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Voluntary Testimony by Executive Branch Officials: An Introduction

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Voluntary Testimony by Executive Branch Officials: An Introduction

Executive branch officials testify regularly before congressional committees on both legislative and oversight matters. Most committee requests for testimony are accepted, and the officials appear voluntarily without the need to issue subpoenas or use the other tools available to Congress to compel appearance.

Congress's authority under the Constitution to legislate and investigate, along with its practices in exercising these powers, provide strong incentives for the executive branch to work voluntarily with Congress. Congress's control over appropriations and the organization and operations of the executive branch may encourage agency leaders to accommodate its requests rather than risk adverse actions toward their agencies. In addition, there are incentives for the executive branch to work with Congress in order to increase the likelihood of success for the Administration's policy agenda and to manage investigations with the potential to damage the Administration's public standing.

These incentives are often sufficient to ensure that the executive branch is responsive to requests from the legislative branch. Many of these interactions are routine, and both Congress and the executive branch have developed formal procedures to promote appropriate engagement. This is particularly apparent in the procedures developed by the Office of Management and Budget in *Circular A-11* and *Circular A-19* to coordinate and control agency statements to Congress on the budget and pending legislation.

There are situations, however, in which the incentives for compliance have been less effective in securing voluntary testimony. While each circumstance is unique, there are three identifiable areas in which executive branch officials may be more likely to conclude that the drawbacks of disclosure to Congress outweigh the incentives discussed in this report: national security and intelligence matters, ongoing law enforcement actions, and executive branch deliberations. Understanding the general incentives that support voluntary testimony, the practices that have developed around its delivery, and when executive branch officials are more likely to object to appearing before Congress may potentially help Congress navigate difficult cases.

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Introduction

In recent presidential Administrations, there have been several high-profile disputes between Congress and the White House regarding access to executive branch officials. This has included attempts by Congress to enforce subpoenas issued to Harriet Miers,¹ White House Counsel to President George W. Bush; Eric Holder,² Attorney General to President Barack Obama; and Wilbur Ross and William Barr,³ Secretary of Commerce and Attorney General to President Donald Trump, respectively.

Such disagreements can draw significant attention, but they are relatively uncommon. Most interactions between Congress and the executive branch are voluntary.⁴ There is a regular flow of communication between the branches. Principals and staff frequently interact with their counterparts. They share data; discuss operations, policy, and projects; and share subject matter expertise. Understanding why voluntary cooperation is a common practice is crucial to understanding Congress's relationship with the executive branch and may help clarify the cases in which the executive branch chooses not to cooperate with Congress.

This report focuses on one facet of inter-branch interaction: testimony before congressional committees. The report outlines the origins of voluntary testimony by the executive branch, identifies some notable incentives for voluntary participation, and covers some key dimensions of the practice of voluntary participation.

Two important caveats limit the scope of this report. First, by design, this report does not engage directly with those occasions when the executive branch refuses to comply with congressional requests and subpoenas.⁵ Second, it should also be noted that all responses are not created equal. The mere fact of voluntary compliance does not ensure that the testimony offered will be candid, complete, or correct. This report does not speak to that potential issue.

Background

Agency leaders, program managers, and subject matter experts routinely testify before congressional committees and subcommittees. In addition to participating in oversight and budget hearings by providing testimony and responding to questions on agency operations, agency

¹ See CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey, pp. 12-16.

² See CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey, pp. 17-18.

³ H.Res. 497.

⁴ In this report, *voluntary* is used to refer to all testimony that is provided without a committee issuing a subpoena to compel appearance. This definition encompasses a variety of situations in which there is significant pressure on the executive branch or even the explicit threat that a subpoena will be issued in the future. As discussed below, this report considers such pressure to be an *incentive* for voluntary compliance. It is also worth noting that Congress typically seeks voluntary compliance before using compulsory measures. See generally CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey for several such examples.

⁵ CRS has reports available that address this issue. See CRS Report RL30240, *Congressional Oversight Manual*, by L. Elaine Halchin et al.; and CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey.

officials frequently appear at informational hearings and when committees are considering possible legislative actions.

The practice of voluntary compliance with congressional requests was established from the first investigation of the executive branch by Congress. That investigation focused on a failed 1791 military campaign against Native American tribes in the Northwest Territory by General Arthur St. Clair.⁶ President George Washington and his cabinet faced the novel question of how to respond to a request for information from Congress. Aware that their decision was likely to establish precedent, they decided, in the words of Secretary of State Thomas Jefferson, that the executive branch should “communicate such papers as the public good would permit & ought to refuse those the disclosure of which would injure the public.”⁷ Washington’s cabinet reviewed the matter and decided that the executive branch should comply fully with Congress’s request. The Administration then provided Congress with documents and officials offered testimony for the investigation.⁸

While President Washington determined that it was appropriate for executive branch activities to remain secret when disclosure would “injure the public” (thus providing the earliest articulation of the concept of executive privilege in American government), he also concluded that compliance with congressional requests should be the default.⁹ Despite changes in the operations of the presidency and Congress, and broader public access to the hearings themselves over television and the internet, this default compliance rule of thumb has generally held over time and across subsequent Administrations.

Incentives for Voluntary Participation in Congressional Hearings

There are a number of reasons that Administrations acquiesce to requests from Congress. Some of the most broadly applicable incentives are outlined below.

The Power of the Purse

Control over the appropriations of departments and agencies is arguably one of Congress’s most effective tools to ensure that those departments and agencies are responsive to requests for testimony. Because the budget process occurs annually, agency leaders are continually dependent upon Congress for funding and understand that a poor working relationship with Congress may adversely affect their appropriation.¹⁰

Adverse budget actions for uncooperative agencies have occurred in the past. One of the best examples of such an action occurred during the 97th Congress. As part of the deliberations over the FY1982 budget, the director of the Office of Policy Development in the Executive Office of the President, Martin Anderson, refused to appear before the House Appropriations Subcommittee

⁶ 3 Annals of Cong. 493 (1792).

⁷ Thomas Jefferson, *The Writings of Thomas Jefferson*, vol. 1, edited by Richard H. Johnston, Albert E. Bergh, and Andrew A. Lipscomb (Washington, DC: Thomas Jefferson Memorial Association, 1903), pp. 303-305.

⁸ See Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004), pp. 10-11.

⁹ Jefferson, *The Writings of Thomas Jefferson*. vol. 1, pp. 303-305.

¹⁰ See, for example, Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* (New Haven, CT: Yale University Press, 2017), pp. 66-76.

on Treasury, Postal Service and General Government. Anderson argued that he could not appear because he was a senior adviser to the President and it would undermine his ability to provide candid advice to the President.

The subcommittee disagreed and noted that prior directors of the same office had appeared without incident. The House Appropriations Committee then zeroed out the budget for the office and stated that “until the legal basis for refusing to appear is presented, [the subcommittee] has no choice but to deny the budget request for this Office.”¹¹ While further discussion and negotiations with Senate appropriators led to a partial restoration, the appropriation was still reduced from the requested \$2.9 million to \$2.5 million.¹²

In a more recent example, as part of the FY2005 appropriations process, the House Committee on Appropriations directed the U.S. Coast Guard to submit quarterly reports to the committee on the maintenance of its legacy vessels and aircraft.¹³ By the next year, the committee was dissatisfied with the agency’s responses and said the following in its report on the agency’s FY2006 appropriation:

The Committee is extremely frustrated in the Coast Guard’s apparent disregard for Congressional direction and has reduced funding for headquarters directorates by \$5,000,000 accordingly.... The Committee cannot adequately oversee Coast Guard programs when the agency fails to answer basic questions or fails to provide timely and complete information.¹⁴

In this case, the concerns raised by Congress extended to all of the agency’s reporting to Congress, both oral and written, but illustrates the potential budget ramifications for agencies that fail to meet Congress’s reporting expectations.

Congressional Control Over Agency Operations

Congress’s legislative power extends beyond appropriations into the organization, operations, and jurisdiction of executive branch agencies. Congress may specify in statute the duties, reporting requirements, and independence of executive branch agencies, among other powers.¹⁵

Furthermore, some researchers have observed that Congress often closely monitors how agencies execute the laws it passes.¹⁶ Congress has developed a variety of tools to control how agencies operate, such as the Administrative Procedure Act.¹⁷ In addition, the regular engagement of Congress in how agencies conduct business may encourage those agencies to work with

¹¹ U.S. Congress, House Committee on Appropriations, *Treasury, Postal Service and General Government Appropriation Bill, 1982*, report to accompany H.R. 4121, 97th Cong., 1st sess., H.Rept. 97-171 (Washington, DC: GPO, 1981), pp. 30-31.

¹² *Budget of the U.S. Government: Fiscal Year 1983*, Appendix, at I-C5.

¹³ U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2005*, report to accompany H.R. 4567, 108th Cong., 2nd sess., H.Rept. 108-541 (Washington, DC: GPO, 2005), p. 60.

¹⁴ U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2006*, report to accompany H.R. 2360, 109th Cong., 1st sess., H.Rept. 109-79 (Washington, DC: GPO, 2006), p. 58.

¹⁵ See CRS Report R45442, *Congress’s Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner, pp. 2-14.

¹⁶ See, for example, Jack R. Beermann, “Congressional Administration,” *San Diego Law Review*, vol. 43, no. 1 (February-March 2006), pp. 69-70.

¹⁷ 5 U.S.C. §§551-559, 701-706. See CRS Report R45442, *Congress’s Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

committees or risk statutory changes that impact their jurisdiction and the rules under which they operate.

The organization of the executive branch and the network of statutes, guidelines, and practices that govern agency operations is complex and evolving.¹⁸ In this context, voluntary cooperation with congressional stakeholders can affect congressional decisions on organization and operations. For instance, one reason for Congress's decision to pass the Homeland Security Act of 2002¹⁹ and create the Department of Homeland Security was to address a concern about access to officials.

After the September 11 attacks, President George W. Bush created the Office of Homeland Security within the Executive Office of the President²⁰ and appointed Tom Ridge to lead it. In March 2002, the Senate Committee on Appropriations invited Ridge to testify about the office's activities, but Ridge declined to appear on the grounds that he was a close adviser to the President. Given the control Ridge exercised over a large portion of the national security bureaucracy, the committee disagreed with Ridge's position, and the two sides eventually agreed that Ridge would provide an "informal briefing" to the Committee.²¹ Through the ensuing establishment of the Department of Homeland Security, Congress asserted its authority to oversee executive branch activity and limited the possibility that Ridge and his successors could attempt to assert privilege as presidential advisers in order to resist congressional requests.

Navigating Congress's Power to Investigate

In addition to the legislative power, the courts have established that Congress has broad authority to investigate the activities of the executive branch.²² While Administrations have sometimes resisted cooperation with specific investigations, they have generally accepted this oversight role of Congress, and a large body of practices and expectations have developed.²³ The acceptance of Congress's authority is such that Presidents have repeatedly allowed personal advisers to testify when credible allegations of malfeasance arise in the Executive Office of the President, despite claiming broad immunity for those advisers in other circumstances.²⁴

Presidents have often followed this practice, even on matters of great political controversy, in order to better manage the visibility and impact when Congress conducts investigations. One of the better studied examples of this strategy is the Reagan Administration's management of the Iran-Contra affair. This incident arose following a decision by Congress to legally bar the government from providing support to the Contras, an insurgent group acting against the

¹⁸ See, for example, CRS Report R44909, *Executive Branch Reorganization*, by Henry B. Hogue; and Beermann, "Congressional Administration," pp. 107-110.

¹⁹ P.L. 107-296.

²⁰ Executive Office of the President, "Establishing the Office of Homeland Security and the Homeland Security Council," 66 *Federal Register* 51812 (October 10, 2001). The mission of this office was to "develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorists threats and attacks."

²¹ See Fisher, *The Politics of Executive Privilege*, pp. 224-227.

²² *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.")

²³ While congressional oversight practice is beyond the scope of this report, CRS has resources available on congressional oversight practice. See, for example, CRS Report RL30240, *Congressional Oversight Manual*, by L. Elaine Halchin et al.

²⁴ For an overview of select instances beginning with the Watergate era, see Fisher, *The Politics of Executive Privilege*, pp. 199-208.

government of Nicaragua.²⁵ Previously, the Central Intelligence Agency (CIA) had, with congressional approval, provided support to the Contras.

Despite the congressional ban, the Reagan Administration and the CIA continued to provide support to the Contras and funded that aid with the proceeds of undisclosed CIA arms sales to the government of Iran. Early in the congressional investigation into these activities, a number of Reagan Administration officials were later shown to have lied to or misled congressional investigators.²⁶ Ultimately, however, with the political fallout from the investigation growing, President Reagan directed the executive branch to cooperate fully with Congress, including an explicit decision not to attempt to assert executive privilege, even regarding direct communications between Reagan and his senior advisors.²⁷

Achieving the Administration's Agenda

An Administration might also determine that it will benefit politically from building a constructive relationship with Congress. Given the broad control Congress exercises over lawmaking and the government, a good working relationship may better position an Administration to implement its agenda, while a poor relationship may make Congress more likely to oppose its policies and restrict its operations.²⁸

For President Jimmy Carter, a constructive working relationship with Congress was an explicit campaign promise.²⁹ In his memoirs, the former President discussed this strategy and why he believed it facilitated his agenda. As President-elect, Carter began lobbying for the authority to reorganize the executive branch—another campaign commitment. While Congress ultimately passed the Reorganization Act of 1977,³⁰ Carter initially faced resistance from the House Committee on Government Operations Chairman Jack Brooks. He summarized the experience as follows:

I learned one lasting lesson from this hair-raising experience: it was better to have Jack Brooks on my side than against me. I found him to be an excellent legislator, and went out of my way to work closely with him in the future. We soon became good friends and allies. I consulted with him on all my subsequent reorganization bills; largely because of his support, ten of eleven bills submitted passed Congress.³¹

²⁵ See *Report of the Congressional Committees Investigating the Iran-Contra Affair*, 100th Cong., 1st Sess. H.Rept. 100-43 and S.Rept 100-216 (Washington, DC: GPO, 1987), pp. 3-4. For a narrative account of the issue, see generally Lawrence E. Walsh, *Firewall* (New York: W. W. Norton Company, 1997).

²⁶ See *Report of the Congressional Committees Investigating the Iran-Contra Affair*, 100th Cong., 1st Sess. H.Rept. 100-43 and S.Rept 100-216 (Washington, DC: GPO, 1987), pp. 3-11.

²⁷ Fisher, *The Politics of Executive Privilege*, pp. 62-64.

²⁸ For discussion of the institutional dynamics of the policymaking process, see generally Lance T. LeLoup and Steven A. Shull, *The President and Congress: Collaboration and Combat in National Policymaking* (New York: Longman, 2003).

²⁹ Jimmy Carter, *Keeping Faith* (Toronto: Bantam Books, 1982), p. 66. President Carter's success (or lack thereof) in achieving this goal has been the subject of considerable commentary. See, for example, Charles O. Jones, "Keeping Faith and Losing Congress: The Carter Experience in Washington," *Presidential Studies Quarterly*, vol. 14, no. 3 (Summer 1984), p. 437; and Mark J. Rozell, "Carter Rehabilitated: What Caused the 39th President's Press Transformation?," *Presidential Studies Quarterly*, vol. 23, no. 2 (Spring 1993), p. 317.

³⁰ P.L. 95-17.

³¹ Carter, *Keeping Faith*, p. 71.

Voluntary Testimony in Practice

Committees can request that executive branch officials appear before them to discuss any matter within the jurisdiction of the committee.³² Any executive branch official, including the President,³³ may testify before Congress under most circumstances. In practice, invitations are usually formal and may lead to negotiations on the logistics, format, and scope of the testimony. Committees have some discretion to define how they will receive testimony and accept or reject accommodations sought by the executive branch.³⁴ The remainder of this report highlights a few important facets of current practice for each branch.

Budget Testimony

As part of the annual appropriations process, agency leaders are expected to appear before appropriations subcommittees to justify their agencies' budget requests. This means that the heads of Cabinet departments and other agencies are likely to testify before Congress at least once per year. The statutory process for submission of the executive branch's budget request, as established by Congress, makes the President the primary actor in the executive branch budget process and gives the President significant control over the final executive branch budget request submitted to Congress each year.³⁵

Using this statutory authority, the Office of Management and Budget (OMB) has established procedures for agency communications with Congress on the budget that are included in OMB *Circular A-11*.³⁶ These guidelines provide for the confidentiality of budget deliberations within the executive branch and require that agencies submit testimony to OMB for review in advance of budget hearings.³⁷ Outside those limitations, when communicating with Congress, the guidance states that agencies are to "give frank and complete answers to all questions."³⁸ As discussed earlier, agencies may face repercussions if a committee decides they have not been sufficiently forthright.

Legislation and OMB

OMB also has a formal procedure for monitoring and clearing other communications to Congress from executive branch agencies. This guidance is outlined in OMB *Circular A-19*.³⁹ All legislative proposals originating within agencies subject to *Circular A-19*, as well as other

³² See House Rule X, 116th Cong. (2019); Senate Rule XXV, 116th Cong. (2019).

³³ Even Presidents have occasionally offered testimony and answered questions before congressional committees. The most recent example is President Gerald Ford's appearance before the House Judiciary Committee on October 17, 1974, testifying about his decision to pardon former President Richard Nixon. For President Ford's prepared remarks, see "Statement of President Gerald R. Ford," prepared statement offered to the House Committee on the Judiciary, October 17, 1974, <https://www.fordlibrarymuseum.gov/library/document/0019/4520699.pdf>.

³⁴ CRS Report 98-392, *Senate Committee Hearings: Witness Testimony*, by Valerie Heitshusen; CRS Report 98-338, *House Committee Hearings: Witness Testimony*, by Christopher M. Davis.

³⁵ 31 U.S.C. §1101 *et seq.*

³⁶ OMB, *Circular A-11*, Section 22: Communications with Congress and the Public and Clearance Requirements, June 2019, https://www.whitehouse.gov/wp-content/uploads/2018/06/a11_web_toc.pdf.

³⁷ OMB, *Circular A-11*, Section 22, pp. 2-3.

³⁸ OMB, *Circular A-11*, Section 22, p. 2.

³⁹ OMB, *Circular A-19: Legislative Coordination and Clearance*, September 1979.

communications to Congress on pending legislation and formal Statements of Administration Policy, are first submitted to OMB for clearance.⁴⁰

In a February 2017 memorandum, OMB Director Mick Mulvaney described the goals for the clearance process as follows:

- “agencies’ legislative communications with Congress are consistent with the President’s policies and objectives;” and
- “the Administration ‘speaks with one voice’ regarding legislation.”⁴¹

The Confirmation Process

The Senate may also use the confirmation process to attempt to ensure future access to agency leaders. As a general matter, the Senate may choose to reject a nominee if the body believes that he or she would not cooperate with Congress after being confirmed. It has become common practice to address this issue directly during confirmation hearings. Frequently, a Senator has asked the nominee appearing before the committee to agree to respond to future congressional requests if they are confirmed. While these commitments may not be binding on these officials, this process allows the Senate to explicitly establish expectations and put the nominee on the record consenting to this condition.

This January 2017 confirmation hearing exchange between Department of Energy Secretary-designee Rick Perry and Senate Committee on Energy and Natural Resources Chairman Lisa Murkowski is an example of this practice:

The CHAIRMAN. You may go ahead and be seated. Before you begin your statement, I am going to ask you three questions addressed to each nominee before this committee. The first is will you be available to appear before this committee and other congressional committees to represent departmental positions and respond to issues of concern to the Congress?

Mr. PERRY. I will, Senator.⁴²

Areas of Potential Friction

While this report is focused on the avenues of formal communication between the branches in hearings, there are circumstances in which the executive branch is less likely to provide public testimony to Congress. While each situation is unique, there are at least three types of information that are more likely to cause such tension: national security and intelligence matters,⁴³ law

⁴⁰ OMB, *Circular A-19*. For a detailed review of this process, see CRS Report R44539, *Statements of Administration Policy*, by Meghan M. Stuessy.

⁴¹ Mick Mulvaney, Director, OMB, *Memorandum M-17-19: Legislative Coordination and Clearance*, February 2017, p. 2, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-19-OMB.pdf>. Other Administrations have issued similar memoranda on the same topic. See Peter R. Orszag, Director, OMB, *Memorandum M-09-09: Legislative Coordination and Clearance*, January 2009, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-09.pdf; and Mitchell E. Daniels Jr., Director, OMB, *Memorandum M-01-12: Legislative Coordination and Clearance*, February 2001, <https://www.whitehouse.gov/wp-content/uploads/2017/11/2001-M-01-12-Legislative-Coordination-and-Clearance.pdf>.

⁴² U.S. Congress, Senate Committee on Energy and Natural Resources, *Nomination of the Honorable Rick Perry to be Secretary of Energy*, 115th Cong. 1st sess., January 19, 2017 (Washington, DC: GPO 2017), p. 10.

⁴³ 50 U.S.C. §§3091-3093. See also CRS Report R45196, *Covert Action and Clandestine Activities of the Intelligence Community: Framework for Congressional Oversight In Brief*, by Michael E. DeVine.

enforcement investigations,⁴⁴ and executive branch deliberations.⁴⁵ In all of these areas, Administrations have sometimes refused to appear before committees or sought to limit public testimony.⁴⁶

The legal and prudential reasons for limiting disclosure of information in each of these areas may, depending on the circumstances, have particular merit. From the perspective of an executive branch official, the costs of voluntary compliance may outweigh the benefits in some cases, and they may decline to testify.

Congress is under no obligation to accept such conclusions and may seek to compel those officials to testify. However, committees may choose to take these concerns into account. For instance, a committee may agree to limit the scope of a request, allow a witness to decline to testify on specific matters, or conduct a closed door session.

This occurred, for example, during former special counsel Robert Mueller’s testimony before the House Committee on the Judiciary⁴⁷ and the House Permanent Select Committee on Intelligence.⁴⁸ Over the course of his testimony on July 24, 2019, both committees allowed Mueller to decline to answer specific questions for all three of the above reasons. In this case, the committees accepted the limits put forward by Mueller, and they were able to hold the hearings.

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⁴⁴ The clearest example in this category is that Department of Justice attorneys are generally barred from disclosing information about grand jury proceedings by Federal Rule of Criminal Procedure 6(e). See also CRS Report R45456, *Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight*, by Michael A. Foster.

⁴⁵ See CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey.

⁴⁶ For a detailed discussion of the limits on congressional access to information, see CRS Report RL30240, *Congressional Oversight Manual*, by L. Elaine Halchin et al., pp 35-68.

⁴⁷ House Committee on the Judiciary, “Oversight of the Report on the Investigation into Russian Interference in the 2016 Presidential Election: Former Special Counsel Robert S. Mueller III,” <https://judiciary.house.gov/legislation/hearings/oversight-report-investigation-russian-interference-2016-presidential-election>.

⁴⁸ U.S. House of Representatives; Committee Repository, “Hearing: Former Special Counsel Robert S. Mueller, III on the Investigation into Russian Interference in the 2016 Presidential Election,” <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=109808>.

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