

June 10, 2020

Rep. Jerrold Nadler, Chairman  
Rep. Jim Jordan, Ranking Member  
U.S. House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Nadler and Ranking Member Jordan:

We are writing to share our grave concerns about Attorney General William Barr's leadership of the Department of Justice (DOJ).

One of us, Claire Finkelstein, is the Algernon Biddle Professor of Law and Professor of Philosophy and the Faculty Director of the [Center for Ethics and the Rule of Law \(CERL\)](#) at the University of Pennsylvania Carey Law School. CERL is a non-partisan university center dedicated to preserving and promoting ethics and the rule of law in national security practice. She has written extensively on the law of armed conflict and democratic governance and teaches national security, professional responsibility, and the law of armed conflict. The other is Richard Painter, the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School who also serves on the Advisory Council of CERL. He was the chief White House ethics lawyer under President George W. Bush, is an Associate Reporter for the American Law Institute Principles of Government Ethics, and has taught and published on lawyers' ethics for several decades. He teaches professional responsibility, business ethics, and securities regulation. We have both published in *The New York Times*, *The Washington Post*, *The Hill*, and other print media, and have commented extensively on multiple television and radio outlets.

We note that the views expressed here are our own personal views and do not necessarily represent the views of our respective academic affiliations and institutions.

We are moved to write by the conduct of Attorney General Barr during the current public health crisis, as well as in response to the public demonstrations following the killing of George Floyd. Our concerns, however, go back further, to the beginning of Mr. Barr's tenure at the DOJ. The mission of the DOJ, as detailed on its website, is to "[enforce the law and defend the interests of the United States according to the law.](#)" As head of the agency that is tasked with ensuring that others abide by federal law, Mr. Barr has a solemn duty to enforce the law objectively, evenhandedly, and non-politically, as well as to act in the best interests of U.S. national security and democracy. As we explain below, Attorney General Barr has compromised the interests of the United States by failing to enforce the law evenhandedly, and in some cases has directly violated professional ethics rules.

As stated in the [United States Department of Justice Standards of Conduct](#), "Government ethics rules implement this common value: public service is a public trust, meaning that the decisions and actions that federal employees take must be made in the best interests of the American people."<sup>i</sup> The [Standards of Ethical Conduct for Employees of the Executive Branch](#) provides that "Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain."<sup>ii</sup> Unfortunately, such has not been the case at the DOJ under Mr. Barr's leadership. The DOJ appears to be increasingly driven by the aim of promoting the partisan political agenda of President Trump rather than protecting the interests of the American people.

Moreover, in defiance of a long-standing tradition of cooperation with Congress, Attorney General Barr has failed to appear before Congress since [May 1, 2019](#), despite repeated requests for him to do so and [supposed agreement](#) on his part to testify. In evading routine appearances and rebuffing requests for engagement and transparency, Mr. Barr is interfering with congressional oversight and obstructing legitimate congressional investigations. This serious failure of professional responsibility at the DOJ is wholly unacceptable.

In this letter, we will address our concerns with Mr. Barr's dangerously expansive vision of executive power, his inconsistent positions on core constitutional rights, his handling of the Russia and Ukraine inquiries, and his use of the DOJ to engage in politicized counter-investigations. We call upon your Committee to investigate these matters and to ask pertinent questions of the attorney general the next time he appears before you. We also urgently request that the Committee investigate these matters, which we view as of the utmost importance for the national security of this country and the integrity of its democratic governance.

### *1. Attorney General Barr's Dangerously Expansive Vision of Executive Power*

In recent weeks, in the midst of both an unprecedented public health crisis and widespread nationwide protests, Attorney General Barr has attempted to consolidate federal power, seemingly for the purpose of advancing the president's personal political agenda. In March, as the pandemic was beginning to have a major impact in the United States, Mr. Barr [proposed measures](#) designed to suspend court proceedings for defendants in U.S. custody during the pandemic. He subsequently [threatened to take legal action](#) to override the governors' stay-at-home orders, despite clear legal authority given to the states under the Tenth Amendment to the U.S. Constitution to regulate the health, welfare, and safety of its citizens. In May, the DOJ [filed an official statement](#) of interest on the side of plaintiffs in Illinois challenging the governor's stay-at-home orders.

More recently, in preparation for the deployment of federal agents to the states, the president on May 31 declared a small, far left and sometimes violent group called "Antifa" a "[domestic terrorist organization](#)." The effect of this declaration was to create a federal criminal interest in the activities of protesters. Immediately thereafter, Mr. Barr [announced](#) the deployment of Joint Terrorism Task Force (JTTF) agents to identify and arrest members of this supposed terrorist group and restore "law and order on our streets." Although it is legal for the attorney general to dispatch federal agents to research federal crimes, news reporting suggests that the violent agitators were not members of an indistinct group that self-identifies as "Antifa," but rather right-wing instigators and anarchist groups who perceived an opportunity to sow chaos and discredit peaceful civil rights protestors. We are concerned that the identification of the agitators as a domestic terrorist organization and Mr. Barr's decision to dispatch federal agents suggests an orchestrated pretext for federal intervention in the face of lack of enthusiasm for federal engagement from state governors. Indeed, as of the date of this letter, no state governor has requested federal assistance in quelling civil unrest and restoring order.

The Committee should investigate what role, if any, Mr. Barr played in President Trump's widely criticized decision to deploy the military to quell civil unrest in Washington, D.C., and Florida and his threats to do the same elsewhere. The use of federal troops in law enforcement was not justified on Insurrection Act grounds, according to military experts. Former Chair of the Joint Chiefs Mike Mullen [wrote](#) in *The Atlantic* that "we have not crossed the threshold that would make it appropriate to invoke the provisions of the Insurrection Act." If use of the Insurrection Act was unwarranted in this case, these actions probably violated the Posse Comitatus Act, which forbids the deployment of military troops to regulate civilian conduct. It would be important for the Committee to determine whether this is a move that the Attorney General endorsed, or even encouraged, on behalf of the president.

A particularly egregious example of federal overreach occurred on Sunday, June 1, in preparation for President Trump's appearance in front of St. John's Church on Lafayette Park. News outlets [reported](#) that Mr. Barr personally ordered the use of force by U.S. Park Police and National Guard troops on peaceful demonstrators in the area who were lawfully exercising their First Amendment rights in order to clear a path for the president.

Police and National Guard used a chemical agent and rubber bullets on the protestors, a full half hour prior to the 7:00 p.m. curfew, to facilitate a White House plan to have the president photographed, Bible in hand, in front of the church. Mr. Barr [defended](#) his actions, saying that protesters had been violent earlier in the day and that pepper spray is not a “chemical irritant.” No evidence was presented that this use of force was necessary to enable to president to walk to the church, and moreover, Mr. Barr’s [argument](#) that pepper spray is not a chemical irritant was incorrect.

Mariann Budde, the Bishop of the Episcopal Diocese of Washington, D.C., rightly [protested](#) the police violence taking place on church property in her diocese, and Michael Curry, the Presiding Bishop of the Episcopal Church, strongly condemned the attack as well. Former military officers also disapproved. Mike Mullen, in the same op-ed mentioned above, wrote that he was “sickened” to see security personnel “forcibly and violently clear[ing] a path through Lafayette Square to accommodate the president’s visit outside St. John’s Church.” Mullen further remarked on the president’s “disdain for the rights of peaceful protest in this country” as well as the “risk of politicizing the men and women of our armed forces.” Former Secretary of Defense, General James Mattis, also [strongly condemned](#) the attack. The Committee should investigate this incident with care and determine why Mr. Barr ordered the use of force on peaceful protestors.

## *2. Inconsistent Position on Core Constitutional Rights*

In a speech he gave at Notre Dame Law School, Attorney General Barr declared that “militant secularists” were to blame for the nation’s ills. That speech, given in an official capacity and [posted](#) on the DOJ website, suggests an indifference to the prohibition on the “establishment of religion” contained in the First Amendment of the U.S. Constitution. The expression “militant secularists” is a capacious category, one that appears to include anyone who rejects the political agenda of the president and high-ranking members of his administration.

The above instances of insensitivity to core constitutional rights is not new to Mr. Barr. Under his tenure, the DOJ has inconsistently defended First Amendment rights of freedom of speech and religious liberty, seemingly based on political or religious favoritism. For example, Attorney General Barr directed DOJ lawyers to side with politically conservative churches fighting the governors’ stay-at-home orders, [alleging a First Amendment right](#) to hold large in-person gatherings despite a public health emergency, yet he took the actions described above against peaceful protestors opposing racist police action, a concern of moderate and left-leaning political constituents. These actions potentially violate one of the central principles of the rule of law in a democratic nation, namely that the powers of law enforcement should not be used to punish political adversaries and to reward political sympathizers. This aspect of Mr. Barr’s apparent motivations raises deep worries about his leadership and is a theme underlying many of the other instances we identify in this letter.

## *3. Attorney General Barr’s Handling of the Russia and Ukraine Inquiries*

The current crises management aside, there were already concerns about William Barr’s leadership of the DOJ as well as his personal ethics since he became Attorney General, particularly having to do with the Russia and Ukraine matters.

First, Attorney General Barr had potentially insurmountable conflicts of interest that should have led him to follow the lead of his predecessor, Jeff Sessions, and recuse himself from supervising Robert Mueller’s investigation into the relationship between the Trump Campaign and Russia. In addition, other conflicts suggest he should have recused himself from Congress’ investigation of the president’s attempt to enlist Ukraine in his reelection efforts.

With respect to Russia, Mr. Barr had already worked with defense lawyers representing subjects of the Mueller investigation. He apparently interviewed with President Trump to discuss serving as his personal attorney in the

investigation and had prepared a lengthy [memorandum](#) for defense attorneys explaining why Robert Mueller could not prosecute Trump for obstruction of justice. Under the [rules of professional ethics](#), a lawyer is not permitted to represent the government in the same party matter in which the lawyer has participated personally and substantially in the private sector.<sup>iii</sup>

Although the government could in theory waive such a conflict by consenting to the conflicting representation, [ethics rules](#) promulgated by the Office of Government Ethics (OGE) specifically prohibit a federal official from participating in a particular party matter for at least a year if the official has a previous attorney, agent, or consulting relationship with any party to that matter.<sup>iv</sup> In other words, President Trump could not provide the consent necessary to waive Mr. Barr's conflict of interest given that he himself had been a subject of the Mueller investigation.

With respect to Ukraine, President Trump [suggested in his phone call](#) with President Zelensky that he should work with Attorney General Barr and with Rudy Giuliani on two investigations that were important to the Trump political campaign: an investigation of Vice President Biden and his son Hunter, and an investigation of the origins of the Russia investigation. Indeed, a “quid pro quo” proposed by President Trump to Ukraine formed the basis for this Committee's vote to impeach the president in 2019. Given Attorney General Barr's apparent involvement in the Ukraine scandal, he should not have been involved in the DOJ's subsequent investigation of this matter. Concerns over Mr. Barr's failure to recuse himself from the Ukraine matter led the New York Bar Association to [call publicly for him to recuse or resign](#), advice he ignored.

This Committee has already questioned Mr. Barr about the circumstances surrounding the release of the Mueller Report, his mischaracterization of the report in his [four-page summary](#), his redactions from the report, his refusal to share the unredacted report with Congress, and his arguably [misleading testimony](#) to Congress regarding communications he had received from Robert Mueller concerning his summary of the report.

Here, however, we wish to raise two additional and more recent concerns about the Russia investigation. First, it has been reported that the attorney general is using DOJ lawyers to defend his decision not to release the unredacted Mueller Report to Congress or the public, including fighting congressional subpoenas in court. In a March 2020 ruling in one case seeking public access to the report, Judge Reggie Walton, a George W. Bush appointee to the federal district court and formerly the chief judge of the Foreign Intelligence Surveillance Court, ordered the DOJ to submit the unredacted report to the court to consider what content should be unredacted and released to the public. Judge Walton [wrote in his order](#) that Attorney General Barr's 2019 handling of the report had been “distorted” and “misleading.” The Attorney General has given no explanation as to why his use of federal resources to prevent release of the unredacted report, even to Members of Congress with a security clearance, is in the public interest.

Second, Mr. Barr has taken the highly unusual step of intervening in DOJ prosecutions and convictions arising out of the Russia investigation. DOJ political appointees intervened in the Roger Stone sentencing and reversed positions taken by career DOJ prosecutors. Roger Stone is likely familiar with important facts surrounding the Russia investigation—particularly about Russia and Wikileaks—but thus far Stone is not cooperating with prosecutors.

Even more troubling, the [DOJ is now trying to reverse the felony conviction of former National Security Advisor Michael Flynn](#), an extreme departure from the ordinary process for handling criminal cases in the DOJ. The Committee will recall that it was the president's effort to prevent the investigation and prosecution of Michael Flynn in 2017 that likely led the president to fire FBI Director James Comey. Current DOJ efforts to reverse the Flynn conviction create at least the appearance, if not the reality, of the attorney general participating in a continuation of the obstruction of justice scheme described in the [Mueller Report](#), Part II, Subsection B. John Gleeson, the retired judge appointed by Presiding Judge Sullivan as amicus curiae to advise on the Michael Flynn

case, has concluded in his [82-page brief](#) of June 10, 2020, that the DOJ has “abdicated the responsibility” to prosecute the case “solely on behalf of justice,” and has engaged in “a gross abuse of prosecutorial power, attempting to provide special treatment to a favored friend and political ally of the President of the United States.”

We believe that the DOJ’s conduct in these criminal cases violates, among other rules and principles, the DOJ’s [Principles of Federal Prosecution](#).<sup>v</sup>

We also note that Mr. Barr’s involvement in the Ukraine matter extends to participating in the campaign of retaliation against whistleblowers and investigators who President Trump blames for his impeachment. The Committee should carefully explore Mr. Barr’s potential involvement in the president’s firings of inspectors general in several agencies and departments. We are particularly concerned about the Attorney General’s potential involvement in the firing of Michael Atkinson, the Inspector General for the Intelligence Community, who was a whistleblower in the Ukraine scandal. Mr. Barr has [falsely accused](#) Mr. Atkinson of misconduct in order to justify his firing and to excuse retaliation against Mr. Atkinson for fulfilling his duty as an inspector general in communicating about the Ukraine matter with Congress. Mr. Barr should be questioned by your Committee about the specifics of what happened in the Atkinson firing and why.

On an unrelated matter, it also concerns us that Mr. Barr has [directed](#) DOJ attorneys to defy congressional subpoenas regarding the 2020 Census.

#### 4. *“Obamagate” and Other Politicized Counter-Investigations*

Finally, we are concerned that the Attorney General uses the DOJ to reinforce highly partisan conspiracy theories. Earlier this year, at least one news outlet [reported](#) that the U.S. government appeared to link our providing help for Australia in a hostage negotiation with Iran to Australia helping the DOJ with an investigation into the origins of the Russia investigation. The focus was a recorded conversation between Trump campaign worker George Papadopolous and a high-ranking Australian diplomat who Donald Trump supporters accuse of spying on Papadopolous. Your Committee should ask the attorney general what he knew about these overtures to the Australian government and what his or the DOJ’s role was in the investigation.

More generally, Mr. Barr has [supported](#) the president’s conspiratorial remarks that the Obama Administration “spied” on the Trump campaign in 2016, even though [Head of the FBI Christopher Wray](#) and the [DOJ Inspector General Michael Horowitz](#) refuted this claim. Your Committee should ask Attorney General Barr about his support for the “Obamagate” accusations and whether the DOJ is still involved in investigating these disproven 2016 “spying” allegations. The Committee should also seek to ascertain whether Mr. Barr agreed to investigate unfounded allegations for the purpose of supporting the talking points of a political campaign. If so, such actions would violate the [Hatch Act](#).<sup>vi</sup>

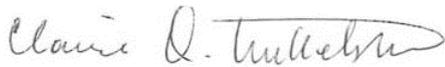
According to several news reports Attorney General Barr has assigned a DOJ prosecutor to [investigate Obama era requests to “unmask”](#) the names of U.S. persons communicating with foreign intelligence targets. Your Committee should ask the attorney general for specific information about how many DOJ officials have been assigned full or part time to “Obamagate” investigations and the reasons for these assignments.

Finally, we are concerned about the number of DOJ attorneys who spent time defending Trump Organization private financial interests in a wide range of matters, including pending suits in three federal circuits involving the Emoluments Clause. In addition, just this past year the [Solicitor General argued to the Supreme Court](#) that under Article II of the Constitution Trump Organization private accountants should not be required to produce subpoenaed financial records to Congress or to a New York State grand jury. Such use of DOJ attorney lawyer time and resources appears to be an impermissible use of official position for private gain in violation of the

Standards of Ethical Conduct for Employees of the Executive Branch.<sup>vii</sup> (As a note, we filed an [amici curiae](#) supporting Cyrus R. Vance in the U.S. Supreme Court case *Trump v. Vance*, one of the three Trump-related financial records cases heard by the Court on May 12, 2020.)

The concerns we have raised in this letter demonstrate that the Attorney General has compromised the interests of the United States and jeopardized our national security by failing to enforce the law evenhandedly. In some cases, he has gone so far as to violate rules of professional conduct and government ethics rules. We request that your Committee, in thorough questioning of the attorney general or otherwise, investigate these matters forthwith. We would be pleased to answer any questions the Committee may have or provide additional information upon request.

Respectfully,



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<sup>i</sup> DOJ Standards of Conduct Section 1-4.010, <https://www.justice.gov/jm/jm-1-4000-standards-conduct> citing 5 C.F.R. § 2635.101.

<sup>ii</sup> 5 C.F.R. § 2635.101(a).

<sup>iii</sup> See ABA Model Rules of Professional Conduct 1.11(d).

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_11\\_special\\_conflicts\\_of\\_interest\\_for\\_former\\_current\\_government\\_officers\\_employees/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_11_special_conflicts_of_interest_for_former_current_government_officers_employees/)

<sup>iv</sup> See 5 CFR 2635.502(b)(1)(iv). <https://www.law.cornell.edu/cfr/text/5/2635.502>

<sup>v</sup> 9-27.260 (“In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by: ... [t]he person's ... political association, activities, or beliefs ...”). <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.260> See also ABA Criminal Justice Standards for the Prosecution Function, (4<sup>th</sup> Ed. 2017) Standard 3-1.6 (“A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion.”).

[https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/)

<sup>vi</sup> 5 U.S.C. § 7323(a). <https://www.law.cornell.edu/uscode/text/5/7323>

<sup>vii</sup> 5 CFR 2635.702. <https://www.law.cornell.edu/cfr/text/5/2635.702>