Conflict of Interest,’ Says Former Assistant FBI Director, *Breitbart* Dec. 4, 2017, available at <http://www.breitbart.com/big-government/2017/12/04/bob-mueller-has-a-huge-conflict-of-interest-says-former-assistant-fbi-director/>.

¹³ Garrett M. Graff, Forged Under Fire—Bob Mueller and Jim Comey’s Unusual Friendship, *Washingtonian* (May 30, 2013), available at <https://www.washingtonian.com/2013/05/30/forged-under-firebob-mueller-and-jim-comeys-unusual-friendship/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Special Counsel Mueller worked: (1) in the USAO for the Northern District of California (1976-82, 1998-2001); (2) in the USAO for the District of Massachusetts (1982-88); (3) in several high-ranking positions in the Department of Justice, including head of the Criminal Division (1989-93); (4) in the USAO for D.C. (1995-98); and (5) as Director of the FBI (2001-13). Robert Mueller, *Wikipedia*, https://en.wikipedia.org/wiki/Robert_Mueller (last visited Jan. 29, 2018). Comey, on the other hand, worked: (1) in the USAO for the Southern District of New York (1987-93, 2002-03); (2) in the USAO for the Eastern District of Virginia (1996-2001); (3) as Deputy Attorney General (2003-05); and (4) as Director of the FBI (2013-17). James Comey, *Wikipedia*, https://en.wikipedia.org/wiki/James_Comey (last visited Jan. 29, 2018).

¹⁸ Offices of the Inspectors General of the Dept. of Defense, DOJ, CIA, NSA, and ODNI, Unclassified Report on the President’s Surveillance Program, at 27 (July 10, 2009), available at <https://fas.org/irp/eprint/psp.pdf>.

the men do not “really have a personal relationship,”¹⁹ that the two have never been to each other’s houses, and they have only ever shared one lunch and two dinners.²⁰ As described by Benjamin Wittes, a journalist who does have a friendship with Comey,²¹ Mueller and Comey “are not, to my knowledge, personal friends,” but rather are “cordial former colleagues and two of the only people alive who have done a particular job.”²²

As a legal matter, neither the professional nor personal relationship between Mueller and Comey likely constitutes a conflict of interest for Mueller. Executive branch ethics regulations instruct that DOJ employees, like all executive branch employees, “shall act impartially and not give preferential treatment to any private organization or individual.”²³ More specifically, no DOJ employee “shall participate in a criminal investigation or prosecution if he has a personal or political relationship with: (1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.”²⁴ A “personal relationship” is “a close and substantial connection of the type normally viewed as likely to induce partiality.”²⁵

Under the DOJ ethics guidelines, whether a friendship qualifies as “personal” is evaluated “on an individual basis with due regard given to the subjective opinion of the employee,” and a “political relationship” is a “close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, *arising from service as a principal adviser or a principal official thereof . . .*”²⁶

Mueller and Comey do not appear to have the type of “close and substantial connection”²⁷ that the conflict of interest regulations contemplate. We are aware of no interpretation of the regulations supporting the conclusion that a mere professional relationship meets this definition. Moreover, the regulations afford “due regard” to the

¹⁹ Graham Lanktree, [Americans Think Mueller and Comey Are Friends. They’re Not](http://www.newsweek.com/americans-think-mueller-and-comey-are-friends-theyre-not), *Newsweek* (Dec. 15, 2017), available at <http://www.newsweek.com/americans-think-mueller-and-comey-are-friends-theyre-not-749168>.

²⁰ *Id.*

²¹ Wittes describes his own relationship with Comey as “We’re friends. We communicate regularly, but I am not among his close intimates or advisers.” See *Lawfare*, [What James Comey Told Me About Donald Trump](https://www.lawfareblog.com/what-james-comey-told-me-about-donald-trump), May 18, 2017, available at <https://www.lawfareblog.com/what-james-comey-told-me-about-donald-trump>.

²² <https://twitter.com/benjaminwittes/status/941408911583739905?lang=en> (Dec. 14, 2017).

²³ 5 C.F.R. § 2635.101(b).

²⁴ 28 C.F.R. § 45.2(a).

²⁵ *Id.* § 45(c)(2).

²⁶ *Id.* (c)(1) (emphasis added).

²⁷ See 28 C.F.R. § 45.2(c)(2).

“subjective opinion of the employee” regarding the nature of the relationship,²⁸ which in this case means giving deference to Mueller’s apparent determination that his relationship with Comey would not cloud his judgment.

Even if Special Counsel Mueller had a “personal relationship” with Comey within the meaning of the regulations, he still may not have a conflict of interest. With respect to the investigation into Russian interference in the campaign, Comey is neither “substantially involved in the conduct that is the subject of the investigation or prosecution” nor does he have a “specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.”²⁹ With respect to investigation of obstruction of justice claims, the conclusion is less clear, as Comey arguably is a central player in the obstruction investigation and has a substantial reputational interest in the outcome of the Special Counsel’s investigation into, among other things, his firing. On the other hand, it is likely the President’s conduct, and possibly that of other White House officials involved in the firing, that is “the subject of the investigation,” and Comey arguably does not have a “specific and substantial” interest in the outcome because he will neither benefit financially nor get his job back. No published guidance or decisions indicate how this question would ultimately be resolved if an ethics complaint were filed.

Regardless, because Special Counsel Mueller does not appear to have a prohibited relationship with Comey, there is no impermissible conflict of interest. Critics also have failed to present compelling evidence that Special Counsel Mueller’s “professional judgment . . . will be or reasonably may be adversely affected by” his relationship with Comey,³⁰ or that he would fail to “act impartially [or would] give preferential treatment” to Comey.³¹

B. Mueller Does Not Have a Conflict of Interest Based on His Former Employment at WilmerHale

Mueller’s former employer, the law firm WilmerHale, represents or represented potential investigation targets including Jared Kushner and Paul Manafort.³² Critics argue that these WilmerHale’s representations present a conflict of interest for Mueller.³³ This allegation is not substantiated either by the facts or the law.

A foundational fact in this analysis is the statement by Robert Novick, a co-managing partner at WilmerHale, that Special Counsel Mueller had no involvement in the Kushner

²⁸ See 28 C.F.R. § 45.2(c)(2).

²⁹ 28 C.F.R. § 45.2(a)(2).

³⁰ D.C. Rules R. 1.7(b)(4).

³¹ 5 C.F.R. § 2635.101(b).

³² See, e.g., Laura Jarrett, DOJ: No Ethics Conflict for Special Counsel in Russia Probe, *CNN*, May 23, 2017, available at <http://www.cnn.com/2017/05/23/politics/doj-ethics-update-robert-mueller/index.html> (describing this argument).

³³ *Id.*

or Manafort matters (the “Trump Matters”) and was not privy to any confidential information.³⁴ While the D.C. Rules do not specifically address conflicts of interest analysis for attorneys moving *from* private practice *to* the government, ABA Model Rules, related D.C. Rules and provisions of the USAM, and an ethics opinion interpreting the D.C. Rules together make clear that Mueller’s association with WilmerHale does not pose a conflict of interest because he was not personally involved in the Trump Matters while he worked at the firm.

The ABA Model Rules expressly address private to public transitions. Under the ABA standard, a government lawyer is barred from participating in a government matter in which the lawyer participated while in private practice only if she did so “*personally and substantially*.”³⁵ The D.C. Rules and USAM standards for lawyers that transition from public practice to private practice reflect a similar approach, prohibiting work on a matter in private practice only if the lawyer participated “personally and substantially” in the matter as a public employee.³⁶ Mueller faces no conflict under this standard since he did not participate in the Trump Matters at all, let alone “personally and substantially.”

A D.C. Bar Ethics opinion provides further guidance on conflicts of interest for lawyers transitioning *from* private practice *to* the government.³⁷ Under this Opinion, a government lawyer must balance the duty she owes to her former clients, protecting client confidences, and the duty she owes to the government, zealous and diligent representation.³⁸ The Opinion emphasizes the importance of maintaining confidentiality and the degree of the lawyer’s involvement in the matter.³⁹ Special Counsel Mueller did not have access to any confidential information nor could one fairly describe the situation as “a changing of sides in the matter in question”⁴⁰ since Mueller was not involved in relevant representation at WilmerHale in the first place. Since the rules and regulations suggest strongly that Special Counsel Mueller would have a conflict of interest only if he had been involved in the Trump Matters *personally*, he has no conflict of interest.

³⁴ See Alison Frankel, [Bob Mueller and the Kushner Client Conflict Question](https://www.reuters.com/article/us-otc-kushner/bob-mueller-and-the-kushner-client-conflict-question-idUSKBN18R2SU), *Reuters*, May 31, 2017, available at <https://www.reuters.com/article/us-otc-kushner/bob-mueller-and-the-kushner-client-conflict-question-idUSKBN18R2SU>.

³⁵ ABA Model Rules R. 1.11(d)(2)(i) (emphasis added).

³⁶ D.C. Rules R. 1.11(a); USAM 1–4.610 (emphasis added).

³⁷ D.C. Bar Ethics Op. 308 (June 2001).

³⁸ *Id.*

³⁹ D.C. Bar Ethics Op. 308.

⁴⁰ *Id.*

C. Mueller Does Not Have a Conflict Based on His Role as FBI Director in the Obama Administration’s Approval of a Transaction Involving Canadian Company Uranium One

Critics argue that Special Counsel Mueller has a conflict of interest based on his prior service as FBI Director during the Obama Administration’s review of the sale of a Canadian company called Uranium One that held mining interests in the United States to Rosatom, the Russian nuclear energy agency.⁴¹ This deal involved the purchase by Rosatom of Uranium One, beginning in 2009 and culminating in 2013.⁴² Because of the national security implications associated with the control of uranium, the 2010 stage required the approval of the Committee on Foreign Investment in the United States (CFIUS), a nine-member agency that receives input from the Departments of Commerce, Defense, Energy, Homeland Security, Justice, State, and Treasury, as well as the Office of the U.S. Trade Representative.⁴³

The conflict of interest argument is grounded in concern that no criminal charges were filed relating to the Uranium One deal or Rosatom during Mueller’s tenure as FBI director.⁴⁴ This argument can be understood in two ways. The first way—cited in some media accounts—is that because then-Director Mueller did not apparently press for investigation or charges in connection with the Uranium One sale, he has a conflict of interest with respect to anything related to Russia.⁴⁵ This argument finds no support in the applicable rules and regulations.

Mueller’s relationship with an entire country is not contemplated by the “personal and political”⁴⁶ relationships the DOJ conflict of interest regulations prohibit between investigators and the subjects and entities directly affected by the outcome of inquiries. The “political” relationships contemplated involve service or advisor roles to public officials,⁴⁷ and “personal relationships” are defined in relationship to individuals, not

⁴¹ Louis Nelson, What you need to know about Clinton and the Uranium One deal, *Politico*, Nov. 14, 2017, available at <https://www.politico.com/story/2017/11/14/hillary-clinton-uranium-one-deal-russia-explainer-244895>.

⁴² *Id.*

⁴³ *Id.*; U.S. Dep’t of the Treasury, Composition of CFIUS, available at <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx>.

⁴⁴ *See, e.g.*, H.R. Res. 606, 115th Cong. (2017). The FBI was at the time reportedly investigating alleged corruption by a different unit of Rosatom in Maryland, and entered into a plea agreement subsequent to Mueller’s 2013 departure from FBI service. Joel Schectman, Exclusive: Secret Witness in Senate Clinton Probe is Ex-Lobbyist for Russian Firm, *Reuters*, Nov. 16, 2017, available at <https://www.reuters.com/article/us-usa-clinton-informant-exclusive/exclusive-secret-witness-in-senate-clinton-probe-is-ex-lobbyist-for-russian-firm-idUSKBN1DG1SB>.

⁴⁵ *See e.g.*, Joe Perticone, Republicans Are About to Make a Public Display Calling for Robert Mueller to Resign, *Business Insider*, Nov. 7, 2017, available at <http://www.businessinsider.com/house-republicans-call-for-robert-mueller-to-resign-2017-11>.

⁴⁶ 28 C.F.R. § 45.2(a).

⁴⁷ *Id.* (c)(1).

countries.⁴⁸ Similarly, the D.C. professional conduct rules on conflict of interest focus on personal, business, and political relationships.⁴⁹ There is no precedent, and no coherent basis, for concluding that a prior FBI investigation or decision not to investigate involving a particular country precludes subsequent investigation of a different subject matter simply because it involves individuals acting on behalf of that same country.

A second way of explaining the conflicts of interest argument is that then-Director Mueller was purportedly protecting Hillary Clinton by not bringing Uranium One related charges against her.⁵⁰ This theory relies on the premise that the Uranium One involved a corrupt quid pro quo between Hillary Clinton and Russian interests under which she advanced the deal in her capacity as Secretary of State in exchange for “a big payment”⁵¹ from Uranium One investors to the Clinton Foundation.⁵² Under this view, Mueller’s failure to investigate Clinton evidenced a pro-Clinton and Democratic bias in violation of the DOJ requirements that investigators act impartially.⁵³

These arguments too lack factual and legal merit. As a starting point, proponents of this theory have offered no evidence that Clinton personally participated in the CFIUS decision to approve the Uranium One deal or was even aware of it.⁵⁴ That no prosecutor filed charges against Clinton during Mueller’s tenure as FBI Director does not suggest that he has a pro-Clinton bias or an anti-Republican or anti-Trump bias; it merely suggests that prosecutors did not believe that a provable crime had occurred. Tellingly, in the time since Special Counsel Mueller left the FBI no charges have been filed against Clinton. Moreover, Clinton’s State Department was only one of *nine* U.S. government agencies that approved the Uranium One sale.⁵⁵ There is simply no credible basis to conclude that then-Director Mueller impermissibly singled out Clinton for preferential treatment.

⁴⁸ *Id.*

⁴⁹ See D.C. Rules R. 1.7(b)(4).

⁵⁰ See, e.g., H.R. Res. 606, 115th Cong. (2017).

⁵¹ Michelle Ye Hee Lee, [The Facts Behind Trump’s Repeated Claim about Hillary Clinton’s Role in the Russian Uranium Deal](https://www.washingtonpost.com/news/fact-checker/wp/2016/10/26/the-facts-behind-trumps-repeated-claim-about-hillary-clintons-role-in-the-russian-uranium-deal), *Washington Post*, Oct. 26, 2016, available at <https://www.washingtonpost.com/news/fact-checker/wp/2016/10/26/the-facts-behind-trumps-repeated-claim-about-hillary-clintons-role-in-the-russian-uranium-deal>.

⁵² H.R. Res. 606, 115th Cong. (2017).

⁵³ See 5 C.F.R. § 2635.101(b).

⁵⁴ *Id.*

⁵⁵ Louis Nelson, [What you need to know about Clinton and the Uranium One deal](https://www.politico.com/story/2017/11/14/hillary-clinton-uranium-one-deal-russia-explainer-244895), *Politico*, Nov. 14, 2017, available at <https://www.politico.com/story/2017/11/14/hillary-clinton-uranium-one-deal-russia-explainer-244895>.

D. Neither a Dispute over Golf Club Fees nor the Fact that Mueller Was Interviewed for the FBI Director Position Present a Conflict of Interest

The President reportedly suggested there were two additional issues that he believed raise conflict of interest concerns for the Special Counsel: that Mueller allegedly had a dispute with the Trump National Golf Club over membership fees when he resigned his membership years earlier, and that Mueller reportedly had interviewed for the position of FBI Director in the Trump Administration in May 2017.⁵⁶ According to a recent *New York Times* account, the President argued that these alleged conflicts (and Mueller's employment with WilmerHale discussed above in section I.B), were grounds for removing him as Special Counsel.⁵⁷

Neither of these two additional purported conflicts has merit. First, regarding the golf fees, a spokesman for Mueller has stated that there was no such dispute at the time Mueller resigned from the club,⁵⁸ and a "person familiar with the matter" elaborated that the sum total of the issue was Mueller reportedly sent a letter "requesting a dues refund in accordance with normal club practice and never heard back."⁵⁹ Even assuming there was a dispute, and assuming that Mueller's former membership in the golf club and a subsequent dispute could constitute a "personal relationship" with the golf club under DOJ ethics rules, the golf club itself would almost certainly not have a "specific and substantial" interest that would be "directly affected by the outcome"⁶⁰ of the inquiry into Russian interference with the 2016 election. Likewise it is difficult to see how a dispute over golf fees would implicate the executive branch-wide limits on financial conflicts of interest, as particular matters in the Russian interference inquiry would not reasonably have a "direct and predictable" effect on such a dispute.⁶¹ As for the interview, merely discussing a job does not constitute "service" that establishes a "political" relationship

⁵⁶ Michael S. Schmidt and Maggie Haberman, Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit, *New York Times*, Jan. 25, 2018, available at <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html>.

⁵⁷ *Id.*

⁵⁸ Carol D. Leonnig, Ashley Parker, Rosalind S. Helderman and Tom Hamburger, Trump Team Seeks to Control, Block Mueller's Russia Investigation, *Washington Post*, July 21, 2017, available at https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html?utm_term=.a6b53ee6ee0e.

⁵⁹ Rosalind S. Helderman and Josh Dawsey, Trump Moved to Fire Mueller in June, Bringing White House Counsel to the Brink of Leaving, *Washington Post*, Jan. 26, 2018, available at https://www.washingtonpost.com/politics/trump-moved-to-fire-mueller-in-june-bringing-white-house-counsel-to-the-brink-of-leaving/2018/01/25/9184a49e-0238-11e8-bb03-722769454f82_story.html?utm_term=.98a47202168d.

⁶⁰ 28 C.F.R. § 45.2.

⁶¹ 18 U.S.C. § 208; 5 C.F.R. § 2635.402(b)(1)(i) ("A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.").

under DOJ ethics rules.⁶² If anything, Mueller's willingness to consider future service for President Trump indicates he did not have a starting point of bias against the President.

II. Mueller's Investigative Team Does Not Face Conflicts of Interest

Some argue that two sources of potential conflicts of interest should disqualify members of Special Counsel Mueller's team: (1) political contributions; and (2) a congratulatory email from prosecutor Andrew Weissmann to then-Acting Attorney General Sally Yates. The first allegation does not create an impermissible conflict of interest because government employees are expressly permitted to make campaign contributions and because no member of Special Counsel Mueller's team was an adviser to or official of either presidential campaign. The second allegation does not constitute an impermissible conflict of interest because the email shows no bias with respect to the Special Counsel's investigation.

As with Mueller, any attorneys serving in the Special Counsel's Office (SCO) who are admitted to practice in the District of Columbia are subject to the District of Columbia Rules of Professional Conduct. Further, under the Special Counsel regulations, the staff of the Special Counsel are subject to DOJ ethics rules and regulations.⁶³ Together, as described above in part I.A., the D.C. Rules, the Department of Justice ethics rules and regulations, the U.S. Attorneys' Manual (USAM), and D.C. Bar ethics opinions define the contours of an impermissible conflict of interest for the SCO team. Specific relevant provisions of these laws are addressed in the analysis below.

A. Special Counsel Investigators Do Not Have Conflicts of Interest Based on Their Contributions to Political Candidates

Critics argue that because members of Special Counsel Mueller's team have made donations to Democratic political candidates, specifically Hillary Clinton, they have conflicts of interest.⁶⁴ This is a specious allegation that lacks any basis in applicable law and regulations.

First, the USAM expressly permits US Attorneys to make political contributions.⁶⁵ Similarly, the guidance regarding implementation of the Hatch Act expressly states that

⁶² 28 C.F.R. § 45.2.

⁶³ 28 C.F.R. § 600.7(a) & (c).

⁶⁴ See, e.g., Pamela Engel and Natasha Bertrand, Kellyanne Conway just escalated the White House's campaign against Robert Mueller, *Business Insider*, July 21, 2017, available at <http://www.businessinsider.com/kellyanne-conway-robert-mueller-trump-2017-7> (describing these arguments).

⁶⁵ See USAM 1-4.430(G).

government employees *may* make campaign contributions.⁶⁶ In addition, the DOJ’s supplemental ethics regulations prohibit employees from participating in a criminal investigation or prosecution if they have a “political relationship” with a person “substantially involved in the conduct that is the subject of the investigation or prosecution,” or with a person who has “a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.”⁶⁷ There is no basis in the public record for asserting that any of the members of Special Counsel Mueller’s team have a “political relationship” with Hillary Clinton, as none appear to have served as a “principal adviser” or “principal official.”⁶⁸

Finally, it should be noted that “both DOJ policy and civil service law prohibit discrimination in hiring for DOJ career positions on the basis of political affiliations.”⁶⁹ Deputy Attorney General Rosenstein confirmed that making employment decisions with respect to career employees in these circumstances due solely to their perceived political views would have been improper.⁷⁰

B. Andrew Weissmann Does Not Have a Conflict of Interest Based on His Congratulatory Email to Acting Attorney General Sally Yates

Critics also argue that Andrew Weissmann, a member of Special Counsel Mueller’s team, has a conflict of interest because he sent an email to Sally Yates praising the position she

⁶⁶ See U.S. Office of Special Counsel, A Guide to the Hatch Act for Federal Employees, Sept. 2014, available at <https://osc.gov/Resources/HA%20Pamphlet%20Sept%202014.pdf>.

⁶⁷ 28 C.F.R. § 45.2(a).

⁶⁸ *Id.* (c)(1).

⁶⁹ Office of the Inspector General, Department of Justice, An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and the Summer Law Intern Program, at II.B., Jun. 2008, available at <https://oig.justice.gov/special/s0806/report.htm> (describing DOJ regulations and relevant statutes).

⁷⁰ Testimony of Rod Rosenstein to the House Committee on the Judiciary, *CNN Newsroom*, Dec. 13, 2017, available at <http://www.cnn.com/TRANSCRIPTS/1712/13/cnr.04.html> (LOFGREN: So you know, I was -- we've been on the committee here for a long time. And I remember, back in 2008, there were allegations that the Department of Justice had used politics as a basis for hiring and firing in the department.

And the Office of Inspector General and the Office of Professional Responsibility issued a report outlining the impropriety of using politics in personnel decisions. One of the things they said was that the department's policy on nondiscrimination includes the Department of Justice needs to seek to eliminate discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, political affiliation, age and the like.

So wouldn't that policy be governing the actions of the individuals working on this? You couldn't discriminate based on this whole list, including their political affiliation?

ROSENSTEIN: Congresswoman, one of the advantages that I bring to the job is, having been in and around the department for a while, I've seen mistakes that have been made in the past.

And that is precisely one of the issues that I've discussed with our political appointees -- that we're not going to do that, that we are not going to improperly consider political affiliation with regard to career employees of the department.)

took on the travel ban in her capacity as Acting Attorney General.⁷¹ The text of the email does not overtly reference President Trump,⁷² and it is not clear from its face that Weissmann is biased for or against anyone.

Even assuming that his congratulatory email evidences an anti-Trump bias *on the travel ban*, it would not indicate a violation of the D.C. conflict interest unless it evidenced that Weissmann’s professional judgment “will be or reasonably may be adversely affected” specifically with respect to the investigation into Russian interference with the election.⁷³ Here, the email involves a matter distinct from the subject of the Special Counsel’s inquiry, and there is no legal or factual basis for asserting it raises a conflict of interest issue.

III. No DOJ Employee Actions Have Justified Removal of Mueller

Critics have suggested that the Special Counsel should be removed on the grounds that his inquiry was politicized by the conduct of two DOJ employees: former Office of the Special Counsel investigator Peter Strzok and career DOJ counsel Bruce Ohr. These allegations are unfounded as Ohr does not appear to have worked on the investigation and Mueller took swift and appropriate actions to remove Strzok last July pending an internal investigation of Strzok’s conduct.

A. The Reassignment of Peter Strzok Was Consistent with Mueller’s Authority and Applicable Ethics Regulations

In July 2017, Mueller reportedly removed FBI agent Peter Strzok from his investigative team after the DOJ Office of the Inspector General discovered text messages between Strzok and FBI lawyer Lisa Page expressing various political views including messages critical of then-presidential candidate Donald Trump (Lisa Page had already left Mueller’s team weeks earlier, before the texts were uncovered).⁷⁴ Strzok reportedly is

⁷¹ See, e.g., Rep. Andy Biggs, Mueller’s Russia Prosecutors Have Lots of Biases and Conflicts of Interest—Here’s a Partial List, *Fox News*, Dec. 15, 2017, available at <http://www.foxnews.com/opinion/2017/12/15/muellers-russia-prosecutors-have-lots-biases-and-conflicts-interest-heres-partial-list.html>.

⁷² The subject line reads: “I am so proud” The message body reads: “And in awe. Thank you so much. All my deepest respects, Andrew Weissmann.” Email from Andrew Weissman to Sally Yates, Jan. 30, 2017, available at <http://www.judicialwatch.org/wp-content/uploads/2017/12/JW-v-DOJ-Yates-docs-Oct-17-00832-pg-4.pdf>.

⁷³ D.C. Rules R. 1.7(b)(4).

⁷⁴ Michael S. Schmidt, Matt Apuzzo and Adam Goldman, In Texts, F.B.I. Officials in Russia Inquiry Said Clinton ‘Just Has to Win’, *New York Times*, Dec. 12, 2017, available at https://www.nytimes.com/2017/12/12/us/fbi-trump-russia.html?_r=0; Laura Jarrett, Months-worth of FBI employees’ texts dreading Trump victory released to Congress, *CNN*, Dec. 13, 2017, available at <http://www.cnn.com/2017/12/12/politics/peter-strzok-texts-released/index.html>; Mike Levine, Senior FBI agent removed from Mueller’s team repeatedly called Trump ‘an idiot’, *ABC News*, Dec. 13, 2017,

one of the FBI's most "experienced and trusted counterintelligence investigators" and previously "helped lead the bureau's investigation into whether [Hillary] Clinton had mishandled classified information on her private email account."⁷⁵ After the Clinton investigation concluded, Strzok became a top agent assisting Mueller's investigation.⁷⁶

The text message exchange, which refers to then-presidential candidate Donald Trump as an "idiot" and a "d*uche," and characterizes his potential victory as "terrifying,"⁷⁷ was discovered during a DOJ Office of the Inspector General inquiry into investigative decisions during the presidential campaign.⁷⁸ The discovery of the text messages occurred at the same time Mueller was accelerating his examination of Trump advisors and was facing criticism for having agents on his team who had previously contributed to Democratic candidates.⁷⁹ Immediately after learning of the allegations, and months before the public or Congress would learn of the texts, Mueller removed Strzok from his team; he was reassigned to the FBI's human resources department, where he has been stationed ever since.⁸⁰ Multiple sources, including the newspaper articles referenced above, suggest that Mueller acted swiftly to remove Strzok so as to rebut any perception of bias by one of his agents.

Mueller's actions regarding Strzok were consistent with his authority and DOJ ethics regulations. The DOJ regulations governing appointment of the special counsel provide that Mueller is bound by the "rules, regulations, practices, and policies of the Department of Justice."⁸¹ In removing Strzok from the investigation, Mueller faithfully followed DOJ directives and arguably went further than he was required to by the regulations. When a DOJ employee is under investigation for alleged misconduct, DOJ Disciplinary Regulations instruct that the employee's supervisors should determine "whether the continued presence of the employee in the work place is likely to create a danger to

available at <http://abcnews.go.com/US/senior-fbi-agent-removed-muellers-team-repeatedly-called/story?id=51755829>.

⁷⁵ Michael S. Schmidt, Matt Apuzzo, and Adam Goldman, Mueller Removed Top Agent in Russia Inquiry Over Possible Anti-Trump Texts, *New York Times*, Dec. 2, 2017, available at https://www.nytimes.com/2017/12/02/us/politics/mueller-removed-top-fbi-agent-over-possible-anti-trump-texts.html?_r=0.

⁷⁶ Schmidt, Apuzzo, and Goldman, *New York Times*, Dec. 12, 2017.

⁷⁷ Jarrett, *CNN*, Dec. 13, 2017.

⁷⁸ Josh Gerstein, *In texts, FBI agents on Russia probe called Trump an 'idiot'*, POLITICO (Dec. 12, 2017), available at <https://www.politico.com/story/2017/12/12/fbi-agents-trump-mueller-texts-294156>.

⁷⁹ Schmidt, Apuzzo, and Goldman, *New York Times*, Dec. 2, 2017.

⁸⁰ In a letter to House Judiciary Committee Chairman Bob Goodlatte of Virginia, the Justice Department stated that the DOJ's Inspector General "informed the Special Counsel of the existence of the enclosed text messages on or about July 27, 2017. Mr. Mueller immediately concluded that Mr. Strzok could no longer participate in the investigation, and he was removed from the team." The public became aware of this incident four months after Strzok's dismissal, in December 2017. Jarrett, *CNN*, Dec. 13, 2017.

⁸¹ 28 C.F.R. § 600.7(a).

personnel or office operations or otherwise be disruptive, detrimental to morale or good order, or an embarrassment to the employer.”⁸² The regulations further direct that where such a risk does exist “but can reasonably be avoided by temporarily reassigning the employee to an available position, managers should make the effort to do so.”⁸³

At the time of his reassignment, Strzok was under investigation by DOJ’s Office of the Inspector General. Given the politically sensitive nature of the Russia investigation, and the fact that the text messages at issue were discovered during a critical time in Mueller’s investigation,⁸⁴ it would have been reasonable for Mueller to conclude that maintaining Strzok on his team might likely create a “danger to . . . office operations,” be “disruptive [and] detrimental to morale or good order,” or otherwise create “an embarrassment” for Mueller and the DOJ as a whole.⁸⁵ That said, we are aware of no evidence that any personal political views of Strzok affected his official duties in any way.

B. Bruce Ohr Was Never Part of Mueller’s Investigative Team

At the end of last year, DOJ career attorney Bruce Ohr was reportedly reassigned after it became clear that he had failed to disclose contacts with the research firm Fusion GPS, which had conducted opposition research on then-candidate Donald Trump for at least two different clients.⁸⁶ Ohr reportedly met in 2016 with Christopher Steele, the former intelligence official Fusion GPS commissioned for its research on Trump, and shortly after the November 8, 2016, election, Ohr had met with Fusion GPS founder Glenn Simpson.⁸⁷ It is not clear from public accounts why Ohr had this meeting. However, Ohr’s wife had worked for Fusion GPS during the 2016 election, which Ohr also had not previously disclosed.⁸⁸

Prior to his reassignment, Ohr held two titles at DOJ: Associate Deputy Attorney General, which had him working closely with Deputy Attorney General Rod Rosenstein, and director of the Organized Crime and Drug Enforcement Task Forces (OCDETF).

⁸² HR Order DOJ 1200.1: Part 3. Labor/Employee Relations: Chapter 3-1, Discipline and Adverse Actions (Aug. 25, 1998), available at <https://www.justice.gov/jmd/hr-order-doj12001-part-3-laboremployee-relations>.

⁸³ *Id.* at 1200.1(B)(6)(6)(2).

⁸⁴ Schmidt, Apuzzo, and Goldman, *New York Times*, Dec. 2, 2017.

⁸⁵ HR Order DOJ 1200.1 at (B)(6)(6)(1).

⁸⁶ James Rosen, Jake Gibson Top DOJ official demoted amid probe of contacts with Trump dossier firm, *Fox News*, Dec. 7, 2017, available at <http://www.foxnews.com/politics/2017/12/07/top-doj-official-demoted-amid-probe-contacts-with-trump-dossier-firm.html>.

⁸⁷ *Id.*

⁸⁸ David K. Li, Wife of demoted Justice Department official worked for ‘dossier’ firm, *New York Post*, Dec. 11, 2017, available at <https://nypost.com/2017/12/11/wife-of-demoted-justice-department-official-worked-for-dossier-firm/>.

When reassigned, Ohr retained his OCDETF title but was removed from his more senior post in orbit of Mueller's investigation.⁸⁹

Mueller critics suggest that Ohr's conduct highlights the politicized nature of the Special Counsel's investigation. These claims are wholly unfounded. We are aware of no evidence that Bruce Ohr ever worked for the Special Counsel, nor is there any basis in the public record for drawing any conclusion about what, if any, influence Ohr had on the Special Counsel's inquiry.⁹⁰

C. Strzok's and Ohr's Conduct Does Not Justify Removal of Mueller

The facts publicly known about both Strzok and Ohr do not remotely justify removal of Mueller. The special counsel regulations specify that a special counsel may be removed only "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."⁹¹ Mueller's decisions to reassign Strzok and DOJ's reassignment of Ohr do not satisfy any of these conditions.

Indeed, it is difficult to imagine how one might construe Mueller's actions (in compliance with the relevant rules and regulations) as amounting to misconduct, dereliction of duty, a conflict of interest, or good cause for his dismissal as Special Counsel. Mueller himself is not the subject of any misconduct inquiry, nor could he be accused of dereliction (quite the opposite: his critics seem alarmed by his progress). There is no information to suggest that Mueller's own actions with respect to Strzok and Ohr might present even the appearance of a conflict of interest;⁹² *he* is certainly not accused of a similar text-message exchange or having connections to Fusion GPS. In fact, with respect to Strzok, he appears to have responded strongly and decisively to the alleged inappropriate conduct. Finally, although "good cause" is not defined further and has not been the subject of judicial analysis, Mueller's strict compliance with DOJ rules and regulations in eliminating even the appearance of impropriety, bias, or a conflict of interest among the members of his investigative team cannot furnish "good cause" for his dismissal. If anything, Mueller's actions bolster the integrity and fairness of his investigation.

⁸⁹ Rosen and Gibson, *Fox News*, Dec. 7, 2017.

⁹⁰ Del Quentin Wilber and Aruna Viswanatha, Justice Department Lawyer Transferred for Not Telling Officials of Meeting with Dossier Author, *Wall Street Journal*, Dec. 12, 2017, available at <https://www.wsj.com/articles/justice-lawyer-criticized-by-trump-allies-was-never-involved-in-russia-probe-1513125769>.

⁹¹ 28 C.F.R. § 600.7(d).

⁹² *See, e.g.*, 5 C.F.R. § 2635.502.

IV. Trump Transition Materials Accessed by the Office of the Special Counsel Likely Do Not Raise Privilege Concerns

Trump for America (TFA), the organization representing the Trump presidential transition, claims that the SCO obtained “unauthorized” access through career officials at the General Services Administration (GSA) to transition materials that implicate the presidential communications, deliberative process, and attorney-client privileges. The TFA claims regarding “unauthorized” access turn on factual assertions that GSA disputes and thus cannot be evaluated definitively at this juncture. Regardless of whether GSA had authority to provide such access, the materials at issue do not likely raise privilege concerns.

Consistent with its duties under the Presidential Transition Act⁹³ and precedent in past presidential transitions, GSA in 2016 entered into a memorandum of understanding (MOU) with the Trump campaign under which GSA agreed to provide facilities and services to the campaign of Donald J. Trump to facilitate the presidential transition.⁹⁴ This support included telecommunications and IT services, software, and equipment.⁹⁵

Under the MOU, transition office staff members must sign for and accept laptops and phones while accepting the terms of the “IT Rules of Behavior,”⁹⁶ which include: “Users have no expectation of privacy on GSA IT resources since all activities are subject to monitoring.”⁹⁷ The MOU further provides that the campaign would return the telecommunications and IT equipment to GSA by February 19, 2017, and GSA would inventory the equipment and delete the data.⁹⁸ Accordingly, as stated in a December 16, 2017, letter to House and Senate oversight committee leaders from TFA attorney Kory Langhofer (the “Langhofer letter”), after the inauguration of President Trump, TFA wound down the transition office and turned over the IT equipment to GSA.⁹⁹

⁹³ 3 U.S.C. § 102 note; PTA section § 4(g).

⁹⁴ General Services Administration, *Memorandum of Understanding between the General Services Administration and Donald J. Trump*, p. 10, available at <https://www.documentcloud.org/documents/4110103-GSA-Memorandum-of-Understanding-with-Trump.html> (“MOU”).

⁹⁵ MOU at 8-11.

⁹⁶ MOU at 10.

⁹⁷ General Services Administration, GSA Order, CIO 2104.1A CHG 1, at p. 3, May 3, 2016, available at https://www.gsa.gov/cdnstatic/CIO_2104.1A_CHGE_1_GSA_Information_Technology_%28IT%29_General_Rules_of_Behavior_%28Posted_Version_-_May_3_2016%29.pdf.

⁹⁸ MOU at 11.

⁹⁹ Letter from Kory Langhofer, Counsel to Trump for America, Inc., to the Chairmen and Ranking Members of the House Committee on Oversight and Government Reform, and the Senate Committee on Homeland Security and Governmental Affairs, Dec. 16, 2017, available at <https://www.politico.com/f/?id=00000160-616c-dcd4-a96b-756de2a90000> (“Langhofer letter”).

At some point in early 2017, TFA “became aware of certain requests” for information that prompted TFA to request GSA to preserve the data on the equipment.¹⁰⁰ TFA also learned that GSA had received a document preservation request from the Office of the Special Counsel.¹⁰¹ TFA alleges that the SCO subsequently requested “emails, laptops, cell phones, and other materials” relating to 13 Trump transition officials through letters to GSA dated August 23, 2017, and August 30, 2017.¹⁰² News reporting suggests that GSA provided a thumb drive with responsive materials to the SCO on September 1, 2017.¹⁰³

In media accounts, GSA representatives acknowledge having received SCO requests,¹⁰⁴ but it is not definitive from the public record whether the Special Counsel issued any warrant. GSA has not disputed TFA’s claim that GSA responded to the SCO requests by providing TFA materials.

GSA and TFA have different accounts of the understanding they reached on providing transition data to investigators. TFA asserts that in a June 15, 2017, meeting involving GSA officials Richard Beckler and Lenny Loewentritt, Beckler represented that GSA would notify TFA upon receipt of any request for data from the Office of the Special Counsel.¹⁰⁵ Loewentritt, on the other hand, says GSA did not promise notification.¹⁰⁶ In fact, GSA’s position as reported in news accounts is that GSA informed the transition team that in using GSA’s devices, “materials ‘would not be held back in any law enforcement’ actions.”¹⁰⁷

The Office of the Special Counsel through a spokesman has issued only one public statement relating to the TFA allegations: “When we have obtained emails in the course of our ongoing criminal investigation, we have secured either the account owner’s

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.*

¹⁰² *Id.* at 4.

¹⁰³ Stephen Braun and Chad Day, Special Counsel obtains thousands of Trump transition emails, *AP*, Dec. 16, 2017, available at <https://www.usatoday.com/story/news/nation/2017/12/16/robert-mueller-special-counsel-obtains-thousands-trump-transition-emails/958840001/>.

¹⁰⁴ Chris Geidner, Key Officials Push Back Against Trump Campaign Claim That a Federal Office Illegally Turned Over Emails to Special Counsel, *BuzzFeed*, Dec. 16, 2017 & updated Dec. 17, 2017, available at https://www.buzzfeed.com/chrisgeidner/the-trump-campaign-claims-a-federal-office-illegally-turned?utm_term=.ogq1GjaqD#.in6zWVOk4 (stating that the GSA deputy counsel said GSA had suggested a warrant or subpoena to the Special Counsel but that Mueller believed a letter was sufficient).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* In August, Beckler reportedly was hospitalized and subsequently passed away. *Id.* One of the co-authors of this report (Eisen) served as the Deputy General Counsel of the 2008 presidential transition, and can state that the Loewentritt assertion is consistent with prior practice.

consent or appropriate criminal process.”¹⁰⁸ The purpose and scope of the SCO’s access to TFA materials is not currently publicly known.

TFA asserts that actions by career GSA staff to provide transition materials to the SCO were “unauthorized” and thus violate (1) a verbal understanding between GSA and TFA about notice for investigative requests; (2) the Presidential Transition Act provisions requiring “secure” communications systems; and (3) the Fourth Amendment protection against unreasonable searches and seizures.¹⁰⁹ Since, in their public comments GSA and TFA have offered starkly different versions of the understanding reached between GSA and TFA on investigative requests for transition materials, it is not possible to conclusively address TFA’s claims that GSA conduct was “unauthorized” at this juncture. Nonetheless, based on the facts as we know them and existing law, the officials’ receipt of notice that they had no expectation of privacy presents major obstacles to any challenge to the disclosure of transition emails to the SCO. GSA’s position is consistent with practice in prior transitions, and at any rate, there is no basis for concluding at this time that wrongdoing occurred.

A. The Presidential Communications Deliberative Process Privileges Do Not Likely Apply

Even if TFA’s assertion that GSA had provided unauthorized access to TFA materials is taken at face value, the transition materials do not likely raise privilege concerns. The presidential communications privilege and the deliberative process privilege are distinct but related bases for shielding executive decision-making communications from compelled disclosure to Congress and the courts. Both are components of “executive privilege,” a creature of common law, not statute, and only a handful of cases have examined their contours. Courts have made clear, however, that these privileges concern official executive branch decision-making, not the conduct of private parties.

The presidential communications privilege protects advice received and directions given by the President as well as documents solicited and received by the President and his top advisors.¹¹⁰ The deliberative process privilege extends more broadly to the agency decision-making process to protect communications that are both pre-decisional and deliberative.”¹¹¹ Both are grounded in the proposition that effective executive branch decision-making requires candor and robust discussion, and that the privileges “‘prevent injury to the quality of agency decisions’ by allowing government officials freedom to debate alternative approaches in private.”¹¹²

¹⁰⁸ *Id.*

¹⁰⁹ Langhofer letter, Dec. 16, 2017.

¹¹⁰ *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008) (internal citations omitted).

¹¹¹ *Id.* at 38 (internal citations omitted).

¹¹² *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997); *See Nixon*, 418 U.S. 683, 708 (1974).

A federal district court recently directly addressed and rejected a claim that executive privilege applies to transition materials. In *Fish v. Kobach*,¹¹³ the defendant, Secretary of State for Kansas Kris Kobach, attempted to withhold a document he had been photographed sharing with president-elect Trump, on the grounds that executive privilege applied to the document. The court found this argument “unpersuasive,” stating:

First, Secretary Kobach’s communication was made to a president-elect, not to a sitting president. Although a president-elect by statute and policy may be accorded security briefings and other transitional prerogatives, he or she has no constitutional power to make any decisions on behalf of the Executive Branch. No court has recognized the applicability of the executive privilege to communications made before a president takes office. If that were the law, it would mean that potentially almost everything communicated to a president-elect by the hundreds of persons seeking appointments in the new administration would be shielded by privilege.¹¹⁴

Further, in a different context, the court in *United States v. Williams* rejected the argument that the Presidential Transition Act confers “official” status on the President-elect, stating that “That Act provides money and office space to the President-elect’s transition team, but does not — and cannot — deem any of the President-elect’s actions ‘official’ before he or she complies with the Oath and Affirmation Clause.”¹¹⁵

Agency guidance similarly reflects a view that presidential transition offices are not conducting official government business. National Archives and Records Administration guidance on Presidential Records, for example, instructs that “Records created by the President-elect and his transition team are also considered personal records. To the extent that these records are received and used after the inauguration by the incoming Presidential Administration, they may become Presidential or Federal records.”¹¹⁶

¹¹³ *Fish v. Kobach*, No. 16-2105, 2017 WL 1373882, at *6 (D. Kan. Apr. 17, 2017), available at https://www.aclu.org/sites/default/files/field_document/fish_v._kobach_-_order_compelling_production_of_documents.pdf, review denied, No. 16-2105-, 2017 WL 1929010 (D. Kan. May 10, 2017).

¹¹⁴ *Id.*

¹¹⁵ *United States v. Williams*, 7 F. Supp. 2d 40 (D.D.C. 1998). *But see* 26A Charles A. Wright & Kenneth W. Graham, Jr. Fed. Prac. & Proc. § 5673 (1st ed.) (“It is a reasonable inference from the cases and the policy of the executive privilege that it only applies to communications to the president during his term of office[,] though there is something to be said for extending the privilege to communications to a president-elect during the transition between administrations.”) (citing no authority, but further observing in a footnote that “even this would not support President Reagan’s claim during a television interview in Los Angeles in 1991 that his communications to his aides during the 1980 election campaign regarding an alleged agreement with the Iranian government regarding release of hostages would be covered by the privilege...”).

¹¹⁶ National Archives and Records Administration, *Guidance on Presidential Records* (undated) (<https://www.archives.gov/files/presidential-records-guidance.pdf>); *see also* National Archives and Records Administration Bulletin A.C. 09.2017, Memorandum from Laurence Brewer, Chief Records Officer for the

Further, the Department of Justice maintains that transition records are not “agency records” for the purpose of the Freedom of Information Act.¹¹⁷ Indeed, the Langhofer letter highlights these very policies when arguing that TFA is a private entity that owned and controlled its own records.¹¹⁸

Based on what is publicly known, TFA has not established that any TFA records reflect official executive branch decision-making, and its claim that its records are subject to executive privilege on its face is utterly unsupported by precedent. Thus, it is not likely TFA would be able to assert executive privilege regarding TFA records.

It is worth noting that even where executive privilege is applicable, the right is not absolute and courts have given weight to law enforcement interests in evaluating executive privilege claims. The Supreme Court has found that a generalized claim of the presidential communications privilege cannot justify withholding information that is specifically requested as part of a criminal proceeding. In the leading case on presidential communications privilege, *United States v. Nixon*, the Supreme Court explained that “[n]owhere in the Constitution ... is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”¹¹⁹ However, the Court said, when the privilege is asserted to avoid releasing information that is evidence in a criminal case, this consideration must be weighed against constitutional considerations favoring its disclosure; namely, the rights guaranteed to criminal defendants in the Sixth Amendment to confront all evidence against them and to present testimony in their defense, and the rights to due process guaranteed in the Fifth Amendment.¹²⁰ The Supreme Court held:

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.¹²¹

Like the presidential communications privilege the deliberative process privilege is “a qualified privilege and can be overcome by a showing of need” that “is to be made

U.S. Government, to Federal Agency Records Officers, Nov. 16, 2016, available at <https://www.archives.gov/records-mgmt/memos/ac09-2017>.

¹¹⁷ U.S. Dep’t of Justice, FOIA Counselor: Transition Team FOIA Issues, *FOIA Update*, Vol. IX, No. 4, Jan. 1, 1988, rev. Sept. 1, 2016, available at <https://www.justice.gov/oip/foia-update-foia-counselor-transition-teamfoia-issues>.

¹¹⁸ Langhofer letter, Dec. 16, 2017, at 3.

¹¹⁹ *United States v. Nixon*, 418 U.S. 683, 711 (1974).

¹²⁰ *Id.*

¹²¹ *Id.* at 713.

flexibly on a case-by-case, ad hoc basis.”¹²² As one would expect, this type of analysis does not lend itself to concrete, widely-applicable rules articulated in the case law; however, the D.C. Circuit notes that “where there is reason to believe the documents sought may shed light on government misconduct,” the privilege is “routinely denied,” on the grounds that shielding internal government deliberations in this context does not serve “the public’s interest in honest, effective government.”¹²³

B. Minimal Transition Communications Are Likely Subject to Attorney-Client Privilege

As noted in Mr. Langhofer’s letter, the presidential transition operated under the umbrella of a non-profit corporation, Trump for America (TFA). The Supreme Court has held that attorney-client privilege can protect communications between employees of a corporation and the corporation’s attorneys in certain circumstances.¹²⁴ The contours of the attorney-client privilege when the “client” is a corporation are necessarily somewhat different than when the “client” is an individual, because the purpose of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice,” and any application of the attorney-client privilege must serve that purpose.¹²⁵

The Supreme Court permitted a company to withhold from government investigators communications made by its employees to company lawyers principally because the communications were “made by [the] employees to counsel for [the corporation] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel” and because the communication contained information from employees that “concerned matters within the scope of the employees’ corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.”¹²⁶ The Court noted that in so holding it did “not undertake to draft a set of rules which should govern challenges to investigatory subpoenas,” noting that doing so would undermine the dictates of the Federal Rules of Evidence that such decisions be made on a case-by-case basis.¹²⁷ Mr. Langhofer’s letter makes no specific assertions about communications obtained by SCO, so there is no way

¹²² *Id.*

¹²³ *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (quoting *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995)); see also *In re Comptroller of the Currency*, 967 F.2d at 634 (“the privilege may be overridden where necessary ... to ‘shed light on alleged government malfeasance’”) (quoting *Franklin Nat’l Bank*, 478 F.Supp. at 582).

¹²⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (“...this Court has assumed that the privilege applies when the client is a corporation.”) (citing *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 394.

¹²⁷ *Id.* at 396.

to assess definitively whether communications exist that would merit withholding under the attorney-client privilege.

Separately, the facts surrounding the presidential transition's use of GSA communications equipment raise questions as to whether TFA waived any claim of attorney-client privilege with respect to any communications that would otherwise qualify. "[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with an assertion of the privilege."¹²⁸ It appears that TFA entered the MOU with GSA as part of the process by which it used GSA's equipment for its communications.¹²⁹ Additionally, under this MOU individual users of GSA equipment were required to agree to certain conditions before using the equipment; GSA has further asserted it informed TFA that "materials 'would not be held back in any law enforcement' actions."¹³⁰

Because the question of whether attorney-client privilege has been waived is "governed by federal common law,"¹³¹ a more complete understanding than is currently possible of the relevant facts would be needed to fully analyze any question of waiver, including knowledge of the nature and timing of all communications between TFA and GSA regarding the terms of the transition office's IT use. For example, if it is established that TFA agreed as a pre-condition of using GSA-provided IT that GSA would disclose TFA communications, it is possible that TFA waived any claim to attorney client privilege. Such an agreement would strike at the heart of the purpose of the attorney-client privilege: to protect and encourage confidential communications made for the purpose of seeking legal advice.

Finally, it should be noted that because the attorney-client privilege derives not from the Constitution but from common law, the SCO would not be prohibited from using information it may learn from privileged documents if it can prove that information in another way; that is to say, information obtained in violation of attorney-client privilege is typically not "fruit of the poisonous tree."¹³² Only if the violation of the attorney-client privilege is so severe as to constitute a due process violation would a court prohibit the

¹²⁸ *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991).

¹²⁹ Letter from Kory Langhofer to Sen. Ron Johnson, Sen. Claire McCaskill, Rep. Trey Gowdy, and Rep. Elijah Cummings, Dec. 16, 2017 (available at <https://www.politico.com/f/?id=00000160-616c-dcd4-a96b-756de2a90000>), at 2.

¹³⁰ Chris Geidner, Key Officials Push Back Against Trump Campaign's Claim That A Federal Office Illegally Turned Over Emails To Special Counsel, *BuzzFeed News*, Dec. 16, 2017, available at https://www.buzzfeed.com/chrisgeidner/the-trump-campaign-claims-a-federal-office-illegally-turned?utm_term=.siaVq2YwM#.sg6ymazlr.

¹³¹ *In re Keeper of Records* (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22 (1st Cir. 2003) (citing *United States v. Rakes*, 136 F.3d 1, 3 (1st Cir.1998)).

United States v. Marashi, 913 F.2d 724, 731, n.11 (9th Cir. 1990) (¹³² "Suffice it to say that no court has ever applied this theory to any evidentiary privilege...") (emphasis in original); see also *United States v. Segal*, 313 F. Supp. 2d 774, 779 (N.D. Ill. 2004).

SCO from using the information it may have learned from any privileged communications;¹³³ after all, the privilege protects *communications*, not information.¹³⁴

V. The Mueller Inquiry Does Not Turn on Opposition Research Funded by the Clinton Campaign

Critics have attempted to discredit the investigation by suggesting it is predicated on information developed by the Clinton campaign. The focus of these allegations is a report known as the “Steele Dossier” that examined connections between Trump and Russia and that its author Christopher Steele ultimately shared with the FBI (the “Steele Dossier” or “Dossier”). Specifically, critics question whether the FBI’s receipt of this document involved “coordinating investigations with one presidential campaign against another presidential campaign,”¹³⁵ and whether it was used as a basis for wiretaps on key witnesses.¹³⁶

Congressional testimony and other evidence that has emerged in public accounts rebuts these claims. The Dossier was one of a number of sources for the FBI about Trump connections to Russia at the launch of the investigation into Russian interference in the election. Further, any use of the Dossier in a wiretapping warrant application would have been subject to FBI verification procedures and judicial scrutiny, as described in detail in Section VI.

A. The FBI Did Not Rely Exclusively on the Dossier to Launch Its Inquiry into Trump Contacts with Russia

The provenance of the Steele Dossier has been established in public accounts including exhaustive testimony before the Senate Judiciary Committee by Glenn Simpson, the head

¹³³ See, e.g., *United States v. Kennedy*, 225 F.3d 1187, 1194–95 (10th Cir. 2000); *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996).

¹³⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (noting that the IRS could have interviewed the employees whose communications were at issue to obtain the same information from them that they had provided to the corporation’s attorneys).

¹³⁵ Mollie Hemingway, [This Defense Of FBI’s Handling Of The Steele Dossier Is One Of The Weakest Yet](https://thefederalist.com/2018/01/18/this-defense-of-fbis-handling-of-the-steele-dossier-is-one-of-the-weakest-yet/), *The Federalist*, Jan. 18, 2018, available at <https://thefederalist.com/2018/01/18/this-defense-of-fbis-handling-of-the-steele-dossier-is-one-of-the-weakest-yet/>.

¹³⁶ Reps. Mark Meadows and Jim Jordan, [It’s time for Jeff Sessions to go, as shown by the latest FBI leak](http://www.washingtonexaminer.com/rep-mark-meadows-and-jim-jordan-its-time-for-jeff-sessions-to-go-as-shown-by-the-latest-fbi-leak/article/2644934), *Washington Examiner*, Jan. 4, 2018, available at <http://www.washingtonexaminer.com/rep-mark-meadows-and-jim-jordan-its-time-for-jeff-sessions-to-go-as-shown-by-the-latest-fbi-leak/article/2644934>; House Committee on Oversight and Government Reform, [Press Release: ICYMI: Chairman Gowdy on Fox News Sunday](https://oversight.house.gov/release/icymi-chairman-gowdy-fox-news-sunday/), Oct. 30, 2017, available at <https://oversight.house.gov/release/icymi-chairman-gowdy-fox-news-sunday/>.

of Fusion GPS, the strategic research firm that produced the Dossier.¹³⁷ Fusion GPS’s work researching candidate Donald Trump was funded by two sets of Trump’s political opponents at different times: the Washington Free Beacon, a conservative website funded by a donor who also supported Marco Rubio in the 2016 Republican presidential primary, and by outside counsel for the benefit of the Clinton campaign and the Democratic National Committee.¹³⁸

In early summer 2016, Fusion GPS hired Steele, a former British intelligence officer, to research alleged Trump ties to Russia.¹³⁹ In late June or early July, his findings were sufficiently troubling that Mr. Steele believed that he had “professional obligations” to report the information he uncovered to the FBI.¹⁴⁰ According to the Simpson testimony, Steele and Simpson agreed he should provide this information out of a sense of “citizenship”¹⁴¹ as he believed it raised “a security issue about whether [Mr. Trump] was being blackmailed,”¹⁴² and Fusion GPS did not discuss the decision to make that disclosure with the clients who paid for the work.¹⁴³

Mr. Steele had an initial meeting with the FBI in July, and in September the FBI and Steele had an additional meeting.¹⁴⁴ Steele also provided the FBI with copies of memos he was producing to summarize his findings.¹⁴⁵ Public accounts and the Simpson testimony indicate that by this time, the FBI had multiple bases for concern about Trump contacts with Russia – and this matter had also caught the attention of other U.S. government officials and intelligence circles in other countries. To wit:

- In July 2016, Wikileaks published hacked DNC emails, and by July 26, 2016 U.S. intelligence agencies reported to the White House with “high confidence” that the

¹³⁷ Senate Judiciary Committee, Transcript, Interview of Glenn Simpson, Aug. 22, 2017, available at <https://www.lawfareblog.com/document-senate-judiciary-committee-interview-transcript-fusion-gps-ceo-glenn-simpson>.

¹³⁸ Kenneth P. Vogel, The Trump Dossier: What We Know and Who Paid for It, *New York Times* (Oct. 25, 2017) available at <https://www.nytimes.com/2017/10/25/us/politics/steele-dossier-trump-expained.html>.

¹³⁹ Transcript, Interview of Glenn Simpson, Aug. 22, 2017 at 76-77.

¹⁴⁰ *Id.* at 159-161, 168.

¹⁴¹ *Id.* at 168.

¹⁴² *Id.* at 159.

¹⁴³ Glenn R. Simpson and Peter Fritsch, The Republicans’ Fake Investigations, *New York Times* (Jan. 2, 2018), available at <https://www.nytimes.com/2018/01/02/opinion/republicans-investigation-fusion-gps.html>.

¹⁴⁴ Transcript, Interview of Glenn Simpson, Aug. 22, 2017 at 170-171.

¹⁴⁵ *Id.* at 171.

Russian government was responsible, although they did not report a conclusion as to the intent of the hack.¹⁴⁶

- In July 2016, when Wikileaks began publishing the hacked emails, Australian officials told the FBI that two months earlier Trump campaign foreign policy advisor George Papadopoulos had claimed to one of their diplomats that Russia had “dirt” on Clinton.¹⁴⁷
- At a June 15, 2016 meeting among top House Republicans, House Majority Leader Kevin McCarthy reportedly remarked he thought Trump might be on Putin’s payroll, interjecting “Swear to God” when his colleagues responded with laughter.¹⁴⁸
- As early as “late 2015,” British intelligence agencies reportedly learned of “suspicious ‘interactions’ between figures connected to Trump and known or suspected Russian agents,” and this information “was passed to the US as part of a routine exchange of information.” In the six months that followed leading up to summer 2016, other countries including Germany and the Dutch and French spy agency “shared further information on contacts between Trump’s inner circle and Russians.”¹⁴⁹

Accordingly, it is clear that the Steele Dossier represented at most only one of a number of predicates to the FBI’s investigation.

¹⁴⁶ David E. Sanger and Eric Schmitt, [Spy Agency Consensus Grows that Russia Hacked DNC](https://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html), *New York Times*, Jul. 25, 2016, available at <https://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html>.

¹⁴⁷ Sharon LaFreniere, Mark Mazzetti, and Matt Apuzzo, [How the Russia Inquiry Began: A Campaign Aide, Drinks, and Talk of Political Dirt](https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html), *New York Times*, Dec. 30, 2017, available at <https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html>.

¹⁴⁸ Adam Entous, [House majority leader to colleagues in 2016: ‘I think Putin pays Trump’](https://www.washingtonpost.com/world/national-security/house-majority-leader-to-colleagues-in-2016-i-think-putin-pays-trump/2017/05/17/515f6f8a-3aff-11e7-8854-21f359183e8c_story.html), *Washington Post*, May 17, 2017, available at https://www.washingtonpost.com/world/national-security/house-majority-leader-to-colleagues-in-2016-i-think-putin-pays-trump/2017/05/17/515f6f8a-3aff-11e7-8854-21f359183e8c_story.html.

¹⁴⁹ Luke Harding, Stephanie Kirchgaessner and Nick Hopkins, [British spies were first to spot Trump team’s links with Russia](https://www.theguardian.com/uk-news/2017/apr/13/british-spies-first-to-spot-trump-team-links-russia), *The Guardian*, Apr. 13, 2017, available at <https://www.theguardian.com/uk-news/2017/apr/13/british-spies-first-to-spot-trump-team-links-russia>.

B. Assertions by the FBI Based on the Dossier on Any Application for an Electronic Surveillance Warrant Would Have Been Required to Undergo a Review to Ensure Accuracy

One media account reports that the Dossier was used in applying for at least one warrant to monitor Trump associate communications.¹⁵⁰ As explained in Section VI below, in order to submit an application for approval of an electronic surveillance warrant to the FISC, the FBI must prepare a detailed affidavit and application that is reviewed by the National Security Law Branch of the FBI under an approval process known as the “Woods Procedures” that require substantiation of every piece of evidence asserted.¹⁵¹ The resulting application would then go to the Office of Intelligence within the National Security Division of the DOJ, which “is responsible for preparing and filing all applications for Court orders pursuant to FISA.”¹⁵² For that reason, even if the FBI relied on the Dossier to support applications for electronic surveillance, an individual at the FBI would have had to certify that there was “probable cause to believe that the ‘target of the surveillance [was] a foreign power or agent of a foreign power’ and that a ‘significant purpose’ of the surveillance [was] to obtain ‘foreign intelligence information,’” among other requirements, and DOJ officials and a judge of the FISC would have reviewed such certification.¹⁵³

¹⁵⁰ Evan Perez, Shimon Prokupecz, and Manu Raju, FBI used dossier allegations to bolster Trump-Russia investigation, CNN, Apr. 18, 2017, available at <http://www.cnn.com/2017/04/18/politics/fbi-dossier-carter-page-donald-trump-russia-investigation/index.html>.

¹⁵¹ Responses by Hon. Robert S. Mueller, III to written questions from Sen. Leahy, Senate Judiciary Committee, Jun. 6, 2002, at 9-10, available at <https://fas.org/irp/agency/doj/fisa/fbi082903.pdf>.

¹⁵² U.S. Dept. of Justice, Office of Intelligence, National Security Division, (updated July 23, 2014) available at <https://www.justice.gov/nsd/office-intelligence>; 28 C.F.R. § 0.72 (“The following functions are assigned to and shall be conducted, handled, or supervised by the Assistant Attorney General for National Security: . . . Supervise the preparation of certifications and applications for orders under the Foreign Intelligence Surveillance Act of 1978, as amended, and the representation of the United States before the United States Foreign Intelligence Surveillance Court and the United States Foreign Intelligence Court of Review; . . .”). See also 28 U.S.C. § 509A (establishing the National Security Division, consisting of “the elements of the Department of Justice (other than the Federal Bureau of Investigation) engaged primarily in support of the intelligence and intelligence-related activities of the United States Government”).

¹⁵³ U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, The Foreign Intelligence Surveillance Act of 1978, available at <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1286> (quoting 50 U.S.C. § 1804).

VI. Representative Nunes's Memo Claiming that the FBI Improperly Obtained a Warrant to Conduct Surveillance on Trump Campaign Officials Lacks Credibility

Representative Devin Nunes, a former member of the executive committee leading President-elect Donald Trump's transition team,¹⁵⁴ has drafted a four-page memo in which he claims that the Department of Justice under the Obama Administration improperly obtained electronic surveillance warrants to target the Trump campaign.¹⁵⁵ In a party-line vote on January 29, 2018, the Republican members of the House Committee on Intelligence that Nunes chairs approved the release of the "Nunes memo" while also voting to prohibit release of an analysis of that memo by Democratic Committee members.¹⁵⁶ The President is currently reviewing whether he will release the memo.

It is unclear precisely what assertions Representative Nunes has made in the memo. Indeed, Nunes to date has even refused to share the memo with his Republican counterpart on the Senate Intelligence Committee.¹⁵⁷ According to early reports, Nunes's memo claims that DOJ improperly relied on the Steele Dossier to obtain an electronic surveillance warrant targeting Trump campaign associate Carter Page.¹⁵⁸ In addition, the memo reportedly states that during the Trump administration, DOJ submitted an application to extend the surveillance and that Deputy Attorney General Rod Rosenstein approved that action.¹⁵⁹

Up until the evening before the Committee vote to release the report, Representative Nunes refused to share the report with the FBI or DOJ, and even then only allowed review by FBI Director Christopher Wray while barring review by Deputy Attorney General Rosenstein.¹⁶⁰ House Intelligence Committee Republicans further voted against

¹⁵⁴ Sarah d. Wire, California Rep. Devin Nunes named to Trump's transition team, *L.A. Times*, Nov. 11, 2016, available at <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-rep-devin-nunes-named-to-trump-s-1478893307-htmlstory.html>.

¹⁵⁵ Jeremy Herb, How the House Intelligence Committee can make Nunes' FISA memo public, *CNN* (Jan. 20, 2018), available at <http://www.cnn.com/2018/01/20/politics/house-intelligence-nunes-fisa-memo/index.html>.

¹⁵⁶ Kyle Cheney, House panel votes to release secret memo, *Politico*, Jan. 29, 2018, available at <https://www.politico.com/story/2018/01/29/trey-gowdy-devin-nunes-fbi-classified-memo-374688>.

¹⁵⁷ Jeremy Herb and Manu Raju, Senate Intelligence Committee not given access to Nunes FISA Memo, *CNN*, Jan. 24, 2018, available at <https://www.cnn.com/2018/01/24/politics/richard-burr-devin-nunes-fisa-memo/index.html>.

¹⁵⁸ Nicholas Fandos, Adam Goldman, and Sharon LaFraniere, Secret Memo Hints at a New Republican Target: Rod Rosenstein, *New York Times*, Jan. 28, available at <https://www.nytimes.com/2018/01/28/us/politics/rod-rosenstein-carter-page-secret-memo.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>.

¹⁵⁹ *Id.*

¹⁶⁰ Cheney, *Politico*, Jan. 29, 2018.

allowing DOJ and the FBI to brief the Committee and House on the report.¹⁶¹ These steps occurred despite DOJ opposition to release of the memo. Assistant Attorney General Stephen E. Boyd, an appointee of President Trump, explained DOJ's concerns in a letter to Representative Nunes, stating that the FBI had provided the House Permanent Select Committee on Intelligence with "more than 1,000 pages of classified documents relating to the FBI's relationship, if any, with a source and its reliance, if any, on information provided by that source."¹⁶² After noting that the department takes seriously any allegation of misconduct, Boyd stated that the department was "currently unaware of *any* wrongdoing relating to the FISA process . . ."¹⁶³ Mr. Boyd stated that the release of the memo without a review by the department to ensure that it does not harm national security or threaten an ongoing investigation would be "extraordinarily reckless."¹⁶⁴

Even without the benefit of reviewing the memo or the materials that it purports to address, there are reasons to discount Representative Nunes's claim that the FBI's actions were improper or subject to partisan influences. Although the FISA is not without controversy, the law has been amended and reauthorized with the support of both Republicans and Democrats. Indeed, on January 19, 2018, the FISA was recently reauthorized after receiving bipartisan support in both houses of Congress and President Trump's signature.¹⁶⁵

The standards for obtaining a FISA warrant for electronic surveillance of any United States person¹⁶⁶ (including any member of the Trump campaign) are laid out by Congress in considerable detail. Each application for a FISA warrant must be made by a federal office "in writing upon oath and affirmation" (i.e. carrying the penalty of perjury) and

¹⁶¹ *Id.*

¹⁶² Letter from Stephen Boyd to Rep. Nunes, Jan. 24, 2018, *available at* <http://cdn.cnn.com/cnn/2018/images/01/24/nunes.letter.pdf>.

¹⁶³ *Id.* (emphasis supplied).

¹⁶⁴ *Id.*

¹⁶⁵ S. 139: FISA Amendments Reauthorization Act of 2017, *Govtrack*, *available at* https://www.govtrack.us/congress/votes/115-2018/s12?utm_campaign=govtrack_feed&utm_source=govtrack/feed&utm_medium=rss; Final Vote Results for Roll Call 16, Office of the Clerk, U.S. House of Representatives, Jan. 11, 2018, *available at* <http://clerk.house.gov/evs/2018/roll016.xml>; White House, President Donald J. Trump Signs S. 139 into Law, *available at* <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-s-139-law/>.

¹⁶⁶ Under FISA, "United States person" means: "a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association [that is a component, faction, or entity of a foreign government or governments or that is directed and controlled by a foreign government or governments of a foreign government]." 50 U.S.C. § 1801(i). *See also* § 1801(a).

must obtain “the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of [FISA].”¹⁶⁷ The application must include:

- “the identity of the Federal officer making the application”;¹⁶⁸
- the identity of the target of surveillance;¹⁶⁹
- a statement of facts and circumstances justifying the applicant’s belief that “the target of the electronic surveillance is a foreign power or agent of a foreign power”;¹⁷⁰
- proposed minimization procedures¹⁷¹ (i.e. procedures that among other things “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information”);¹⁷²
- “a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance”;¹⁷³
- a certification from one of several senior executive branch officials¹⁷⁴ that (among other things) the information sought is “foreign intelligence information”¹⁷⁵ (and a statement providing the basis for this

¹⁶⁷ 50 U.S.C. § 1804.

¹⁶⁸ 50 U.S.C. § 1804(a)(1).

¹⁶⁹ 50 U.S.C. § 1804(a)(2).

¹⁷⁰ 50 U.S.C. § 1804(a)(3).

¹⁷¹ 50 U.S.C. § 1804(a)(4).

¹⁷² 50 U.S.C. § 1801(h)(2).

¹⁷³ 50 U.S.C. § 1804(a)(5).

¹⁷⁴ 50 U.S.C. § 1804(a)(6).

¹⁷⁵ Under FISA, “Foreign intelligence information” means:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

certification);¹⁷⁶ that “a significant purpose of the surveillance is to obtain foreign intelligence information”;¹⁷⁷ that this information “cannot reasonably be obtained by normal investigative techniques” (and a statement providing the basis for this certification);¹⁷⁸

- a summary of how the surveillance will be conducted and whether physical entry will be required to conduct the surveillance;¹⁷⁹
- a “statement of the facts concerning all previous [FISA] applications . . . involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application”;¹⁸⁰ and
- a statement of the period of time in which surveillance will be conducted.¹⁸¹

A judge may enter an order approving surveillance if he or she finds that the application was made by a federal office and approved by the Attorney General; there is probable cause to believe that “the target of the electronic surveillance is a foreign power or agent of a foreign power . . .” and “each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power”; the minimization procedures meet FISA requirements; and the application meets the requirements listed above and the statements supporting those representations are not clearly erroneous.¹⁸² So not only does FISA require extensive processes and checks within the Department of Justice, but a federal judge must find that substantive and procedural requirements have been met.

To extend an order approving electronic surveillance of a United States person, an application for extension and new findings must be submitted for court approval every 90 days.¹⁸³ In an application for an extension, DOJ and the court must account for the intelligence that the surveillance has yielded—including whether the surveillance has in

50 U.S.C. § 1801(e).

¹⁷⁶ 50 U.S.C. § 1804(a)(6)(A) and (E)(i).

¹⁷⁷ 50 U.S.C. § 1804(a)(6)(C).

¹⁷⁸ 50 U.S.C. § 1804(a)(6). The processes that are in place to verify assertions made in a FISA application are known as “Woods procedures”, after the agent who drafted them. See Michael Woods, Foreign Intelligence Surveillance Act Procedures to Ensure Accuracy, *Federal Bureau of Investigation*, Apr. 5, 2001, available at <https://fas.org/irp/agency/doj/fisa/woods.pdf>. See generally Asha Rangappa, It Ain’t Easy Getting a FISA Warrant: I Was an FBI Agent and Should Know, *Just Security*, Mar. 6, 2017, available at <https://www.justsecurity.org/38422/aint-easy-fisa-warrant-fbi-agent/>.

¹⁷⁹ 50 U.S.C. § 1804(a)(7).

¹⁸⁰ 50 U.S.C. § 1804(a)(8).

¹⁸¹ 50 U.S.C. § 1804(a)(9).

¹⁸² 50 U.S.C. § 1805(a).

¹⁸³ 50 U.S.C. § 1805(d).

fact produced foreign intelligence that is relevant to the underlying case.¹⁸⁴ In addition, the court “may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.”¹⁸⁵

Although the process of obtaining a warrant under FISA is conducted *ex parte*, which means that only the government gets to make a case to the presiding judge, that procedural feature is consistent with how federal search and arrest warrants are obtained.¹⁸⁶ FISA applications are rarely denied¹⁸⁷; however, the scope of the government’s request is sometimes modified and the review process assuredly impacts what applications the government actually files.¹⁸⁸ Because Representative Nunes has not made his memo available, it is impossible to say what component of the FISA process was supposedly violated.

To the extent that Nunes is claiming partisan political bias on the part of the Foreign Intelligence Surveillance Court, such an accusation simply does not hold water. The Court is composed of eleven federal district judges who were selected by Chief Justice John Roberts to serve on the Court. Two of them were appointed to district court judgeships by Barack Obama, five by George W. Bush, two by Clinton, one by George H.W. Bush, and one by Ronald Reagan.¹⁸⁹ There is no evidence that these judges have failed to enforce the standards laid out in the FISA.

Finally, the circumstances surrounding the creation and the reaction to Representative Nunes’s plans to release his memo suggest that the accusations it contains are not credible. The Department of Justice released a letter to Representative Nunes on January 24, 2018 asserting that his memo “purports to be based on classified source materials that neither [Nunes] nor most of [the Committee] had seen.”¹⁹⁰ Many of Representative Nunes’s fellow Republican colleagues on the House Intelligence Committee have failed to go on record standing by the accusations in the memo¹⁹¹; Democratic members of the

¹⁸⁴ 50 U.S.C. § 1804(a)(8) (requiring that an application contain “a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application”).

¹⁸⁵ 50 U.S.C. § 1805(d).

¹⁸⁶ See Fed. R. Crim. P. 4, 41.

¹⁸⁷ Evan Perez, Secret Court’s Oversight Gets Scrutiny, *Wall Street Journal*, Jun. 9, 2013, available at <https://www.wsj.com/articles/SB10001424127887324904004578535670310514616>.

¹⁸⁸ Conor Clarke, Is the Foreign Intelligence Surveillance Court really a Rubber Stamp?, *Stanford Law Review*, Feb, 2014, available at <https://www.stanfordlawreview.org/online/is-the-foreign-intelligence-surveillance-court-really-a-rubber-stamp/>.

¹⁸⁹ United States Foreign Intelligence Surveillance Court, Current Membership, available at <http://www.fisc.uscourts.gov/current-membership> (accessed Jan 26, 2018).

¹⁹⁰ Letter from Stephen Boyd to Rep. Nunes, Jan. 24, 2018.

¹⁹¹ Quinta Jurecic and Benjamin Wittes, How Many of Devin Nunes’s GOP Colleagues on the Intelligence Committee Will Stand Up for the Accuracy of His Memo? Hint: Not Many, *Lawfare*, Jan 23, 2018,

committee are planning their own memo to lay out the ways in which they believe the Nunes memo distorts the truth¹⁹²; Representative Adam Schiff, Ranking Member of the House Intelligence Committee described the memo as “[r]ife with factual inaccuracies and referencing highly classified materials that most of Republican Intelligence Committee members were forced to acknowledge they had never read”¹⁹³; and Representative Jerrold Nadler, Ranking Member of the House Committee on the Judiciary, has described the memo as a “profoundly misleading document.”¹⁹⁴

Four additional points bear noting: First, regardless of the factual basis for the original FISA applications submitted in 2016, the Russia investigation has hardly proven to be a “witch hunt.”¹⁹⁵ On the contrary, we now know that there were multiple previously undisclosed contacts¹⁹⁶ between the Trump campaign and Russia and we know that members of the Trump campaign—including candidate Trump’s own son—were receptive to receiving Russian “dirt” on Clinton.¹⁹⁷ For those reasons, if it is indeed true that federal law enforcement agents submitted that there was probable cause to believe that Trump campaign associates may be foreign agents, revelations since then have provided additional reason to examine that possibility rather than discrediting it.

Second, it is important to consider whether Representative Nunes’s previous role as part of the Trump transition team may affect his interest in the outcome of the Special Counsel investigation. The statement of offense filed in conjunction with the guilty plea of Michael Flynn suggests that the conduct of transition officials may be under scrutiny.¹⁹⁸

available at <https://lawfareblog.com/how-many-devin-nunes-gop-colleagues-intelligence-committee-will-stand-accuracy-his-memo-hint-not>.

¹⁹² Chris Megerian, *Democrats prepare their own memo on surveillance to counter Republican document*, *L.A. Times*, Jan. 24, 2018, available at <http://www.latimes.com/politics/la-na-pol-essential-washington-updates-democrats-prepare-their-own-memo-on-1516827374-htmlstory.html>.

¹⁹³ *Republicans call for release of memo on alleged surveillance abuses*, *CBS News*, Jan. 19, 2018, available at <https://www.cbsnews.com/news/republicans-call-for-release-of-memo-on-surveillance-abuses/>.

¹⁹⁴ *Letter from Ranking Member Nadler to Chairman Goodlatte*, Jan. 23, 2018, available at <https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/JN%20LETTER%20TO%20GOODLATTE%20RE%20NUNES%20MEMO%201-23.pdf>.

¹⁹⁵ As explained in Section V.B, *supra*, it appears that the FBI relied on multiple sources to support its request for electronic surveillance warrants.

¹⁹⁶ Jack Holmes, *All of the Trump Administration’s Ties to Russia (That We Know About)*, *Esquire*, Dec. 1, 2017, available at <http://www.esquire.com/news-politics/news/a53134/trump-administration-russia-ties/>.

¹⁹⁷ Jo Becker, Adam Goldman, and Matt Apuzzo, *Russian dirt on Clinton? ‘I Love It,’ Donald Trump Jr. Said*, Jul. 11, 2017, available at <https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html>.

¹⁹⁸ Statement of the Offense, *U.S. v. Michael T. Flynn*, No. 17-cr-00232 (Dec. 1, 2017, D.D.C.), available at <https://www.justice.gov/file/1015126/download>.

Third, Representative Nunes has previously raised a different theory of law enforcement misconduct that have been thoroughly debunked and that led him to announce his recusal from the Intelligence Committee's Russia investigation.¹⁹⁹ Representative Nunes's involvement in matters that are plainly inconsistent with such a recusal is yet another reason to question his integrity and credibility.²⁰⁰

Fourth, and perhaps most disturbing of all, reports are now emerging that the memo is an attempt to discredit Mueller's supervisor, Deputy Attorney General Rod Rosenstein. The *New York Times* reports that "Rosenstein approved an application to extend surveillance of a former Trump campaign associate shortly after taking office last spring" and that account suggests that "the reference to Rosenstein's actions in the memo . . . indicates that Republicans may be moving to seize on his role as they seek to undermine the inquiry."²⁰¹ The President and his allies have militated for the removal of Mueller. That objective evidently proving too daunting, they seem to be shifting their fire to removing Mueller's supervisor.²⁰² Doing so would permit Rosenstein's replacement by someone who could throttle the investigation.²⁰³ The possibility that the memo is reverse-engineered to achieve this outcome is, of course, one more reason to doubt its conclusions.

For these reasons, the Nunes memo and any other claims that the FBI improperly obtained a FISA warrant to conduct surveillance on members of the Trump campaign are not credible.

¹⁹⁹ See Karoun Demijarian, House Intelligence Chairman Devin Nunes recuses himself from Russia probe, *Washington Post*, Apr. 6, 2017, available at https://www.washingtonpost.com/powerpost/house-intelligence-chairman-devin-nunes-recuses-himself-from-russia-probe/2017/04/06/8122b5bc-1ad2-11e7-855e-4824bbb5d748_story.html?utm_term=.09f6faa94c28; Ken Dilanian, Susan Rice Did Nothing Wrong, Say both Dems and Republicans, *NBC News*, Apr. 17, 2017, available at <https://www.nbcnews.com/politics/congress/susan-rice-did-nothing-wrong-say-both-dems-republicans-n747406>; Max Greenwood, Burr: Nunes 'created' unmasking allegations against Rice, *The Hill*, Jul. 21, 2017, available at <http://thehill.com/homenews/senate/343219-burr-nunes-created-unmasking-allegations-against-rice>.

²⁰⁰ See Evan Perez, Manu Raju, and Jeremy Herb, Nunes signs off on new subpoenas to firm behind Trump-Russia Dossier, *CNN*, Oct. 10, 2017, available at <https://www.cnn.com/2017/10/10/politics/fusion-gps-subpoenas-devin-nunes/index.html>.

²⁰¹ Fandos, Goldman, LaFraniere, *New York Times*, Jan. 28, 2018.

²⁰² See Sara Murray, Kara Scannell, Dana Bash, and Pamela Brown, Frustrated by Russia investigation, Trump turns ire toward Rosenstein, *CNN*, Jan. 26, 2018, available at <https://www.cnn.com/2018/01/26/politics/donald-trump-rod-rosenstein-frustration/index.html>.

²⁰³ Asha Rangappa, How Trump Could Derail the Special Counsel Investigation, *Slate*, Dec. 18, 2017, available at <http://www.slate.com/news-and-politics/2018/01/jeff-sessions-norfolk-speech-betrays-his-own-justice-department.html>.

VII. An Additional Special Counsel Is Not Warranted Under Applicable Law

Beyond arguing for Mueller’s removal, critics are also calling for a new special counsel to supplement his work. The argument has two main flavors: Mueller’s partisanship and bias will preclude him from looking at issues that merit inquiry, or the scope of his inquiry precludes such review. These calls for a second special counsel to investigate concern a range of matters, including the so-called “Uranium One” issue, the FBI’s handling of its investigation of Hillary Clinton’s emails, the FBI’s involvement and possible use of the Steele Dossier, and possibly even supposed transgressions committed by Special Counsel Mueller. For the reasons we explain below, none of these matters meet the criteria established by DOJ for appointing a special counsel.

Section 600.1 of the DOJ special counsel regulations require that the attorney general (or acting attorney general when the attorney general is recused) appoint a special counsel when three conditions are present: (1) “when he or she determines that a criminal investigation of a person or matter is warranted”; (2) “that investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating Division of the Department of Justice would present a conflict of interest for the Department” or, alternatively, “other extraordinary circumstances”; and (3) that it is “in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”²⁰⁴ And even when these conditions are met, the attorney general is explicitly encouraged by the special counsel regulation to consider alternatives to the appointment of a special counsel.²⁰⁵

The special counsel regulations do not define these conditions in greater detail, but other department regulations and policies as well as other portions of the special counsel regulations inform their meaning. The first condition—a determination that a criminal investigation is warranted—is best read in conjunction with guidelines established by the FBI for launching a full criminal investigation. According to those guidelines, an investigation is not warranted unless there is an “articulable factual basis” of criminal activity.²⁰⁶ In other words, there must be some factual reason to suspect that a criminal offense has been committed.

The second condition—the presence of a conflict of interest or other extraordinary circumstances—is best understood in reference to DOJ’s conflict of interest

²⁰⁴ 28 C.F.R. § 600.1.

²⁰⁵ 28 C.F.R. § 600.2.

²⁰⁶ The Attorney General’s Guidelines for Domestic FBI Operations, Sept. 29, 2008, *available at* https://www.aclu.org/sites/default/files/field_document/2008.9.29%20AG%20Guidelines%20for%20Domestic%20FBI%20Operations%20signed.pdf; Valerie Caproni, *Statement Before the Senate Select Committee on Intelligence*

Washington, DC, Sept. 23, 2008, *available at* <https://archives.fbi.gov/archives/news/testimony/attorney-general-guidelines-for-domestic-fbi-operations>; The Brennan Center for Justice, *Just What Is an FBI Investigation? A Fact Sheet*, May 20, 2013, *available at* <https://www.brennancenter.org/analysis/just-what-fbi-investigation-fact-sheet>.

regulations.²⁰⁷ Most relevant here are the provisions that prohibit participation in a criminal investigation or prosecution where a person has a “personal or political relationship” with a person or organization that is either the subject of the investigation or would be directly affected by the outcome.”²⁰⁸ (*See* further discussion of conflict of interest regulations at Part I.A) This regulation further defines these prohibited relationships as follows:

(1) Political relationship means a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof; and

(2) Personal relationship means a close and substantial connection of the type normally viewed as likely to induce partiality. An employee is presumed to have a personal relationship with his father, mother, brother, sister, child and spouse. Whether relationships (including friendships) of an employee to other persons or organizations are “personal” must be judged on an individual basis with due regard given to the subjective opinion of the employee.

A potential conflict can be waived by a supervisor in writing if the relationship in question “will not have the effect of rendering the employee’s service less than fully impartial and professional” and “[t]he employee’s participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.”²⁰⁹

Elucidation of the third condition—a public interest in a special counsel assuming responsibility for a matter—is a more difficult task because the question of what is in the “public interest” is plainly open-ended. Nonetheless, in the case of matters that were already the subject of an investigation or are currently being investigated, the attorney general might consider whether reopening or transferring the matter would be a waste of resources.

Finally, even if all three considerations in section 600.1 of the special counsel regulation are satisfied, section 600.2 explicitly encourages the attorney general to consider alternatives to appointing a special counsel. These may include pursuing an initial factual inquiry or legal research to inform the decision or directing that an appropriate component of DOJ pursue the matter (along with appropriate steps to mitigate conflicts).²¹⁰

²⁰⁷ *See* 18 U.S.C. § 208; 5 C.F.R. §§ 2635.401-403; 5 C.F.R. §§ 2635.501-503.

²⁰⁸ 28 C.F.R. § 45.2.

²⁰⁹ *Id.*

²¹⁰ 28 C.F.R. § 600.2.

A. The “Uranium One” Matter

The so-called “Uranium One” controversy does not satisfy the conditions for the appointment of a special counsel. As discussed above in section I.C, this matter concerns the Obama Administration’s 2010 decision to allow Russia’s state atomic energy agency Rosatom to take ownership of the Canadian company Uranium One, which has uranium interests in the United States.²¹¹ Attorney General Sessions reportedly has opened a DOJ review of a dormant DOJ investigation of alleged corruption relating to the Administration’s approval of this deal, despite DOJ’s earlier finding that prosecution was not warranted.²¹²

The Uranium One matter meets none of the conditions for the appointment of a special counsel. The claimed corrupt conduct is a quid pro quo whereby then-Secretary of State Hillary Clinton engineered approval of the Rosatom deal in exchange for Uranium One investor contributions to the Clinton Foundation.²¹³ However, there is no evidence that Secretary Clinton was personally involved in the State Department’s decision to sign off on the deal, nor is there any evidence that the donations to the foundation were part of a quid-pro-quo.²¹⁴ Second, even if there were reason to reopen the investigation, there is no reason that a conflict would be presented if the matter were handled by the FBI in concert with the Criminal Division of the Department of Justice or the United States Attorney General for the District of Columbia. Finally, assignment of a special counsel to revisit an issue that has already undergone scrutiny and involves the President’s political opponent is not in the public interest.

B. The FBI’s Handling of the Clinton Email Investigation

The Department of Justice Inspector General is already undertaking a review of the FBI’s handling of the investigation into the use of a private email server by Hillary Clinton while she was Secretary of State.²¹⁵ The inquiry includes scrutiny of then-FBI Director Comey’s decision to discuss the closure of that investigation at a news conference and his decision to disclose 11 days before the 2016 election that he had new information that

²¹¹ Tom Winter, Pete Williams, and Ken Dilanian, Prosecutors ask FBI agents for info on Uranium One deal, *NBC News*, Dec. 21, 2017, available at <https://www.nbcnews.com/news/us-news/prosecutors-ask-fbi-agents-info-uranium-one-deal-n831436>.

²¹² *Id.*

²¹³ Linda Qiu, Donald Trump inaccurately suggests Clinton got paid to approve Russia uranium deal, *Politifact*, June 30, 2016, available at <http://www.politifact.com/truth-o-meter/statements/2016/jun/30/donald-trump/donald-trump-inaccurately-suggests-clinton-got-pai/>.

²¹⁴ *Id.*

²¹⁵ Max Greenwood, DOJ watchdog report on FBI handling of Clinton probe expected by spring, *The Hill*, Nov. 15, 2017, available at <http://thehill.com/policy/national-security/360588-justice-dept-watchdog-report-on-fbi-handling-of-clinton-probe>.

might cause him to reopen it.²¹⁶ A report by the Inspector General is expected sometime in the spring of 2018.²¹⁷

This matter also fails to meet the conditions for the appointment of a special counsel. Although there is a clear need for an outside investigator to avoid the conflicts that would arise if the FBI was investigating its own handling of a case, there is no articulable factual basis for thinking that a crime was committed. While it is possible that former FBI Director Comey violated department policy²¹⁸ and the Hatch Act²¹⁹ by issuing public statements about the status of the Clinton investigation, such violations do not carry criminal penalties.²²⁰

In addition, there is an ongoing independent investigation of the FBI's handling of this case being undertaken by the Inspector General of the Department of Justice. Because there is no reason to doubt the integrity of that effort, the public interest is not served by transferring authority over the matter to a special counsel who would undoubtedly have to begin his or her investigation from scratch.

C. DOJ and the FBI Conduct Concerning the Steele Dossier

As discussed above in Part V, the Steele Dossier was a summary by former intelligence officer Christopher Steele of research he conducted for strategic research firm Fusion GPS on behalf of the Clinton campaign. The conduct of the FBI and DOJ concerning the Steele Dossier does not meet the conditions for the appointment of a special counsel.

Steele reportedly provided the Dossier to the FBI in 2016 out of concern that candidate Trump was vulnerable to blackmail,²²¹ and had several meetings with the FBI during the 2016 presidential campaign.²²² While, at one point, the FBI reached an agreement with

²¹⁶ Adam Goldman, Eric Lichtblau, and Matt Apuzzo, Comey Letter on Clinton Email Is Subject of Justice Dept. Inquiry, *New York Times*, Jan. 12, 2017, available at https://www.nytimes.com/2017/01/12/us/politics/james-comey-fbi-inspector-general-hillary-clinton.html?_r=0.

²¹⁷ Greenwood, *The Hill*, Nov. 15, 2017.

²¹⁸ See United States Attorneys' Manual (USAM), *Dep't of Justice*, 1997 §§ 1-7.000-7.710, 1-8.000-1-8.080; Matt Apuzzo, Adam Goldman, Michael S. Schmidt, and William K. Rashbaum, Justice Dept. Strongly Discouraged Comey in Move in Clinton Email Case, *New York Times*, Oct. 29, 2017, available at <https://www.nytimes.com/2016/10/30/us/politics/comey-clinton-email-justice.html>.

²¹⁹ Lauren Hodges, Did FBI Director James Comey's Email Announcement Break The Law, *NPR*, Oct. 31, 2016, available at <https://www.npr.org/2016/10/31/500071704/did-fbi-director-james-comeys-email-announcement-break-the-law>.

²²⁰ See 5 U.S.C. § 1505.

²²¹ See Section V.A., *supra*. See also, Glenn R. Simpson and Peter Fritsch, The Republicans' Fake Investigations, *New York Times*, Jan. 2, 2018, available at <https://www.nytimes.com/2018/01/02/opinion/republicans-investigation-fusion-gps.html>.

²²² *Id.*

Steele to pay him to continue his work, those plans fell through once the Dossier became public.²²³

The allegations of impropriety center on Bruce Ohr, a senior DOJ career official. Ohr's wife worked for Fusion GPS,²²⁴ and Ohr reportedly met with Steele before the 2016 election to discuss the Dossier and with Fusion GPS founder Glenn Simpson after the election.²²⁵ Ohr was reportedly reassigned in December 2017 when these connections to Fusion GPS came to light.²²⁶ Separately, Senate Judiciary Committee Chairman Chuck Grassley and Judiciary Subcommittee on Crime and Terrorism Chairman Lindsey Graham referred Christopher Steele to DOJ for criminal prosecution for possible violations of 18 U.S.C. § 1001 for false statements to investigators.²²⁷

These circumstances fail to merit appointment of a new special counsel for several reasons. First, as with the Uranium One and Clinton email server matter, here there is no factual basis establishing that a crime was committed by Ohr or any other DOJ official.²²⁸ Further, although the FBI at one point had plans to compensate Steele,²²⁹ there is no allegation that Ohr played a role in that decision (and therefore violated 18 U.S.C. § 208, which prohibits officials from participating in decisions that might financially benefit their spouses). And Ohr's personal connection to Fusion GPS notwithstanding, it is not improper for a senior DOJ official to take meetings with individuals like Steele and

²²³ Kenneth P. Vogel, The Trump Dossier: What We Know and Who Paid for It, *New York Times*, Oct. 25, 2017, available at <https://www.nytimes.com/2017/10/25/us/politics/steele-dossier-trump-explained.html>.

²²⁴ Maegan Vazquez, Pamela Brown, and Laura Jarrett, Trump's lawyer wants a special counsel to investigate DOJ official with Fusion GPS ties, *CNN*, Dec. 12, 2017, available at <http://www.cnn.com/2017/12/12/politics/bruce-ohr-special-counsel/index.html>; James Rosen and Jake Gibson, Wife of demoted DOJ official worked for firm behind anti-Trump dossier, *New York Times*, Dec. 11, available at <http://www.foxnews.com/politics/2017/12/11/wife-demoted-doj-official-worked-for-firm-behind-anti-trump-dossier.html>.

²²⁵ Rowan Scarborough, Justice Dept. lawyer who met with dubious Trump dossier author to be hauled before Congress, *Washington Times*, Dec. 7, 2017, available at <https://www.washingtontimes.com/news/2017/dec/7/bruce-ohr-who-met-dossier-author-christopher-steele/>.

²²⁶ James Rosen and Jake Gibson, Top DOJ official demoted amid probe of contacts with Trump dossier firm, *Fox News*, Dec. 7, 2017, available at <http://www.foxnews.com/politics/2017/12/07/top-doj-official-demoted-amid-probe-contacts-with-trump-dossier-firm.html>.

²²⁷ See, e.g., Sen. Chuck Grassley, Press Release, Senators Grassley, Graham Refer Christopher Steele for Criminal Investigation, Jan 5, 2018, available at <https://www.grassley.senate.gov/news/news-releases/senators-grassley-graham-refer-christopher-steele-criminal-investigation>; Mythili Sampathkumar, Congressional Committee and Fusion GPS come to agreement over firm's bank records, *The Independent*, Oct. 29, 2017, available at <http://www.independent.co.uk/news/world/americas/us-politics/russia-trump-campaign-fusion-gps-christopher-steele-dossier-congress-robert-mueller-a8026516.html>.

²²⁸ The grounds for the criminal referral by Senators Grassley and Graham have not been made public, but even if they have merit, they relate to alleged false statements by Fusion GPS officials to investigators, not misconduct on the part of DOJ employees.

²²⁹ Vogel, *New York Times*, Oct. 25, 2017.

Simpson who claim to have information about a possible effort by an enemy superpower to infiltrate a presidential campaign or interfere with an election.

Nor is there reason to think that the public interest would be served by the appointment of a special counsel to handle this matter, especially because the Dossier bears on subjects that fall within the jurisdiction granted to Special Counsel Mueller—including the investigation of possible cooperation between the Trump campaign and Russia.²³⁰

D. Special Counsel Mueller’s Investigation

The suggestion²³¹ that a second special counsel should be appointed to investigate alleged transgressions by Special Counsel Mueller should be dismissed out of hand. As explained elsewhere in Parts I, II, and III of this memo, there is no support for the accusations that Special Counsel has violated department policy. There is furthermore no credible basis whatsoever to suggest that Special Counsel Mueller or a member of his team has committed a criminal offense--a mandatory precondition for the appointment of a special counsel.

Even if there were a factual basis for alleging criminal misconduct, appointment of a special counsel to supervise Special Counsel Mueller would not be in the public interest. Deputy Attorney General Rosenstein currently has authority to supervise Mueller directly and can resolve any issues regarding the scope of Mueller’s authority or perceived violations of department policy directly with him. There is no reason to think that the public’s interest in responsible supervision of Mueller would be better served by a new special counsel whose job would essentially be to second-guess actions that Rosenstein has approved.

Conclusion

The baseless attacks that we detail and discredit in this report are a reflection of the low bar that has been set by those who seek to discredit the Russia investigation. Of course, these attacks could not have been levelled under the assumption that they would ultimately prove to be persuasive; instead, their apparent aim is to drive a wedge between concerned citizens and the law enforcement institutions and officers responsible for this investigation. We have no doubt that these attacks will be repeated—in form if not in substance—until the investigation has run its course. Healthy skepticism of new “controversies” concerning Mueller’s investigation put forward by the President and his allies is therefore warranted.

²³⁰ Office of the Deputy Attorney General, Order No. 3915-2017, May 17, 2017, available at <https://www.justice.gov/opa/press-release/file/967231/download>.

²³¹ See, e.g., Peter Grier, Does US need special counsel to probe special counsel Mueller?, *Christian Science Monitor*, Dec. 13, 2017, available at <https://www.csmonitor.com/USA/Politics/2017/1213/Does-US-need-special-counsel-to-probe-special-counsel-Mueller>.