



## **Report on the Department of Justice and the Rule of Law**

**Under the Tenure of Attorney General William Barr**

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**By**

**Center for Ethics and the Rule of Law Ad Hoc Working Group**

**in partnership with Citizens for Responsibility and Ethics in Washington**

**CREW**

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*The views of the CERL-CREW Ad Hoc Working Group do not necessary reflect those of CERL and its Executive Board, CREW and its Board of Directors, or any other entity.*

## **I. Description of Project, Methodology, and Working Group Members**

### **Working Group Chairs:**

From CERL:

**Claire O. Finkelstein** is the Algernon Biddle Professor of Law and Professor of Philosophy and 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, warfare, and democratic governance. 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.

**Richard W. Painter** is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School and a member of 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 for several decades on professional responsibility, government ethics, business ethics, and securities regulation. He has commented extensively on multiple television and radio outlets.

From CREW:

**Noah Bookbinder** is the Executive Director of Citizens for Responsibility and Ethics in Washington (CREW). He ascended to the position in March 2015 after serving as the Director of the Office of Legislative and Public Affairs at the United States Sentencing Commission, Chief Counsel for Criminal Justice for the United States Senate Judiciary Committee, and a trial attorney for the Department of Justice Public Integrity Section. His expertise lies in the field of public corruption, where he has taught classes at George Washington University Law School and Howard University School of Law.

### **Working Group Members:**

**Jennifer Ahearn** is CREW's Policy Director. She previously served in the Office of General Counsel of the U.S. Sentencing Commission and as a law clerk to Judge Thomas B. Russell of the U.S. District Court for the Western District of Kentucky. She has worked mainly on issues of criminal public corruption law and written for various outlets.

**Virginia Canter**, former Chief Ethics Counsel at CREW, has served as Ethics Advisor to the IMF, White House Associate Counsel to Presidents Clinton and Obama, Senior Ethics Counsel for the Department of the Treasury, Assistant Ethics Counsel for the Securities and Exchange Commission, and General Counsel for the National Endowment for the Humanities.

**George Croner** is a senior fellow in the program on national security at the Foreign Policy Research Institute (FPRI) and a member of CERL's Advisory Council. His specialties include the

law of electronic surveillance, intelligence-gathering, and FISA. George oversaw signals intelligence and FISA compliance at the Operations Division of the Office of General Counsel at the National Security Agency (NSA). He also served as the NSA's chief litigation counsel in high-profile cases like *Westmoreland v. CBS*, *U.S. v. John Walker*, *U.S. v. Wu-tai Chin*, and *U.S. v. Ronald Pelton*, and was the NSA representative to the White House interagency group tasked with investigating and declassifying Iran-Contra intelligence information. George later worked in private practice at Kohn Swift & Graf on complex litigation matters, serving as lead or co-lead counsel in numerous class action suits.

**Stuart Gerson** was the U.S. Acting Attorney General during the early Clinton administration after being appointed Assistant Attorney General for the Civil Division of the Department of Justice by President George H. W. Bush. In this role as the federal government's chief litigator, Stuart represented the government in various high-profile actions. Stuart is a member of the firm Epstein Becker & Green, P.C., in its litigation and health care and life sciences practices. He also works on cases in antitrust, cybersecurity, and securities regulation. He is a founding member of Checks & Balances and ReUnite, organizations of right-of-center former senior governmental officials seeking a return to the rule of law, and is lead counsel in the border wall litigation, *El Paso County v. Trump*.

**Richard Meyer** is the Interim Executive Director of CERL. He served as a judge advocate, field artillery commander, and military intelligence specialist for the U.S. Army from 1985 to 2007. Afterwards, he became an Associate Professor for the Department of Law for the United States Military Academy at West Point. He has also taught at Columbia Law School and the Mississippi College Law School as well as short courses at law schools around the globe. He has served as the chair of the International & Global Outreach committees for the Southeastern Association of Law Schools, the President and Executive Director of the Global Legal Education Associations Consortium initiative and as a member of the editorial committee of Oxford's Journal of International Criminal Justice.

**Elizabeth Rindskopf Parker** is Dean Emerita at the University of the Pacific McGeorge School of Law. Previously, she served as general counsel to the National Security Agency (NSA) and Central Intelligence Agency (CIA) as well as the Principal Deputy Legal Adviser to the U.S. Department of State. Her extensive background in national security and intelligence law is complemented by a diverse array of accomplishments. Elizabeth sat on the Public Interest Declassification Board under President George W. Bush, served as general counsel for the University of Wisconsin System, and published various law review articles and book reviews.

**Shawn Turner** is Professor of Strategic Communication at Michigan State University and a national security communication analyst for CNN. He formerly served as Director of Communication for U.S. National Intelligence at the Office of the DNI, Assistant Press Secretary for Foreign Affairs at the NSC, and Deputy White House Press Secretary for National Security under the Obama Administration. Moreover, Shawn chaired the Information Operations program at the Daniel Morgan Graduate School of National Security and was an adjunct professor at the University of Pennsylvania Carey Law School. He is a member of the NSA's Board of Advisors and frequently writes/comments on current security issues.

## **Consultant:**

**Donald B. Ayer** recently retired as a partner in the Washington office of Jones Day, where his work focused primarily on appellate litigation. He has briefed and argued many appeals and has argued a total of 19 cases in the U.S. Supreme Court. During his career in private practice, he served as president of the American Academy of Appellate Lawyers and as president of the Edward Coke Appellate Inn of Court. Since 2006, he has taught a course in Supreme Court advocacy at Georgetown Law School, and has also taught at Duke, NYU, and Stanford Law Schools. Before entering private practice in the 1990s, Donald served over 10 years in the U.S. Department of Justice, including as an assistant U.S. Attorney during the late 1970s, as U.S. Attorney for the Eastern District of California and as Principal Deputy Solicitor General under President Reagan, and as Deputy Attorney General under President George H. W. Bush. Before that, he clerked for Judge Malcolm R. Wilkey of the D.C. Circuit followed by Justice William H. Rehnquist of the Supreme Court.

## **Supporting Interns:**

**Aedan Collins** is a 2L at the Georgetown University Law Center. She studied international relations at the College of William and Mary and the University of St. Andrews and worked as a Wargames Analyst at Booz Allen Hamilton prior to law school. Her interests include the intersection of law and security, negotiations and dispute resolution, and constitutional law.

**Quinn Dunkak** is a 2L at Penn Law. Originally from New York, Quinn studied international studies at Johns Hopkins and proceeded to manage technology projects at the U.S. State Department and the United Nations. He is interested in international law and national security.

**Andrew Figueiredo** is a 2L at Penn Law. A Kansas native, he studied international development at McGill University, where he wrote a supervised independent research paper comparing the phenomena of populism in Venezuela and Hungary. His interests include antitrust enforcement, First Amendment law, and America's economic security.

**Ashley Fuchs** is a political science and classical studies double major and Benjamin Franklin Scholar in the College of Arts and Sciences at the University of Pennsylvania. She studies contemporary politics alongside ancient political theory with an additional focus on Russia. Originally from Long Island, Ashley has worked with CERL as a research assistant and volunteer on issues regarding election security, the CIA torture program, and Women, Peace and Security efforts.

**Peter Neal** is a 2L at Penn Law. Originally from Wyoming, he attended The George Washington University, where he majored in political communication. He also spent time working in the White House and on Capitol Hill as well as on Secretary Clinton's 2016 presidential campaign and at the Atlantic Council before attending law school.

**Dylan O'Connor** is a 2L at Penn Law. He hails from Vermont and graduated cum laude from North Carolina State University in 2014 with a B.S. degree in biological sciences and a B.A. degree in French language and literature. Prior to law school, Dylan worked in the biotechnology industry in North Carolina, helping to design and engineer processes to develop biotech drug products.

**Henry Scherck** is a 2L at Penn Law. Before entering law school, he worked as a legal clerk at several international law firms. He holds a master’s degree in international development from the London School of Economics and a bachelor’s degree in political science and classics from Union College.

**Alana Sheppard** is a 2L at Penn Law from the San Francisco Bay Area. She majored in politics and classics at Oberlin College, with a semester studying international law and history in the Balkans. She graduated in 2018 and spent a year in Los Angeles before law school. At Penn Law, she volunteers with If/When/How and serves on various student wellness committees.

**Robert Stoffa** is a 2L at Penn Law. He was born and raised in Missouri. Robert attended Washington University in St. Louis, graduating magna cum laude in 2019 with a B.A. degree in history, a second major in political science, and a minor in writing. After law school, Robert plans to pursue a career in commercial litigation.

## **II. Executive Summary**

This report was undertaken by the Center for Ethics and the Rule of Law (CERL), in conjunction with Citizens for Responsibility and Ethics in Washington (CREW), to address serious concerns about the activities of the Department of Justice (“the DOJ”) under the leadership of Attorney General William Barr with respect to the rule of law. CERL and CREW consulted with a bipartisan group of experts consisting of national security specialists, lawyers, retired military, former acting and deputy attorney generals, and law professors and, assisted by student interns, consulted open source reports as well as conducted a series of interviews pertaining to DOJ activities during a period of over 19 months, namely from the beginning of Mr. Barr’s current tenure as attorney general on February 14, 2019 to October 1, 2020.

CERL is a non-partisan interdisciplinary university center at the University of Pennsylvania dedicated to preserving and promoting ethics and the rule of law in national security, warfare, and democratic governance. CREW is a non-partisan nonprofit organization using legal action, in-depth research, and communications to reduce the influence of money in politics and help foster a government that is ethical and accountable. Both organizations have 501(c)(3) status and as such do not engage in the promotion of particular candidates for political office.

In order to ensure that the United States remains a “government of laws, and not of men,” it is critical that our nation’s highest law enforcement office maintain both independence from partisan politics as well as a certain independence from the rest of the executive branch. Despite the fact that the attorney general is appointed by the president and serves at his pleasure, a recognition of the independence of the DOJ from the White House political agenda has been a critical foundation for maintaining the DOJ’s integrity and credibility over the course of its roughly 250-year history. In order to assure the American public that the decisions of the DOJ are based on the merits rather than political favoritism or worse still, electoral politics, prosecutions must not be brought on the basis of partisan politics nor should law enforcement powers of any sort be wielded in favor of the occupant of the Oval Office.

Most importantly, the DOJ serves as a critical support for the rule of law by ensuring that its functions, which include a broad array of prosecutorial, investigative, advisory, and enforcement

activities, not only adhere to the letter of the law but also cleave to the broad array of ethical principles and practices that have enabled the DOJ to remain above the fray of political controversy and maintain its legal and moral authority. Of all the federal agencies, it is most critical that the agency responsible for maintaining and enforcing federal law be scrupulous in holding itself to the four corners of the law. It is also critical that that same agency conduct itself ethically and non-politically. By the same token, the Working Group acted from the concern that any deviation from either ethical or rule of law norms within the DOJ would be particularly damaging to the effort to maintain the rule of law and that a law enforcement authority that distorted the law distorted to suit political aims could damage the concept of legality beyond all recognition.

The Working Group studied eight areas in which concerns have been raised about the conduct of either Attorney General Barr or about DOJ policy under Mr. Barr's leadership from the standpoint of the rule of law: 1) the rollout of the report of Special Counsel Mueller and Mr. Barr's involvement in both presenting it and later redacting it; 2) the involvement of the DOJ in the alleged Ukraine matter; 3) the use of politicized counter-investigations and possible coordination of such investigations across the branches to undercut the origins of the Russia probe; 4) the interference on the part of the DOJ in on-going investigations and prosecutions for political purposes, including advising the president on the use of the pardon power; 5) the use of emergency powers, including deployment of federal agents and federal troops against protestors in Portland and Lafayette Square; 6) the firing or reassignment of individuals whose mandate requires that they remain politically independent, such as Inspectors General of the various federal agencies; 7) the potential involvement of the DOJ in the politicization of the Intelligence Community; 8) the overall politicization of the DOJ, including: apparent political motives behind actions and opinions from the Office of Legal Counsel ("OLC"), multiple U.S. attorney offices, and the Office of the Solicitor General; an assessment of whether Mr. Barr violated the Hatch Act in his involvement in Lafayette Square; and finally, DOJ resistance to congressional oversight and a general unwillingness to cooperate with congressional inquiries plus encouraging similar stances within the rest of the executive branch.

Our work was based mainly on open-source reporting, combined with interviews with our group as a whole or that separate members of our group conducted. Some of the individuals interviewed have agreed to have their names identified in the report, and where this is the case, their thoughts on relevant items of inquiry are quoted and attributed. The full report also details individuals who were invited to speak with us but who declined, including the attorney general himself. The report is most notable for legal analysis the Working Group was able to bring to bear on a wide variety of concerning situations and for the bipartisan nature of its composition. The report also identifies themes that run through the various disparate areas in which the DOJ plays a role, bearing witness to the extraordinary breadth of the DOJ's mandate and the potential for extensive damage to the rule of law where the DOJ misuses its authority for politicized ends. While the three co-chairs of the Report are ultimately responsible for its content, the members in the Working Group uniformly expressed grave concern about the status quo at DOJ and shared most if not all of the specific concerns expressed in this report.

We reached several general conclusions as well as made more specific findings relating to each of the nine areas above. Due to the importance of these findings, they have not been shortened within this executive summary.

## General Findings:

1. Mr. Barr appears to embrace an autocratic view of the power of the executive branch, specifically presidential power, and he views his own extensive authority as flowing from this nearly unbounded view of presidential power. This authoritarian worldview limits the degree to which Mr. Barr regards himself as bound by the rule of law and makes him see himself as entitled to ignore the laws, ethics and historical practices that have helped to ensure that the work of the Department is in line with the values of a democratic nation.
2. The Working Group reached the dismaying conclusion that Mr. Barr regards the DOJ as limited in its operations by nothing other than contrary political power. There is no evidence that Mr. Barr seeks to constrain the operations of the DOJ in accordance with a view of law as a limiting principle on its authority. Law serves at best as a rhetorical tool for enhancing power rather than as a source of constraint on that power.
3. The Working Group came to the reluctant conclusion that Mr. Barr is using the powers of the DOJ as a vehicle for supporting the political objectives of President Donald Trump. There are two senses in which this appears to be the case. First, the attorney general is willing to take measures to please the president or because the president has requested or pressed him to do so. Second, the attorney general appears to be willing to use the powers of his office to attempt to help with the president's bid for re-election. These are distinct phenomena and should be analyzed separately. They raise separate and distinct concerns about the conduct of the attorney general, though both create an ethos of politicization at the DOJ.
4. The Working Group identified recent developments at the Department of Justice as an extreme departure from the reform agenda implemented by Attorneys General Ed Levi and Griffin Bell in the 1970's, a reform that was sparked by concerns about the Department following the Watergate scandal. The Working Group found that because the DOJ plays a vital role in securing and protecting the rule of law, its continued politicization is dangerous to our system of democratic governance. The DOJ appears to have transitioned from a department that regarded itself as bound by the law to a department that treats adherence to law as optional, and moreover as one that uses law for political ends. Using law as a weapon against political enemies poses a lasting threat not only to the integrity of the Department of Justice, but also a threat to the rule of law itself.
5. A consistent theme of the Working Group's findings was that Mr. Barr could not be trusted to represent the work of the department accurately, and that there are consistent problems of veracity in Mr. Barr's public statements and representations. In numerous different areas, the Working Group found that he distorted both law and facts, placing a spin on his own actions, the actions of the DOJ, or the actions of the president's political rivals in a way that was not faithful to reality and seemingly motivated by political considerations.
6. The Working Group found that in several different areas, the actions of the DOJ under Mr. Barr compromised U.S. national security and increased risks to U.S. national interests relative to foreign and domestic enemies. As with the Working Group's other findings, the clear picture emerged that Mr. Barr was more interested in supporting the president's re-

election bid and supporting his general wishes than in protecting the interests of U.S. national security. Examples can be found in the specific findings.

### **Specific Findings:**

1. The attorney general seriously and intentionally mischaracterized the Mueller Report when he presented its findings to Congress and to the American people. The intentional nature of the mischaracterization is made clear by the fact Mr. Barr had received a series of summaries from the Mueller team and yet he substituted his own summary of the report for the summaries the Mueller team had prepared, along with other facts surrounding Mr. Barr's representations, such as objections from Mr. Mueller himself that Mr. Barr disregarded. The purpose of this mischaracterization was indisputably political, namely, to benefit Donald Trump by obscuring the Mueller Report's findings regarding the Russia probe. One individual interviewed by the Working Group, a senior member of the Mueller team, made clear that no one in the Special Counsel's office expected the announcement and the letter produced by the attorney general. Moreover, the attorney general had provided every reason to believe that the public release of the Mueller Report would, in the first instance, consist of a release of summaries that the Mueller team had prepared and which the attorney general knew had been prepared for that purpose. This suggests that the attorney general not only misled the American people with regard to the content of the Mueller Report, but that he also intentionally misled the Mueller team into believing they would have more control over the public roll out of the report than ultimately they did.
2. Attorney General Barr should have recused from the Russia investigation under ethics rules promulgated by the United States Office of Government Ethics pursuant to the Ethics in Government Act of 1978, as well as under state bar ethics rules based on the ABA Model Rules of Professional Conduct that apply to all DOJ attorneys by federal statute. This recusal was required because as a private sector lawyer, Mr. Barr had previously written a 19-page memo about the Mueller investigation for lawyers representing targets of the investigation. Having interviewed personally with President Trump about the possibility of representing him privately in the Mueller investigation, along with Mr. Barr's public statements about the Mueller investigation. The Working Group also discussed whether Attorney General Barr had a conflict of interest that required him to recuse from the Ukraine matter at DOJ, as evidenced by President Trump's having asked the President of Ukraine to contact Mr. Barr in the phone call they had that was the subject of Mr. Trump's impeachment. This refusal to recuse went against a strongly worded opinion of the City Bar in New York where Barr is licensed to practice law. Given the current state of knowledge regarding the basis for Mr. Trump's remarks, the Working Group could not reach agreement about whether Mr. Barr should not have recused with regard to the Ukraine matter. The question for the Working Group ended up being whether Mr. Barr had engaged in communications with Ukraine about the subject matter described in the phone call or other conduct that was the underlying subject matter of the Ukraine investigation.
3. The Working Group disagreed strongly with the Attorney General's refusal to release an unredacted version of the Mueller Report to Congress, an action that obstructed Congressional inquiry and signaled a concerning lack of respect for Congressional oversight. Moreover, the failure to release the unredacted report deepened political rancor

and spawned litigation in the courts relating to House subpoenas and public requests under the Freedom of Information Act. A Republican appointed federal judge strongly criticized DOJ's handling of the Mueller Report, including DOJ withholding of redacted portions of the Report from Congress and the public. While litigation over the report was pending, the Attorney General launched a series of counter-investigations designed to discredit the Russia investigation as well as the Mueller Report, a move the Working Group saw as highly problematic.

4. The Attorney General has also continued to make misleading public statements about the Russia investigations as well as counter-investigations, seemingly in order to provide political cover for President Trump. This conduct fits in with a consistent pattern demonstrated elsewhere in this Report: An Attorney General who is determined to use the DOJ in every possible way to provide political cover and political support for President Trump, regardless of what the rule of law requires.
5. President Trump in his phone call with the President of Ukraine described Attorney General Barr as having a role that is entirely inappropriate for any lawyer at DOJ, including the Attorney General: investigating the president's political opponents and possibly coordinating with Rudy Giuliani, a private lawyer representing the president's political campaign. To the extent the conduct for which President Trump was criminal it is important to know whether the Attorney General was involved. Congress should investigate.
6. Attorney General Barr apparently encouraged the Office of Legal Counsel (OLC) to issue an opinion to justify concealment of the Ukraine whistleblower's report from Congress. The Attorney General also has supported President Trump's firing of Inspector Generals in the middle of the Ukraine scandal and other investigations.
7. The Working Group is concerned about the impropriety and the intentions behind the Durham investigation, as well as other US Attorney investigations that are currently taking place relating to the origins of the probe into the Trump campaign to discredit the Russia investigation. Even though Justice Department policy forbids public comments on pending investigations, Attorney General Barr has repeatedly given interviews on Fox News and elsewhere about the counter-investigations, especially the Durham investigation. One of the clearest and most overriding concern of the Working Group to come out of the present study is concern about the intended use of the counter-investigations against political enemies of the president, especially in the immediate run up to the election. The Working Group expressed grave concerns that Mr. Barr is attempting to use these investigations for the purpose of announcing high level indictments in the immediate run up to the November elections. The Working Group also noted that the House and Senate do not seem fully prepared for politically motivated indictments or other politicized uses of these investigations in the run up to the November election. Congress must be prepared to confront such maneuvering should it in fact occur.
8. The Working Group also concluded that there has been extensive political and politically-motivated interference in individual prosecutions by the White House and Attorney

General – particularly in the cases of Michael Flynn and Roger Stone. This interference goes well beyond what has occurred in previous administrations and is a violation of Justice Department practices and procedures. In the case of Roger Stone, the Working Group particularly noted the likelihood that Mr. Stone’s sentence was commuted, rather than Mr. Stone receiving a pardon, in order to assist with the effort to immunize Mr. Stone from having to testify in any future proceeding involving Mr. Trump. With commutation of Mr. Stone’s sentence, but no pardon for his underlying actions, Mr. Stone could still claim he could not respond to a subpoena on the grounds that it would violate his Fifth Amendment privilege against self-incrimination. This conclusion reinforced the impression that the actions of the president in the area of pardons and commutations, is politically motivated. DOJ, which has its own pardon office to advise the president, thus has apparently played a role that facilitated and implicitly condoned the President’s abuse of the pardon and commutation power, probably to silence witnesses in ongoing investigations. This is yet another obstruction of justice problem.

9. The DOJ has played a crucial role in the Trump Administration’s response to various national “emergencies” of differing orders of magnitude, as well as some perceived, but not actual, emergencies. The Department has supported the Trump Administration in using “emergency” arguments to abrogate the right of Congress to determine appropriation of federal funds for a proposed border wall. The federal response to both the COVID19 emergency and to civil unrest after the police killing of George Floyd in Minneapolis has been highly politicized. DOJ has supported the Trump Administration in applying inconsistent legal standards to critically important questions such as First Amendment freedom of speech and assembly and federalism issues surrounding states’ prerogative to protect public health and maintain order under the Tenth Amendment. The DOJ supported private lawsuits against states responding to the COVID19 pandemic with temporary stay at home orders. On the other hand, in at least one instance the Attorney General gave orders to federal officers to use tear gas and pepper spray as well as other physical force on peaceful protesters so the President could have a political photo op of himself outside a church in Washington, DC.
10. DOJ manipulates loopholes in the law to justify use of federal officers for violent crackdowns on dissent, including in Portland, Oregon and in Lafayette Park in the District of Columbia where federal troops were used against peaceful protesters. DOJ’s actions raise troubling questions under the First Amendment and under applicable statutes, regulations and procedures for deployment of federal forces including the National Guard. DOJ is also supporting the President’s use of federal armed forces to encroach upon the legitimate law enforcement prerogative of the states guaranteed under the Tenth Amendment, the Posse Comitatus Act and other statutes.
11. DOJ has a troubling approach to civil liberties and surveillance, particularly rights under the First Amendment. There has been ramped up FBI/DOJ surveillance and other law enforcement activities aimed at the political left after the President’s declaration – without any basis in applicable law -- of “antifa” as a terrorist organization. There have also been reports of federal agents tapping the cell phones of protesters in Portland, presumably without a warrant and if so in violation of the Fourth Amendment.

12. Several recent DOJ actions likely violate the Hatch Act, which prohibits federal officials from using their official position to influence the results of a partisan election. These actions include the possibility that the Attorney General had a role in the Ukraine scandal as described in the President's phone call with the President of Ukraine, the Attorney General's actions in clearing Lafayette Park of peaceful protesters to facilitate a political photo op for the President holding a Bible upside down outside a church, and developments in DOJ's Russia counter investigations that are intended to influence the November 2020 election. One member of the Working Group had previously filed a Hatch Act complaint against Mr. Barr following his conduct in the Lafayette Square incident.
13. Many members of the Working Group are concerned that DOJ's procedures for selecting federal judges have been excessively politicized -- with a lot of input coming from a few outside organizations such as the Federalist Society -- although we note that this has occurred in past administrations as well. Legitimate questions arise as to whether these outside organizations are inappropriately outsourced functions that should be performed in DOJ and whether lobbying of DOJ with respect to judicial nominations meets the bare minimum standards of the Lobbying Disclosure Act of 1995 as amended.
14. DOJ has consistently resisted Congressional oversight, principally by refusing to comply with House of Representatives subpoenas. With respect to enforcement of House subpoenas the Attorney General is so flagrant as to ask the Speaker of the House "did you bring your handcuffs." DOJ also advises other federal agencies against subpoena compliance and litigates in support of other federal agencies -- and even the Trump Organization -- in ignoring subpoenas. In two recent cases, *Trump v. Mazars* and *Trump v. Vance*, the Supreme Court ruled that subpoenas directed at the President are enforceable if there is a demonstrable need for the information, and that the president must comply with a valid subpoena whether it is issued by Congress or by a grand jury. Most if not all of the House of Representatives subpoenas directed at DOJ are supported by a demonstrable need for the information. DOJ nonetheless refuses to comply with these subpoenas.
15. The Attorney General has an active role in firing United States Attorneys engaged in investigations that get too close to the President and his associates, most notably in the Southern District of New York (SDNY). There has also been a reshuffling of US Attorneys in the Eastern District of New York (EDNY) where the Ukraine investigations are pending. These actions if motivated by a desire to stymie investigations are probably a repeat violation of the obstruction of justice statute, 18 U.S.C. §1512(c)(2) (prohibiting criminal penalties for anyone who "corruptly ... obstructs, influences, or impedes any official proceeding, or attempts to do so"). This statute appears to have been violated with President Trump's 2017 firing of FBI Director James Comey, as described in Part II of the Mueller Report. This obstruction of justice statute continues to be ignored and DOJ adheres to the position taken in a 19-page memo written for Trump's personal lawyers by Mr. Barr in private practice arguing that the president by removing a prosecutor or investigator cannot obstruct justice because he has the power to remove federal officers under Article II of the Constitution. The Supreme Court, however, has made it clear, most

recently in *Trump v. Vance*, that the criminal laws do apply to the president. Presumably this would include this and other obstruction of justice statutes.

16. The Working Group concluded that there is a grave danger to the Intelligence Community from politicized DOJ investigations, intimidation and potential prosecutions, and that this danger poses in turn a grave risk of harm to U.S. national security, which depends heavily upon effective intelligence operations and a collaborative relationship between the president and the IC.
17. The use of a criminal investigation is ill-suited to examining the process of foreign intelligence analysis, that it poses unnecessary risks to intelligence sources and methods, that it intimidates and alienates foreign intelligence analysts, and that it chills the analytic process in a way likely to undermine the candor essential to producing the best intelligence information for national policymakers. The cumulative effects are likely to increase the attrition of talented intelligence personnel and neutralize the concept of “speaking truth to power” that is essential to the effective use of intelligence in national policy decisions. All of this weakens prospective U.S. intelligence capabilities to the advantage of Russia and other adversaries in competition with the interests and goals of the United States. Careless investigations also risk compromising intelligence sources and methods. This will likely bring high attrition in intelligence agencies and a climate of fear among intelligence personnel. This also creates a disincentive to share information, particularly information that risks exposing/embarrassing political appointees. This in turn will bring a substantial weakening of US intelligence gathering going forward, greatly advantaging Russia and other adversaries.
18. The Attorney General inappropriately has mixed religious views with the official business of the DOJ by, among other things, attacking “militant secularists” in an October 2019 speech given at Notre Dame Law School that was posted on the DOJ website. This was both an endorsement of one set of religious views and a denunciation of another set of religious views in an official speech. The Attorney General also may have conducted other official DOJ business during his visit to Notre Dame, such as discussion of DOJ amicus briefs in religious freedom cases, including one case involving the archdiocese of Indianapolis, and possibly may have discussed nominations to the Supreme Court and other federal courts. Mixing these official DOJ functions with an official capacity endorsement/denunciation of particular religious views raises very troubling questions under the First Amendment establishment clause and, because of Barr’s attack on “militant secularists” in his official speech, the First Amendment free exercise clause. The Attorney General also may have violated federal ethics rules prohibiting official capacity endorsement of private organizations.
19. The Department of Justice has aggressively targeted individuals who have chosen to write books or articles that are unflattering to President Trump. Particular cases in point are the efforts on the part of the DOJ to interfere with the publication of former National Security Advisor John Bolton’s book, as well as another book written by former Trump attorney Michael Cohen. In both of these instances, we believe that the actions of the DOJ infringe

on the First Amendment rights of the authors and publishers, and subvert the criminal process for political purposes.

A common theme for the above points is the use of the DOJ to further President Trump's 2020 re-election campaign. The Working Group had been particularly concerned that Mr. Barr was determined to use the Durham investigation to justify President Trump's conduct in the 2016 campaign and to discredit the Russia investigation of Robert Mueller. Until quite recently, all signs pointed towards a politically orchestrated "October surprise," in which John Durham or one of the other U.S. Attorneys assigned to investigate the origins of the Russia probe would announce his findings prior to the election, which Mr. Barr would then use to hand down some high level indictments from the Obama Administration, including possibly Vice-President, now presidential candidate, Joe Biden, as well as large number of individuals from the Obama Intelligence Community.

These concerns were heightened last week, when DOJ changed its policies to allow prosecutors more discretion to file indictments and announce investigations prior to the election.<sup>1</sup> In addition, the president said in a phone call on October 8, 2020 on Fox News and Fox Business that Mr. Barr has "all the information he needs" in order to bring indictments of top Democrats like Joe Biden and Barak Obama.<sup>2</sup> Several news outlets have reported, however, that Mr. Barr has said that the Durham report will not be ready until after the election.<sup>3</sup> Reporting suggests that Mr. Trump is disappointed in Mr. Barr on this point, saying, "Unless Bill Barr indicts these people for crimes, the greatest political crime in the history of our country, then we're going to get little satisfaction unless I win and we'll just have to go, because I won't forget it," a thinly veiled threat to Mr. Barr. The following day, on October 9, President Trump ratcheted up his pressure on the Department of Justice in a radio interview with Rush Limbaugh, calling the delayed Durham report "a disgrace," and said that Hillary Clinton should be "jailed."<sup>4</sup>

### **Recommendation:**

In light of the severity of the abuses set forth in this Report, the Working Group recommends that the House of Representatives open a formal impeachment inquiry into the conduct of Attorney General Barr. The House should leave that inquiry open until most of the relevant information has been obtained from DOJ, by subpoena or otherwise. We note that under the recent *Mazars* holding the legal case for prompt enforcement of subpoenas by federal courts would be even stronger if there were an open impeachment inquiry into the conduct of the Attorney General, and most likely

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<sup>1</sup> See Justice Dept. Eases Election Fraud Inquiry Constraints as Trump Promotes False Narrative, Michael S. Schmidt and Katie Benner, New York Times, October 7, 2020 accessible at <https://www.nytimes.com/2020/10/07/us/politics/justice-department-election-fraud.html>

<sup>2</sup> Peter Baker and Maggie Haberman, *Trump Lashes Out at His Cabinet With Calls to Indict Political Rivals*, The New York Times, Oct. 8, 2020. <https://www.nytimes.com/2020/10/08/us/politics/trump-calls-to-indict-political-rivals.html>

<sup>3</sup> Alayna Treene, *Barr Tells Republicans Durham Report Won't Be Ready by Election*, Oct. 9, 2020. <https://www.axios.com/barr-durham-report-election-3c02ec6a-7613-4083-b35c-4844de6da16b.html>.

<sup>4</sup> Anne Gearan, et. al., *Trump, Lagging in Polls, Pressure Justice Department to Target Democrats and Criticizes Barr*. Oct. 9, 2020. [https://www.washingtonpost.com/politics/trump-barr-durham-russia/2020/10/09/05ed9842-0a40-11eb-a166-dc429b380d10\\_story.html](https://www.washingtonpost.com/politics/trump-barr-durham-russia/2020/10/09/05ed9842-0a40-11eb-a166-dc429b380d10_story.html)

had an impeachment inquiry been underway when the subpoena to Mazars for Donald Trump's financial records. The conduct described in this Report is more than enough to justify opening such an impeachment inquiry and we recommend that the House Judiciary Committee do so at once. Potential charges include abuse of power, obstruction of Congress and obstruction of justice. If there is sufficient evidence of high crimes and misdemeanors by the Attorney General, the House should then vote out articles of impeachment against the Attorney General.

**Additional Recommendations:**

1. Strengthen the independence of the special counsel.
2. Staggered ten-year terms for U.S. attorneys.
3. Staggered ten-year terms for IGs
4. Strengthen the independence of career DOJ attorneys in all departments.
5. Require recusal of presidential appointees in the DOJ from particular party matters involving the president's personal financial interests, the president's family or his campaign.
6. Strengthen the legal protections for inspectors general and expand their purview.
7. Strengthen the independence of members of the Intelligence Community, specifically ODNI.
8. Ensure vigorous use of the congressional budgetary process to engage in oversight. Require regular testimony from the attorney general.
9. Move some of the oversight responsibility from the Office of Professional Responsibility (OPR) to the inspectors general. The Inspector General Access Act of 2019 (S. 685 / H.R. 202) is currently pending in Congress, having been co-sponsored by eight Democrats and six Republicans in the Senate and three Democrats and one Republican in the House.
10. Require all DOJ attorneys to comply with ethics advice from DOJ ethics officials.
11. Legislatures in states with active investigations of individuals who are held to be immune from prosecution while in office because of interpretations of federal law should amend their criminal statutes to toll their statutes of limitations during those periods of service.
12. Congress should expand the reporting requirements of the Federal Election Campaign Act to require notice of any foreign individual's or entity's offer of any assistance, direct or implied, material or otherwise, to a covered political campaign or candidate.

Details on these recommendations appear in the full Report below.

### III. Introduction

This report is a broad survey of certain activities conducted by the DOJ from January 2019 to the present under the leadership of Attorney General William Barr. Its purpose is to assess the DOJ's adherence to rule of law values during Mr. Barr's tenure to date and, where there has been divergence from those values, the likely impact of the DOJ's actions. The importance of the DOJ's fidelity to the rule of law cannot be overstated. The DOJ has an extraordinarily broad portfolio, ranging from traditional investigatory and prosecutorial activities; to law-enforcement functions, advisory communications with the president, including on judicial nominations, representing the interests of the federal government in judicial matters, and more. All DOJ activities are central to the rule of law in the United States in that they effectively translate federal law on the books into federal practice surrounding and enforcing that law. In the gap between formal law and practice lies interpretation of the law, historical practices of the DOJ, ethical norms of professional practice, and the ethical norms of general and personal morality. Adherence to the rule of law depends as much on the patterns of normative practice, on the judgment calls of DOJ personnel, on the character of DOJ leaders and their motivations, and ultimately on the integrity with which the DOJ conducts its work as it does on adherence to the formal parameters of black letter law. Of all federal agencies, it is most critical that the agency responsible for maintaining and enforcing federal law be scrupulous in holding itself to the ideals of dispassionate and objective uses of the law and the awesome power of the federal government to enforce that law.

The DOJ serves as a critical support for the rule of law by ensuring that its functions, which include a broad array of prosecutorial, investigative, advisory and enforcement activities, not only adhere to the letter of the law but also cleave to the broad array of ethical principles and practices that have enabled the DOJ to remain above the fray of political controversy and maintain its legal and moral authority. By the same token, there is concern that any deviation from either ethical or rule of law norms within it would be particularly damaging, and a law enforcement authority that distorted the law to suit political aims could damage the concept of legality in the United States beyond repair. When law itself is distorted to justify the accomplishment of illegal or immoral aims, the law itself sustains significant loss of moral authority.

This report was undertaken to examine potential politicization in the aims and practices of the DOJ and whether the changes in it may be causing lasting damage to democratic norms, posing a particular risk to the maintenance of civil and constitutional rights. This has come from a decaying, or in some cases an all-out assault on, the guardrails that hold the democratic norms of our system in place, particularly with regard to the securing of individual rights and the uses of the DOJ's investigatory powers that have threatened those rights.

This project grew out of the summer internship program of the Center for Ethics and the Rule of Law (CERL), an annual program that this year took place from June 29 to August 21, 2020. Each year, CERL identifies current research topics of relevance to national security, democratic governance, and the rule of law, and professionals guide the students in conducting in-depth research on the selected topics.

In accordance with CERL's focus on interdisciplinary discussion and research, CERL Faculty Director Claire Finkelstein and CERL Advisory Council member Richard Painter assembled a team of diverse subject matter experts into a Working Group to consult with the interns on this

project. At Professor Painter's suggestion, CERL partnered with the nonpartisan organization Citizens for Responsibility and Ethics in Washington (CREW), led by its Executive Director Noah Bookbinder, as well as Jennifer Ahearn. Virginia (Ginny) Canter, a former White House and government ethics lawyer and until recently CREW's Chief Ethics Counsel, also was in the Working Group.<sup>5</sup> CERL added two members from its Executive Board, Elizabeth Rindskopf Parker and Shawn Turner, and another member of its Advisory Council, George Croner. Former Acting Attorney General Stuart Gerson was recruited to join the group. Richard Meyer participated as the Interim Executive Director of CERL, and the student members of the Working Group served primarily under his direction. Former Deputy Attorney General Donald Ayer served as a consultant to the Working Group.

After the Working Group was assembled, Professor Finkelstein and Professor Painter, as Co-Chairs of the Working Group, identified 17 different areas of research topics for the CERL summer interns. These 17 areas were combined into nine assignments that incorporated a series of questions and research tasks. Individuals with whom the Working Group might speak were also identified so that interviews might be scheduled for the group as a whole.

As the interns prepared their research documents, they met daily with Mr. Meyer and weekly with the Working Group to discuss in-progress findings and receive further guidance. All meetings were virtual. Professor Finkelstein led the Working Group meetings, and breakout rooms were organized to give the interns the opportunity to converse with the Working Group member(s) with expertise in their respective area of research.

While the interns were performing this research, the Working Group began conducting interviews. It invited 29 individuals to interview with the group; 17 accepted and were interviewed. Of those 17, nine granted permission for their names to be included in the interview list of this report. Those nine can be found below at Appendix F as well as the 12 who declined or did not respond to the invitation. Professor Finkelstein led these interviews, but the entire Working Group was invited and most attended every session. All interviews were conducted in the Zoom virtual environment.

The interns provided their final reports on the nine assignment at the end of the internship. Each presented his or her findings to the group in both oral and written form. The chairs assembled the written findings into this report and sent it to the Working Group for comment. The chairs then integrated these comments.

The Working Group unanimously reached certain broad conclusions about the functioning of the DOJ under the leadership of Mr. Barr. First, it concluded that the DOJ has been considerably more politicized in all its relevant functions under the tenure of Mr. Barr than it previously was, even under former Attorney General Jeff Sessions. Second, the Working Group concluded that the DOJ's politicization was based on two factors: A general willingness of Mr. Barr to fulfill the requests of President Trump, and a clear attempt to press the DOJ into service to assist in the president's bid for re-election. The group identified the willingness on the part of Mr. Barr to use the DOJ to assist the president's re-election campaign as part of a broader pattern, one that has unfolded across several federal agencies and close advisors. Professors Finkelstein and Painter, for example, had identified this same pattern with respect to the Department of State, noting, for

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<sup>5</sup> Note that Ms. Canter is no longer affiliated with CREW.

example, that Secretary Mike Pompeo has acted similarly with regard to the State Department and has used his official position in numerous respects to bolster the president's re-election chances. Professors Finkelstein and Painter had filed a Hatch Act complaint against Secretary Pompeo based on the speech he gave at the Republican National Convention, in which he broadcast from Israel's Western Wall in the middle of a diplomatic trip relating ostensibly to securing a "peace deal" in the Middle East.<sup>6</sup> Professor Painter also filed an earlier Hatch Act complaint against Mr. Barr for his role in the Lafayette Square incident and the president's campaign-style photo-op in front of St. John's Church across from the White House.<sup>7</sup>

The Working Group was especially concerned about the use of the DOJ's investigatory authority to target political competitors and paid particular attention to the possibility that one or more of several ongoing investigations relating to the origins of Crossfire Hurricane might be deployed as a part of an "October surprise" designed to shift the attention of voters immediately prior to the election. The group devoted considerable attention to interviewing individuals who might be aware of the intentions behind Mr. Barr's use of the Durham investigation, in addition to two other U.S. attorney investigations. In addition to the three U.S. attorney investigations, there are currently three majority-led Senate investigations of a similar nature, with 53 individuals on a "subpoena list" who may be asked to testify regarding the origins of the Russia probe. The Working Group explored whether the DOJ was playing a role in coordinating these various counter-investigations across the branches.

The concerns of the Working Group were not alleviated on July 28, 2020, when Mr. Barr testified before the House Judiciary Committee. At that hearing, he suggested that he might well use the Durham investigation as a political tool prior to the election on November 3. Several times in the hearing Republican members of the House Judiciary Committee referenced their hopes that the Durham investigation would uncover something soon, and when pressed by Democratic members of the committee, Mr. Barr refused to commit to a non-politicized use of the results.

Similar remarks about pending investigations later in the summer only heightened those concerns. On August 13, despite DOJ policies prohibiting public comments by the DOJ on pending investigations, Mr. Barr gave an interview with Sean Hannity on Fox News in which he said, there will be "a development" Friday [August 14] in the Durham investigation, "indicat[ing] that things are moving along at the proper pace as dictated by the facts in this investigation." Mr. Barr emphasized, "[W]e need to get the story of what happened in 2016 and '17 out," adding "[I]f people crossed the line, if people involved in that activity violated criminal law, they will be charged." Furthermore, he told Hannity the timing of the case was not being dictated by the

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<sup>6</sup> See Brian Slodysko, *Watchdog groups say convention appearances broke Hatch Act*, WASHINGTON POST (Aug. 27, 2020), [https://www.washingtonpost.com/politics/pompeos-jerusalem-speech-violated-hatch-act-complaint-says/2020/08/27/8f86480e-e87d-11ea-bf44-0d31c85838a5\\_story.html](https://www.washingtonpost.com/politics/pompeos-jerusalem-speech-violated-hatch-act-complaint-says/2020/08/27/8f86480e-e87d-11ea-bf44-0d31c85838a5_story.html) ("[T]wo law school professors filed a separate complaint against Secretary of State Mike Pompeo, arguing he committed an 'egregious violation' by delivering a video-taped speech from Israel).

<sup>7</sup> See Letter from Richard Painter, Univ. of Minn. L. School, to Henry Kerner, Special Counsel, Office of the Special Counsel & Emory Rounds, Dir., U.S. Office of Gov. Ethics (June 15, 2020), <https://www.law.upenn.edu/live/files/10561-painter-complaint-hatch-act> ("I request that you investigate violations of the Hatch Act, as well as misuse of official position, 5 CFR 2635.702, by the Attorney General and other officials in the Department of Justice in connection with President Trump's presidential campaign photo opportunity that took place outside St. John's Church").

election, stating, “We're aware of the election. We're not going to do anything inappropriate before the election. But we're not being dictated by this schedule.”<sup>8</sup>

The development on August 14 turned out to be a guilty plea by Kevin Clinesmith, a former FBI assistant general counsel who was charged with false statements for altering an e-mail from the CIA that investigators relied on in 2017 to seek renewal of a FISA court order allowing a wiretap on the former Trump campaign adviser Carter Page.<sup>9</sup> Nothing Clinesmith said in his guilty plea implicated anyone higher up in the FBI in wrongdoing or linked anyone in the Obama Administration to an effort to “spy” on Trump or his campaign. This was a very strange thing—hardly news—for the attorney general of the United States to be discussing on Fox News, particularly when the DOJ almost never talks with the press about pending investigations until indictments or plea deals are announced and indeed has policies against it. The group discusses the Durham investigation further in Section V.3. of this report and specifically on Mr. Barr’s departure from DOJ policies about public statements in Section V.3.e.

The objective of these highly politicized counter-investigations appears to be to discredit the DOJ’s own investigation of Russian election meddling in 2016 to distract and confuse the American public in the run-up to the election, and to convince the American electorate that Trump and his campaign look like the victims of an illegitimate effort on the part of the Obama Administration to interfere with the Trump campaign. Using the DOJ’s criminal investigatory powers as a tool for shifting election messages and aiding the president in his bid for re-election is an abuse of office by Mr. Barr. The Working Group felt that the politicized investigations are cause for grave concern about the functioning of the DOJ under his leadership.

It is important to bear in mind that the politicized use of the above-mentioned counter-investigations is occurring as intelligence reports show that Russian actors are continuing their activities from the 2016 election and using a variety of methods in an effort to influence the 2020 election.<sup>10</sup> On August 14, the Intelligence Community’s top election security official William Evanina released a statement saying that “We assess that Russia is using a range of measures to primarily denigrate former Vice President Biden and what it sees as an anti-Russia ‘establishment’”; however, the statement also said that China and Iran are attempting to damage Trump.<sup>11</sup>

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<sup>8</sup> Charles Critz, *Barr teases Friday ‘development’ in Durham probe, says investigation won’t be ‘dictated to’ by election*, Fox NEWS (Aug. 13, 2020), <https://www.foxnews.com/politics/barr-durham-report-development-friday-election-timing>.

<sup>9</sup> Matt Zapotosky & Devlin Barrett, *Ex-FBI lawyer, accused of falsifying document in probe of Trump’s campaign, to plead guilty*, WASHINGTON POST (Aug. 14, 2020), [https://www.washingtonpost.com/national-security/kevin-clinesmith-fbi-trump-russia-john-durham/2020/08/14/2f579994-de26-11ea-809e-b8be57ba616e\\_story.html](https://www.washingtonpost.com/national-security/kevin-clinesmith-fbi-trump-russia-john-durham/2020/08/14/2f579994-de26-11ea-809e-b8be57ba616e_story.html).

<sup>10</sup> SEN. SELECT COMM. ON INTELLIGENCE, REPORT ON RUSSIAN ACTIVE MEASURES, CAMPAIGNS, AND INTERFERENCE IN THE 2016 U.S. ELECTION VOL. 5: COUNTERINTELLIGENCE THREATS AND VULNERABILITIES (2020); Spencer P. Boyer, *Here We Go Again: Russia Gears Up to Interfere in 2020 Election With Coronavirus Disinformation*, FOREIGN POLICY (Apr. 30, 2020), <https://foreignpolicy.com/2020/04/30/2020-election-interference-russian-coronavirus-disinformation/>.

<sup>11</sup> Zachary Cohen & Manu Raju, *Intel officials tell Congress that Russia is spreading false information about Biden*, CNN (Aug. 7, 2020), <https://www.cnn.com/2020/08/07/politics/us-intelligence-russia-election-interference-biden/index.html>.

According to its website, the mission of the U.S. Department of Justice is to “enforce the law and defend the interests of the United States according to the law.”<sup>12</sup> The Working Group concluded that Mr. Barr has compromised the interests of the United States by failing to enforce the law evenhandedly; has compromised the national security interest of the United States by interfering with investigations of illegal conduct that pose a threat to our national security, including with respect to Russia and Ukraine; and in some cases has directly violated professional ethics rules. Based on a series of specific findings that the Working Group identified and relying upon its examination of public sources as well as corroborating interviews with a variety of individuals knowledgeable about DOJ functioning both prior to and following the beginning of Mr. Barr’s tenure, the Working Group concluded that there is sufficient basis for Congress to conduct a detailed impeachment inquiry into the record of Mr. Barr during his most recent tenure at the DOJ. The Working Group notes additionally that in light of two recent judicial cases, *Trump v. Mazars* and *Committee on the Judiciary v. McGahn*, it is critical that Congress have a clear statement of the basis for its legislative purpose in conducting investigations. The group believes that Congress and the American people are entitled to immediate answers in the face of strong evidence that Mr. Barr is subordinating the legitimate work of the DOJ to the partisan political purpose of re-electing the president. Should Congress determine that this conclusion is ultimately correct, upon a more detailed investigation than the CERL-CREW Working Group has the capacity to conduct, it seems highly likely that impeachment proceedings would be warranted against Mr. Barr.

## **IV. Historical Background**

### **1. The Department of Justice and the Levi-Bell Reforms**

Edward Levi, a Republican and son, grandson, and great grandson of prominent rabbis, was a law professor and then president at the University of Chicago before being appointed attorney general by President Gerald Ford. Griffin Bell, a Democrat and son of a Georgia farmer, graduated from Mercer University Law School; after years of law practice he served for 15 years as a Georgia Court of Appeals judge and was a neighbor of Jimmy Carter. These two very different men shared a steadfast commitment to reforming a Department of Justice that had seen one attorney general, John Mitchell, go to prison and another, Richard Kleindienst, resign after lying to Congress about his taped telephone conversations with President Richard Nixon. Levi and Bell were determined to depoliticize the DOJ and restore its independence.

Attorney General Levi was appointed in the aftermath of the Watergate scandal. His reforms included guidelines for FBI surveillance and other activities, reinforcing the ideal of professionalism and adherence to separation of powers and the rule of law and new DOJ rules and structures to assure integrity of DOJ actions.<sup>13</sup> As Levi stated:

Nothing can more weaken the quality of life or more imperil the realization of the goals we all hold dear than our failure to make clear by words and deed that our

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<sup>12</sup> PERFORMANCE.GOV, DEPT. OF JUST., Agency Plans and Reports (Last Accessed Sept. 11, 2020), <https://www.performance.gov/justice/#:~:text=To%20enforce%20the%20law%20and,to%20ensure%20fair%20and%20impartial.>

<sup>13</sup> See Levi’s book, “[Restoring Justice: The Speeches of Attorney General Edward H. Levi](#).” For an overview of the Levi-Bell initiative see <https://www.nytimes.com/2018/04/29/opinion/the-sense-of-justice-that-were-losing.html>

law is not an instrument of partisan purpose, and it not to be used in ways which are careless to the higher values which are within all of us.<sup>14</sup>

This was in stark contrast with President Richard Nixon’s perspective: “We have never used (our power). We haven’t used the (Federal) Bureau (of Investigation) and we haven’t used the Justice Department, but things are going to change now. And they’re going to change, and, and they’re going to get it right.”<sup>15</sup> German legal philosopher Carl Schmitt in the 1920s provided yet another rationale for this use of executive power: “The specific political distinction ... is that between friend and enemy.”<sup>16</sup> Moreover, according to him, “Sovereign is he who decides on the exception.”<sup>17</sup>

It is Attorney General Levi’s vision that is reflected in the stated mission of the DOJ, as noted above, to “enforce the law and defend the interests of the United States according to the law.”<sup>18</sup> As head of the agency tasked with ensuring that others abide by federal law, the attorney general 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.

Unfortunately, however, it is Richard Nixon’s vision that too often reflects the reality of how the DOJ is sometimes used by presidents and their allies for political purposes. The rule of law is proclaimed on the outside while very different things happen on the inside. While this report focuses on the past 20 months (January 2019 to the present), the group notes that politicization of the DOJ is not a problem unique to the Trump Administration, even if it has become noticeably more severe. The DOJ has been politicized in prior administrations of both parties.

Consultant to the Working Group, Donald Ayer, Deputy Attorney General in the George H. W. Bush Administration, recently told the House Committee on the Judiciary:

As Attorney General Levi’s special assistant at the time, Jack Fuller, has said, “Levi took restoring faith in the legitimacy of government and adherence to the rule of law as his very highest priority.”<sup>19</sup> Doing so demanded, again in Levi’s words, that ours be “a government of laws and not men,”<sup>20</sup> and that people believe in their guts that no person is above the law.

Ayer describes Levi’s focus:

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<sup>14</sup> Edward H. Levi, Att’y General, Farewell Remarks at the US. Dep’t of Justice (Jan. 17, 1977), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/01-17-1977.pdf>.

<sup>15</sup> Richard Nixon, President, Private White House Tape (Sept. 15, 1972) in Marshall Cohen, Annie Grayer, & Tal Yellin, *In their own words: Nixon on Watergate, Trump on the Russia investigation*, CNN (Apr. 12, 2019), <https://www.cnn.com/interactive/2019/politics/trump-nixon-comparison/index.html>.

<sup>16</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (1932)

<sup>17</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (1922)

<sup>18</sup> PERFORMANCE.GOV, DEP’T OF JUST., *Agency Plans and Reports* (Last Accessed Sept. 11, 2020), <https://www.performance.gov/justice/#:~:text=To%20enforce%20the%20law%20and,to%20ensure%20fair%20and%20impartial.>

<sup>19</sup> David F. Levi et. al, *Restoring Justice: The Legacy of Edward H. Levi*, Am. Academy of Arts & Sciences (Winter 2014), <https://www.amacad.org/news/restoring-justice-legacy-edward-h-levi> (comments of Jack Fuller).

<sup>20</sup> *Id* (comments of Mark Wolf).

Numerous government-wide reforms emerged during Attorney General Levi's two-year term of service and in the years that followed. These initiatives used a combination of prohibitions, procedures, and requirements of transparency to prevent people in and out of power from making government a tool of private or political advantage. Among them were statutes imposing campaign finance limitations, an ethics-in-government act, an act creating Inspectors General in major Federal agencies to act as watch-dogs within the executive branch who also report to Congress, a special counsel statute, amendments to expand citizen rights under the Freedom of Information Act, the Foreign Intelligence Surveillance Act, a statute providing for congressional oversight of intelligence activities, a Foreign Corrupt Practices Act outlawing bribes to foreign governments, and during the 1980s, the Whistleblower Protection Act.

As Ayer makes clear, Levi's leadership was "transformative." Levi put a number of guardrails on democratic governance in place, measures that have largely stood the test of time, and at least until now have been accepted by both sides of the aisle. More specifically, he created guidelines to limit the FBI's use of coercive interrogation. He also created new institutions, including the DOJ's Office of Professional Responsibility, that focused on the proper ethical conduct of those within the DOJ itself, and a Public Integrity Section within the DOJ's Criminal Division whose entire job was to police criminal conduct by government officials at all levels.

Attorney General Bell continued Levi's reforms during the Carter Administration.<sup>21</sup> He also imposed strict limits on FBI investigations and protocols for communication between the White House and the DOJ which—whether or not followed—are in place to this day.<sup>22</sup> These protocols require White House staff to communicate with the DOJ about particular investigations and prosecutions only through the White House Counsel's office, not by contacting individual employees of the DOJ.<sup>23</sup> Bell was also very much involved in designing the Foreign Intelligence Surveillance Act of 1978, which set limits on government wiretaps of U.S. persons by establishing a special court and other safeguards in cases of importance for national security.<sup>24</sup>

After leaving office, Attorney General Bell wrote a book titled *Taking Care of the Law*, built around the clause of the Constitution stating that the president "shall take Care that the Laws be faithfully executed."<sup>25</sup> Bell was committed to fulfilling this duty that President Carter had delegated to him and others at the DOJ.

The controlling jurisprudential question defining the efficacy and the appropriateness of the reforms of Levi and Bell is about the relationship between law and politics. Is the law so firmly rooted in politics that law is inseparable from politics—as German academic Carl Schmitt

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<sup>21</sup> GRIFFIN B. BELL & RON OSTROW, *TAKING CARE OF THE LAW* (Mercer University Press 1982).

<sup>22</sup> Internal Memorandum from Donald F. McGahn II, Counsel to the President, to all White House Staff (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>.

<sup>23</sup> *Id.*

<sup>24</sup> 50 U.S.C. CH. 36

<sup>25</sup> GRIFFIN B. BELL & RON OSTROW, *TAKING CARE OF THE LAW* (Mercer University Press 1982).

famously argued in his critique of law in the Weimar Republic?<sup>26</sup> In this context, are federal government lawyers only to fulfill the executive’s political mission in which “the specific political distinction ... is that between friend and enemy.”<sup>27</sup>

Or, in a representative democracy as Levi and Bell asserted, do the rule of law and the DOJ lawyers charged with enforcing it, stand above politics, capable of restraining the men and women who wield political power? The United States has seen on more than one occasion what can happen when DOJ lawyers see themselves as above the law. This attitude in the OLC led the country into a deeply immoral and illegal program involving the use of torture and rendition as part of the Bush Administration’s “war on terror.” Led in large part by OLC attorney John Yoo and others in that office, in coordination with the White House and the CIA, the RDI (“Rendition, Detention and Interrogation”) program relied heavily, and could not have occurred without, the willingness to use law as a weapon rather than to see it as a constraint. The Nixonian attitude towards the DOJ and its mission appears to be making a comeback in the current administration, and it should seem unsurprising that Mr. Barr has brought John Yoo in as a consultant with his 2002 memos justifying the use of torture as no doubt an effective calling card with the president, who has vowed to bring back torture.<sup>28</sup>

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>29</sup> The Standards of Ethical Conduct for Employees of the Executive Branch provide 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>30</sup>

DOJ lawyers are also bound by the professional responsibility rules in the states in which they are admitted and practice law. Although state rules differ somewhat, most all of those rules are based on the ABA Rules of Professional Conduct Rules relevant to this report include Rules 1.2(d) (prohibiting a lawyer from advising a client to commit a crime or assisting in a crime), Rule 1.7

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<sup>26</sup> Carl Schmitt, *The Concept of the Political* (1932) arguing that the people exist prior to any constitutional document and that a sovereign who expresses the will of the people may set aside the positive legal and constitutional order to fulfill the will of the people. See *Id.* at \_\_\_ in which Schmitt states that “the specific political distinction ... is that between friend and enemy.”

<sup>27</sup> See SCHMITT, *POLITICAL THEOLOGY (POLITISCHE THEOLOGIE)* (1922) on the doctrine of “Sovereignty” with the opening line “Sovereign is he who decides on the exception”; and the treatise *The Concept of the Political (Der Begriff des Politischen)*. “The specifically political distinction [...] is the distinction between friend and enemy” (Schmitt 1963a: 26), and “The concept of the state presupposes the concept of the political” (Schmitt 1963a: 20). See also Carl Schmitt, who argued for the primacy of politics in his critique of law in the Weimar Republic, *The Concept of the Political (Der Begriff des Politischen)*. (1932), was also a prominent lawyer in the late Weimar period, arguing cases for the federal government, including *Reich v. Prussia* (1932) before the German Supreme Court. See note \_\_\_ below. Schmitt joined the Nazi Party in 1933 at about the same time as the law in Germany was absorbed entirely by the political and representative democracy came to an end.

<sup>28</sup> See Andrew Cohen, *The Torture Memos, 10 Years Later*, *THE ATLANTIC* (Feb. 6, 2012), <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/> (“later pronouncements of policy, in one way or another, were all based upon the perversion of law and logic contained in the February 7 memo”).

<sup>29</sup> DEP’T OF JUSTICE, *JUSTICE MANUAL STANDARDS OF CONFLICT 1-4.000* (2018), <https://www.justice.gov/jm/jm-1-4000-standards-conduct>.

<sup>30</sup> 5 CFR § 2635.101 (2020), <https://www.law.cornell.edu/cfr/text/5/2635.101>

(concurrent conflicts of interest), Rule 111(d) (conflicts of interest for government lawyers on account of prior participation in a matter in the private sector), Rule 113 (organization as client), Rule 4.1 (truthfulness in statements to others), and Rule 8.4 (professional misconduct).<sup>31</sup>

We cannot fully explore such jurisprudential questions here. But in this report, the group asks: How far are we now, in 2020, from the objective of DOJ independence that was embodied in the Levi-Bell initiative to depoliticize the DOJ in the 1970s? To what degree have we embraced the Nixonian, instrumentalist ideals for the DOJ? And what are the costs of treating the law and its enforcement as just one more tool in the arsenal of partisan politics? Readers of this report will realize that today's DOJ is very far from the Levi-Bell objective and accordingly drifting ever further from the original mission of the DOJ to protect and defend the rule of law in a representative democracy.

## 2. William Barr's Authoritarian Vision of Executive Power

A fundamental question underlying this report is whether the president and his administration are subject to the rule of law or whether executive power under Article II overrides the rule of law. Just this past July in *Trump v. Vance*, the U.S. Supreme Court unanimously rejected the argument that the president is immune from criminal process under Article II of the Constitution.<sup>32</sup> The clear inference from the Court's holding in *Vance* is that the president is subject to the criminal law. This not only means that the president must comply with subpoenas in criminal cases—in *Vance* a New York State grand jury investigation—but that the president must also cooperate with federal criminal investigations. The president must comply with valid subpoenas in a federal criminal investigation, a matter already addressed by a unanimous court in *United States v. Nixon*, and the president may not violate the federal obstruction of justice statute. Any iteration of presidential power that purports to allow the president or persons working for him to obstruct justice or commit any other crime goes well beyond the bounds of Article II. From the Court's ruling in *Clinton v. Jones* flows the proposition that the president is subject to the civil law, including civil lawsuits for acts committed in his personal capacity.<sup>33</sup> The message is clear: no man is above the law.

This report focuses on one specific context in which an expansive view of presidential power has led to abuse of authority on the part of the president's immediate subordinates and where, in turn, that abuse of power may be causing damage to the rule of law such that it may only be undone

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<sup>31</sup> See generally MODEL CODE OF PROF'L CONDUCT (AM. BAR ASS'N 2020). For instance, rule 8.4 provides that it is professional misconduct to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law. *Id.* at 8.5.

<sup>32</sup> See generally, *Trump v. Vance*, 140 S. Ct. 2412 (2020).

<sup>33</sup> Civil lawsuits for money damages brought against the president personally for his official acts have generally been disallowed. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Civil suits are typically brought against the president in his official capacity and against the government for injunctive relief, and occasionally for damages where allowed. Nothing in *Nixon v. Fitzgerald*, however, implies that a president cannot be criminally prosecuted for crimes he commits in office.

with the greatest difficulty. The abuse of power on the part of the attorney general, on behalf of the president in the past 18 months, as the Working Group discovered, are consistent across nearly every area of the DOJ portfolio. These abuses include, but are not limited to, the DOJ's support for the use of presidential power under Article II to frustrate criminal investigations of the president, his private businesses, his associates such as Michael Flynn and Roger Stone, his administration, and his campaign. The White House and various federal agencies, including the DOJ, ignore subpoenas from Congress. The president uses his control of the country's foreign policy and military aid to foreign nations to advance his political campaign, a key component in the Ukraine scandal. At home, President Trump has been advised by the DOJ about his powers to override governors' stay-at-home orders in the COVID-19 public health emergency as well as his response to racial unrest following the death of George Floyd in May 2020.

There are, however, limits to presidential power. A critically important function of the DOJ is to advise the president of these limits, not simply to act as a shield for the most blatant abuses of presidential power.

Again, as Donald Ayer observed in his testimony before the House Judiciary Committee:

One aspect of those beliefs is his extreme reading of the unitary executive theory – the undisputed idea that the president is the head of a single executive branch and thus constitutionally entitled to wield substantial control over all activities of that branch. The critical question is how much control is enough, and the Supreme Court in a string of cases has made clear that presidential control may be limited in some ways when other legitimate goals demand it. For example, in *Morrison v. Olson*, a case that Bill Barr has expressly attacked, the Reagan Supreme Court ruled by a vote of 7-1 that the ability to remove an independent counsel for “good cause shown” is enough presidential control to satisfy the constitutional mandate.

President Trump nominated Attorney General Barr to succeed former Attorney General Jeff Sessions on December 7, 2018, following an unsolicited 19-page letter extolling the virtues of undivided presidential authority that Mr. Barr sent to the president. The letter is now widely regarded as an informal job application.<sup>34</sup>

Mr. Barr had spent his early career working in private practice as deputy assistant director for legal policy in the Reagan administration and as an attorney in the OLC under President George H. W. Bush.<sup>35</sup> He was nominated by President Bush to be deputy attorney general and, in 1991, attorney general.<sup>36</sup> Barr's early career put some of his long-held views on display.<sup>37</sup> Since high school, Mr.

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<sup>34</sup> Maegan Vasquez & Kaitlan Collins, *Trump nominates William Barr to be his next attorney general*, CNN POLITICS, (Dec. 7, 2018) <https://www.cnn.com/2018/12/07/politics/william-barr-attorney-general-nomination/index.html>

<sup>35</sup> UNITED STATES COMM. ON THE JUDICIARY, 116<sup>TH</sup> CONG., QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES [William Barr], [https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20(PUBLIC).pdf).

<sup>36</sup> *Id.*

<sup>37</sup> See Marie Brenner, “*I Had No Problem Being Politically Different*”: *Young William Barr Among the Manhattan Liberals*, VANITY FAIR (Dec. 2019), <https://www.vanityfair.com/news/2019/10/the-untold-tale-of-young-william-barr> (exploring how Barr's conservative views evolved).

Barr espoused views of strong executive authority.<sup>38</sup> Because of the Bush Administration’s more reserved approach to executive power, however, the outer limits of Mr. Barr’s views were not tested.<sup>39</sup>

In just about all the matters discussed in this report, we see Mr. Barr’s extreme—and we think dangerous—interpretation of presidential power coming to bear.

In the opening weeks of his tenure as attorney general, Mr. Barr used his expansive view of presidential power to “exonerate” President Trump from an obstruction of justice charge. That matter is discussed in Part II of the Mueller Report and in Section V.4.a. of this report.

In 2020, amid both an unprecedented public health crisis and widespread nationwide protests, Mr. 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.<sup>40</sup> He subsequently threatened to take legal action to override 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.<sup>41</sup> In May, the DOJ filed an official statement of interest on the side of plaintiffs in Illinois challenging governors’ stay-at-home orders.<sup>42</sup> We discuss this use of executive authority in the COVID-19 crisis in more detail in Section V.5.b of this report.

In response to the civil unrest after the George Floyd’s death in Minneapolis, the president sought to use his powers to crack down on protestors, once again infringing on the law enforcement functions of the states, supposedly preserved by the Tenth Amendment. Use of federal troops for domestic law enforcement purposes poses obvious dangers to the rule of law, dangers that Congress has confronted with specific statutes strictly limiting domestic deployments of federal troops. Rather than advise President Trump on how to comply with these statutes, Mr. Barr appears to have been finding ways around them to allow federal deployments that violate the spirit and perhaps the letter of the law.

The group notes that domestic military deployments for political purposes are a serious threat to representative democracy and can precede the demise of democracy itself. The legal maneuvering today around U.S. law restricting domestic federal troop deployments is reminiscent of some of the maneuvering by federal government lawyers in Weimar Germany. In 1932, those lawyers

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<sup>38</sup> *Id.*

<sup>39</sup> Sean Illig, “*It’s ideologue meets grifter*”: How Bill Barr made Trumpism possible, VOX, (Jun. 27, 2020), <https://www.vox.com/policy-and-politics/2020/6/24/21281485/bill-barr-donald-trump-berman-doj-david-rohde>

<sup>40</sup> Betsy Woodruff Swan, *DOJ seeks new emergency powers amid coronavirus pandemic*, POLITICO (Mar. 21, 2020), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>.

<sup>41</sup> See U.S. Const. amend. X; Chris Strohm, *Barr Threatens Legal Action Against Governors Over Lockdowns*, BLOOMBERG (Apr. 21, 2020), <https://www.bloomberg.com/news/articles/2020-04-21/barr-says-doj-may-act-against-governors-with-strict-virus-limits>.

<sup>42</sup> Jonah Meadows, Patch Staff, *Challenge To Stay-At-Home Order Belongs In State Court, DOJ Says*, PATCH ILLINOIS (May 23, 2020), <https://patch.com/illinois/across-il/challenge-stay-home-order-belongs-state-court-doj-says>.

successfully argued before Germany's Supreme Court in *Reich v Prussia*<sup>43</sup> that the constitution permitted federal troop deployments under command of Chancellor Franz von Papen against the will of the State of Prussia to quell rioting by communists and other agitators. Infamously, the next Chancellor of Germany, Adolf Hitler, expanded these “emergency powers” even further in March 1933 to end representative democracy altogether. The United States is not at all close that stage, but statutes enacted by Congress to restrict domestic deployment of federal troops are there in part to make sure that we never are.<sup>44</sup> We believe that it is the duty of Mr. Barr to advise the president on how to comply with those laws, not to find a way around them.

As pointed out in Section V.5.c of this report, we are concerned about the role that 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.”<sup>45</sup> 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.<sup>46</sup> It would be important for an inquiry to determine whether this is a move that the Mr. Barr endorsed or even encouraged on behalf of the president.

Next came the firing of Geoffrey Berman, U.S. Attorney in the Southern District of New York, a matter discussed in Section V.6.b of this report. Mr. Barr’s extreme vision of presidential power underscored this act as well. Here again the group saw a resurfacing of Mr. Barr’s view that Article II overrides the obstruction of justice statute.

The same thing has occurred in the firings of up to five inspectors general in the middle of investigations. President Trump has apparently been advised by Mr. Barr that his power under

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<sup>43</sup> On July 20, 1932 Field Marshall von Hindenburg, the Reich President, concerned about the inability of a socialist party (SPD) dominated government in the State of Prussia to control street demonstrations by communists and other civil unrest, claimed authority under Article 48 of the Constitution to issue his decree “concerning the restoration of public safety and order in the Land of Prussia.” He declared the Chancellor of Germany, Franz von Papen, to be the commissioner of Prussia, and instructed von Papen to take over much of the government of Prussia with the support of General von Schleicher, the Minister of Defense. See David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 AMERICAN POLITICAL SCIENCE REVIEW 121 (1997). <https://www.jstor.org/stable/2952263?seq=1> The case came before the Supreme Court in Leipzig which had to rule on the legitimacy of the 'Preussenschlag' of July 1932. David Dyzenhaus, *Lawyer for the Strongman*, AEON (Jun. 12, 2020), <https://aeon.co/essays/carl-schmitts-legal-theory-legitimises-the-rule-of-the-strongman>. Carl Schmitt argued for the federal government that the President had the authority he claimed under Article 48 even though the countersignature of the cabinet was required for him to exercise that authority under statutes implementing Article 48 and even though the cabinet, while appointed by the President, required the support of the Reichstag. The President could exercise that power for up to 60 days by dissolving the Reichstag and thereby ensuring support from a cabinet appointed by him and unchecked because the Reichstag was not in session. Schmitt had found a loophole in the constitutional structure and helped President von Hindenburg exploit it to advance Schmitt’s own vision of executive power. See *Id.* The Supreme Court’s ruling in 1932 did not come down clearly on either side as a matter of legal doctrine but did allow the federal deployment of soldiers in Prussia to proceed.

<sup>44</sup> They also exist in the wake of grievances expressed by the American founders about the presence of troops in the domestic realm. *Cf.* U.S. CONST. amend. III.

<sup>45</sup> Mike Mullen, *I Cannot Remain Silent*, THE ATLANTIC (Jun. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/american-cities-are-not-battlespaces/612553/>.

<sup>46</sup> 18 U.S.C. § 1385 (2020).

Article II to remove federal officers takes precedence over—and in effect nullifies—the obstruction of justice statute. For the reasons explained above—and explained in Part II of the Mueller Report—we believe this interpretation of Article II is incorrect and dangerously incorrect.

The common theme in many if not all these developments is Mr. Barr’s effort to expand executive power under Article II of the Constitution and use it to accomplish the political objectives of President Trump. Mr. Barr apparently believes that Article II invites the president’s political priorities into the DOJ. His concept of the political and the influence of the political on the rule of law is dangerous in a DOJ that is supposed to be apolitical. Going back to the quotes at the beginning of this background section, the group believes that Attorney General Edward Levi articulated the correct vision of a DOJ free from the political. We reject, as inconsistent with our Constitution and the constitution of any representative democracy, jurisprudential philosophies that allow the rule of law to be subsumed by the political. The ideas set forth in Carl Schmitt’s book, *The Concept of the Political* in Weimar Germany, may have been a precursor for what followed and certainly are not appropriate for defining the rule of law in the United States. The group is also very concerned about the philosophical approach of Mr. Barr and does not believe he is an appropriate person to run the DOJ.<sup>47</sup> We include in our recommendations at the end of this report a recommendation that the House of Representatives open a formal impeachment inquiry against Mr. Barr and go to court to enforce House subpoenas of the DOJ, the White House, and other parts of the administration.

## V. Issues in Barr’s Department of Justice

### 1. DOJ’s Handling of the End of Special Counsel Mueller’s Investigation

Attorney General William Barr compromised public confidence in the DOJ’s investigative process when he attempted to skew the findings of the Mueller Report and other related DOJ investigations.<sup>48</sup> As discussed in detail below, Mr. Barr publicly released a four-page letter to Congress purporting to “summarize” the “principal conclusions reached by the special counsel and the results of his investigation” in advance of the release of the redacted Mueller Report more than three weeks later.<sup>49</sup> Mr. Barr then failed to correct the public record even after receiving a critique from Mueller himself. Three days after Mr. Barr’s letter was released, Special Counsel Mueller explained to Mr. Barr: “There is now public confusion about critical aspects of the results of the investigation,” which “threatens to undermine a central purpose for which the Department

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<sup>47</sup> See Donald Ayer, *Why Bill Barr Is So Dangerous*, THE ATLANTIC (Jun. 30, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/bill-barrs-dangerous-pursuit-executive-power/592951/>; Donald Ayer, *Bill Barr Must Resign*, THE ATLANTIC (Feb. 17, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/donald-ayer-bill-barr-must-resign/606670/>.

<sup>48</sup> ROBERT MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (Mar. 2019) (hereinafter MUELLER REPORT), <https://www.justice.gov/storage/report.pdf>.

<sup>49</sup> Letter from William Barr, Att’y General of the US, to Cong. (Mar. 24, 2019) (available at <https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html>); Letter from Noah Bookbinder, Exec. Dir., CREW, to William Barr, Att’y General of the US (Apr. 11, 2019) (available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/04/11154733/Barr-Letter-4-11-19.pdf>).

appointed the Special Counsel: to assure public confidence in the outcome of the investigations.”<sup>50</sup> Mueller’s concerns were well-founded. Mr. Barr’s four-page letter was later found by federal judge Reggie B. Walton to have presented a “distorted” and “misleading” account of Mueller’s findings.<sup>51</sup>

a. Barr’s Role in Oversight of Special Counsel Mueller’s Investigation

Robert Mueller was appointed by Deputy Attorney General Rod Rosenstein within days of FBI Director James Comey being fired by President Trump in May 2017. Attorney General Jeff Sessions had recused himself from the Russia investigation because of his prior involvement with the Trump campaign. In his confirmation hearings, Sessions was less than candid with his colleagues in the Senate regarding his contact with Russian officials.<sup>52</sup> Sessions’ recusal left Rosenstein in charge of supervising Mueller. President Trump, dissatisfied with this situation, continually and publicly berated Sessions for his recusal from the Russia investigation.

In early November 2018, President Trump fired then-Attorney General Sessions.<sup>53</sup> He was replaced by Acting Attorney General Matthew Whitaker. This appointment was likely unconstitutional and may have represented an attempt to install an attorney general more open to White House influence.<sup>54</sup> The lack of Senate confirmation, however, would have likely left an acting attorney general in a weaker position to influence events more broadly, and it appears that Rosenstein continued to be the primary supervisor of the Mueller investigation during this time.

Mr. Barr was apparently familiar with the Russia investigation, having written a lengthy letter to the DOJ while working in the private sector urging that Mueller’s investigation be curtailed.<sup>55</sup> President Trump had considered hiring Mr. Barr for his personal legal team but chose to hire him as attorney general instead. He was confirmed by the Senate on February 14, 2019, and almost immediately inserted himself into the Russia investigation.<sup>56</sup>

Mueller finished the investigation several weeks after Mr. Barr’s confirmation and submitted his 400-page report to Mr. Barr. Mueller had already indicted Trump associate Roger Stone and over

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<sup>50</sup> Letter from Robert Mueller, Special Counsel, to William Barr, Att’y General of the US (Mar. 27, 2019) (available at [https://www.washingtonpost.com/context/special-counsel-mueller-s-letter-to-attorney-general-barr/e32695eb-c379-4696-845a-1b45ad32fff1/?utm\\_term=.54af0fcfd0b7](https://www.washingtonpost.com/context/special-counsel-mueller-s-letter-to-attorney-general-barr/e32695eb-c379-4696-845a-1b45ad32fff1/?utm_term=.54af0fcfd0b7)).

<sup>51</sup> See Elec. Privacy Info. Ctr. v. United States DOJ, 442 F. Supp. 3d 37 (D.D.C. 2020) (memorandum opinion), <https://int.nyt.com/data/documenthelper/6805-judge-walton-ruling-on-barr-cr/2df9b5c6d7de0fef1e35/optimized/full.pdf#page=1>.

<sup>52</sup> Richard W. Painter, *Jeff Sessions Needs to Go*, N.Y. TIMES (Mar. 2, 2017) <https://www.nytimes.com/2017/03/02/opinion/jeff-sessions-needs-to-go.html>.

<sup>53</sup> Eric Lach, *Trump Fires Jeff Sessions, and Throws His Administration Back Into Chaos*, THE NEW YORKER (Nov. 11, 2018), <https://www.newyorker.com/news/current/trump-fires-jeff-sessions-and-throws-his-administration-back-into-chaos>.

<sup>54</sup> See Neal K. Katyal & George T. Conway III, *Trump’s Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html> (arguing that the Acting AG required Senate confirmation per “the Constitution’s very explicit, textually precise design”).

<sup>55</sup> For a longer discussion of this memorandum, see Section V.3.a of this Report.

<sup>56</sup> Jeff Mordock, *William Barr publicly details his talks about joining Donald Trump’s legal team*, WASHINGTON TIMES (Jan. 15, 2019), <https://apnews.com/da7a26e86b9d9973ccea3f147789689f>.

a dozen Russian agents. Mueller's team had obtained criminal convictions against Trump campaign manager Paul Manafort, deputy campaign manager Rick Gates, campaign operative George Papadopoulos, and former national security advisor Michael Flynn.

b. Barr's Mischaracterization of the Mueller Report

When Special Counsel Mueller finished his report, Attorney General Barr substituted his own description of its outcome for Mueller's, skewing the initial public understanding of the report's findings.

The Mueller Report, divided into two parts, explained the facts uncovered by the investigation in terms of two key areas. First, it explained the contact between the Trump campaign and the Russians and analyzed whether there was a provable criminal "conspiracy" under federal law. Second, it addressed Trump's efforts to stop the investigation and whether his actions violated federal obstruction of justice law. Mueller's team carefully prepared summaries of the conclusions in each of the two volumes of the report so they could be publicly released by Mr. Barr while the full report went through the redaction process.<sup>57</sup>

Instead of releasing the Mueller Report or any of the prepared summaries, Mr. Barr sent his own four-page letter to Congress on March 24, 2019.<sup>58</sup> This action was both highly unusual and entirely unnecessary given that Mueller had already signed off on the summaries that were included in the report. Barr's inaccurate summary of the Mueller Report allowed President Trump and Trump-aligned media outlets to dismiss the entire investigation as a hoax. The president loudly proclaimed that there was "NO COLLUSION NO OBSTRUCTION!"<sup>59</sup>

Members of Mueller's team were surprised by and objected to Mr. Barr's characterizations, writing a letter to Mr. Barr on March 27, 2019.<sup>60</sup> Mueller noted that there already was an executive summary of the report that could be publicly released: Mr. Barr did not need to prepare a new one.<sup>61</sup> Mueller and his team made this point at a March 5, 2019, meeting and reiterated it early in the afternoon on March 24, 2019. Mueller also said he considered Mr. Barr's four-page letter to be potentially misleading given that it "did not fully capture the context, nature, and substance of [the Special Counsel's] Office's work and conclusions."<sup>62</sup> Mueller requested that Mr. Barr send the prepared executive summaries to Congress along with other materials. Mr. Barr did not.<sup>63</sup>

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<sup>57</sup> Teleconference Interview with Andrew Weissmann, lead prosecutor in Robert S. Mueller's Special Counsel's Office (2017-19) & Chief of the Fraud Section in the Department of Justice (2015-2019) (Aug. 13, 2020).

<sup>58</sup> Letter from William Barr, Att'y General of the US, to Cong. (Mar. 24, 2019) (available at <https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html>).

<sup>59</sup> Donald J. Trump (@realDonaldTrump) TWITTER (Jul. 24, 2019, 7:55 AM), <https://twitter.com/realDonaldTrump/status/1153997249497772032>.

<sup>60</sup> Teleconference Interview with Andrew Weissmann, lead prosecutor in Robert S. Mueller's Special Counsel's Office (2017-19) & Chief of the Fraud Section in the Department of Justice (2015-2019) (Aug. 13, 2020); Letter from Robert Mueller, Special Counsel, to William Barr, Att'y Gen. of the US (Mar. 27, 2019) (on file at [https://www.washingtonpost.com/context/special-counsel-mueller-s-letter-to-attorney-general-barr/e32695eb-c379-4696-845a-1b45ad32fff1/?utm\\_term=.54af0fcfd0b7](https://www.washingtonpost.com/context/special-counsel-mueller-s-letter-to-attorney-general-barr/e32695eb-c379-4696-845a-1b45ad32fff1/?utm_term=.54af0fcfd0b7)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Mr. Barr failed to mention this letter during a House Judiciary Committee hearing when he was asked under oath whether members of Mueller’s team were “frustrated at some level with the limited information included” in his letter to Congress summarizing Mueller’s conclusions. On April 9, 2019, Representative Charlie Crist (D, FL-13) asked Mr. Barr: “Do you know what they are referencing with that?” Barr responded, “No, I don’t.”<sup>64</sup> At a Senate hearing on April 10, 2019, Senator Chris Van Hollen of Maryland asked Barr if Mueller supported his (Barr’s) conclusions about the report. He responded, “I don’t know whether Bob Mueller supported my conclusion.”<sup>65</sup>

The attorney general continued to make misleading statements to the press about the Mueller Report. For example, Mr. Barr stated in a press conference that the White House had fully cooperated with the Mueller investigation.<sup>66</sup> This was not true because, inter alia, President Trump had refused to participate in an interview with Mueller.<sup>67</sup>

### c. Excessive Redactions in the Released Version of the Mueller Report

A redacted version of the Mueller Report was released nearly a month after Mr. Barr’s misleading summary and statements had been circulating as the only DOJ commentary on the matter. The redactions were excessive in two principal ways, as discussed below, and continued to undermine Congress’ and the public’s ability to understand the Special Counsel’s findings.

Firstly, the redactions failed to distinguish between what would be appropriate for public release and what would be appropriate for Congress to see, treating Congress as though it was entitled to no more information than the public. That is not consistent with our system of checks and balances, and processes exist for Congress to receive even classified information. Ultimately, the DOJ has backed down on all but one of these issues—the Supreme Court will hear a case challenging a court order to release information withheld because it came via a grand jury proceeding, which is subject to special secrecy rules.<sup>68</sup>

Secondly, some of the redactions went beyond the scope of what existing freedom of information law permits the government to withhold. A careful, in camera review of these redactions by a federal judge concluded that, while some were appropriate, others were not.<sup>69</sup> In particular, the DOJ sought to redact information about Special Counsel Mueller’s decisions to prosecute or not prosecute certain individuals, but the court held that this information could not be withheld under

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<sup>64</sup> Chad Day, *Key takeaways from Barr’s testimony and Mueller’s letter*, AP (May 2, 2019), <https://apnews.com/ec455a7ba1c846deaf8a2616f7754698>.

<sup>65</sup> Sarah Gray, *Video shows William Barr denying knowledge of Mueller’s objections to his summary of the Russia probe days after Mueller sent him a letter about it*, BUSINESS INSIDER (Apr. 30, 2019), <https://www.businessinsider.com/william-barr-video-mueller-report-objections-2019-4>.

<sup>66</sup> John Kruzel, *Did Donald Trump ‘fully’ cooperate with Mueller investigation? No*, POLITIFACT (Apr. 22, 2019), <https://www.politifact.com/factchecks/2019/apr/22/william-barr/did-trump-fully-cooperate-mueller-investigation-no/>.

<sup>67</sup> *Id.*

<sup>68</sup> *Dept. of Justice v. House Comm. on the Judiciary*, No. 19-1328 (to be argued Dec. 2, 2020).

<sup>69</sup> *Elec. Privacy Info. Ctr. v. U.S. Dept. of Just.*, No. 1-19-cv-810, dkt. #130 (filed Sept. 30, 2020), available at <https://www.documentcloud.org/documents/7220685-LEOPOLD-EPIC-FOIA-Mueller-Report-Unredacted-Walton.html>.

the law.<sup>70</sup> More than a year after the Mueller Report's completion, however, the public still does not have access to this information.

In sum, Attorney General Barr's conduct at the conclusion of Special Counsel Mueller's investigation prevented Congress and the public from learning, in a timely manner, what each was entitled to know regarding critical aspects of Mueller's work.

## 2. DOJ's Handling of the Ukraine Investigations

The DOJ's handling of the Ukraine whistleblower complaint raises questions about whether its resources were improperly used to protect President Trump's political interests and prevent further scrutiny into Attorney General Barr's personal role in the matter. Mr. Barr was identified as Trump's "personal envoy" in the complaint,<sup>71</sup> and was repeatedly named by Trump as a conduit to Ukrainian President Volodymyr Zelensky on matters related to the foreign pressure campaign.<sup>72</sup>

For purposes of maintaining public trust in the integrity of the DOJ's decision-making, the stakes cannot be higher when allegations involve presidential misconduct. Under Mr. Barr we have seen decisions made by the DOJ involving the Ukraine whistleblower complaint reveal a systemic breakdown in institutional reporting and investigative processes.

After determining that the allegations expressed in the complaint were not of "urgent concern," in an opinion memorandum, the OLC referred the matter to DOJ's Criminal Division for a possible campaign finance violation.<sup>73</sup> The OLC's opinion disrupted the transmittal process established by statute to inform congressional intelligence committees of "credible" Intelligence Community Inspector General (ICIG) whistleblower complaints and prevented the complaint from leaving the executive branch.<sup>74</sup> The Criminal Division then closed the case without investigation based on a determination that "help with a government investigation" could not be quantified as a "thing of value" for purposes of campaign finance law, limiting its review of the evidence to the White House provided memo and "rough transcript" for the July 25 call between President Trump and Zelensky.<sup>75</sup>

While the extent of Mr. Barr's involvement in the DOJ's handling of the Ukraine whistleblower complaint has not been publicly revealed, the DOJ has indicated that Mr. Barr did not formally recuse himself from matters related to the whistleblower complaint,<sup>76</sup> and one report indicates that

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<sup>70</sup> *Id.*

<sup>71</sup> Letter from an unnamed whistleblower to Sen. Richard Burr and Rep. Adam Schiff (Aug. 12, 2019) (hereinafter "Whistleblower Complaint") (on file at <https://bit.ly/2lXyus1>).

<sup>72</sup> Memorandum of Telephone Conversation, Telephone conversation with President Zelensky of Ukraine (Sept. 24, 2019) (hereinafter "White House Memorandum") (on file at <https://bit.ly/2n4ZFBg>).

<sup>73</sup> "Urgent Concern" Determination by the Inspector General of the Intelligence Community, 43 Op. O.L.C. 1 (Sept. 24, 2019) (Memorandum Opinion for General Counsel) (hereinafter "OLC Opinion") (on file at <https://bit.ly/2mmm1OI>).

<sup>74</sup> *Id.*

<sup>75</sup> Devlin Barrett, Matt Zapotosky, Carol D. Leonnig, & Shane Harris, *Trump offered Ukrainian president Justice Dept. help in an investigation of Biden, memo shows*, WASHINGTON POST (Sept. 26, 2019), [https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian-president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian-president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0_story.html).

<sup>76</sup> See Josh Gerstein, *Barr is thrust back in harsh glare as Ukraine scandal grows*, POLITICO (Sept. 25, 2019), <https://politi.co/2lOi2dB> (noting that there was no recusal).

a DOJ official said he had “minimal involvement.”<sup>77</sup> Given his position as attorney general and possible role as a substantive witness, even “minimal” participation by Mr. Barr in the DOJ’s handling of the whistleblower complaint would undermine the integrity of the DOJ’s decision-making.

A full accounting of the DOJ’s decision-making processes is warranted, including any role played by Mr. Barr with respect to the whistleblower complaint and efforts by Rudy Giuliani, President Trump, and others to pressure Ukrainian government officials into providing them damaging information about his major political rival in the 2020 election.

#### a. The Ukraine Whistleblower Complaint

On August 12, 2019, a government whistleblower reported a matter of “urgent concern” to ICIG Michael Atkinson that President Trump was “using the power of his office to solicit interference from a foreign country in the 2020 election.”<sup>78</sup> According to the complaint, President Trump was “pressuring a foreign country to investigate one of the President’s main domestic political rivals,” by asking Ukrainian President Volodymyr Zelensky, during a July 25, 2019 call, to “take actions,” which the complainant believed could help the president’s 2020 re-election bid.<sup>79</sup> These actions included a request to initiate an investigation into Vice President Joe Biden and his son Hunter Biden; assist in an effort to show that allegations of Russian interference in the 2016 U.S. presidential election originated in Ukraine; and “meet or speak with two people the president named explicitly as his personal envoys on these matters, Mr. Giuliani and Attorney General Barr, to whom the president referred multiple times in tandem.”<sup>80</sup>

The allegations in the whistleblower complaint were corroborated in a five-page memorandum released by the White House that summarized the July 25, 2019 call.<sup>81</sup> According to the memorandum, after Zelensky indicated that Ukraine was almost ready to buy military weapons from the United States for defensive purposes, President Trump immediately said, “I would like you to do us a favor though.”<sup>82</sup> He then asked Zelensky to investigate two matters involving the 2016 election and Vice President Biden, and repeatedly asked him to speak with Attorney General Barr and Mr. Giuliani about them. Mr. Barr is referenced four times, including when the president told Zelensky that he would like Giuliani “to call you along with the Attorney General,” noting that “there’s a lot of talk about Biden’s son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great.”<sup>83</sup>

#### b. DOJ and the Ukraine Whistleblower Complaint

After reviewing and determining that the complaint was credible and of “urgent concern,” ICIG Atkinson notified Acting Director of National Intelligence (DNI) Joseph Maguire that the complaint triggered a mandatory transmittal requirement to the congressional intelligence

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<sup>77</sup> Evan Perez and Katelyn Polantz, *Trump’s attorney general has “minimal involvement” as Justice department whistleblower complaint referral*, CNN (Sept. 25, 2019), <https://cnn.it/2pmECva>.

<sup>78</sup> Whistleblower Complaint, *supra* note 70.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> White House Memorandum, *supra* note 71.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

committee pursuant to the Intelligence Community Whistleblower Protection Act (ICWPA), 50 U.S.C. § 3033(k)(5)(A).<sup>84</sup>

Rather than notifying Congress of the complaint however, Acting DNI Maguire referred the matter to OLC, which subsequently issued an opinion concluding that the complaint was not of “urgent concern” within the meaning of the applicable statute, and therefore did not trigger a reporting requirement to congressional intelligence committees.<sup>85</sup> OLC concluded that the whistleblower complaint did not involve an “urgent concern” because the alleged conduct did not concern “the funding, administration, or operation of an intelligence activity” under the authority of the DNI.<sup>86</sup> OLC advised that the whistleblower complaint alleged a violation of a criminal law that should be referred to DOJ’s Criminal Division for appropriate review.<sup>87</sup>

After the matter was referred to DOJ’s Criminal Division, the case was closed without investigation based solely on a review of the “official record of the call” for possible campaign finance violations.<sup>88</sup> The Criminal Division closed the case after it made a determination, in consultation with other DOJ offices, that “help with a government investigation” could not be quantified as a “thing of value” for purposes of campaign finance law.<sup>89</sup>

After learning of OLC’s decision, ICIG Atkinson notified the House Permanent Select Committee on Intelligence that Acting DNI Maguire had determined that he was not required to transmit “my determination of a credible urgent concern” or any of the information in the complaint to the congressional intelligence committee “because the allegations do not meet the definition of an ‘urgent concern’ under the statute.”<sup>90</sup> Atkinson noted that he was continuing his efforts to obtain direction from Acting DNI Maguire regarding how to bring the whistleblower complaint to the congressional intelligence committee in an authorized and protected manner, and in accordance with appropriate security practices. Notably, Atkinson also explained that Maguire’s treatment of the Ukraine whistleblower complaint does not appear to be consistent with past practice:

As you know, the ICIG has on occasion in the past determined that, for a variety of reasons, disclosures submitted to the ICIG under the urgent concern statute did not constitute an urgent concern. In those cases, even though the ICIG determined that those disclosures did not meet the definition of an urgent concern, the DNI nevertheless provided direction to the ICIG to transmit the ICIG's determination and the complainants' information to the congressional intelligence committees. In

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<sup>84</sup> See 50 U.S.C. § 3033(k)(5)(A) (“An employee of an element of the intelligence community, an employee assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information to the Inspector General”).

<sup>85</sup> OLC Opinion, *supra* note 72.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Devlin Barrett, Matt Zapposky, Carol D. Leonnig, and Shane Harris, *Trump offered Ukrainian president Justice Dept. help in an investigation of Biden, memo shows*, WASHINGTON POST (Sept. 26, 2019), [https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian-president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian-president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0_story.html).

<sup>89</sup> *Id.*

<sup>90</sup> Letter from Michael Atkinson, ICIG, to Reps. Adam Schiff & Devin Nunes (Sept. 9, 2019), (on file at [https://intelligence.house.gov/uploadedfiles/20190909\\_ic\\_ig\\_letter\\_to\\_hpsci\\_on\\_whistleblower.pdf](https://intelligence.house.gov/uploadedfiles/20190909_ic_ig_letter_to_hpsci_on_whistleblower.pdf))

each of those cases, the ICIG followed the DNI's direction and transmitted the ICIG's determination along with the complainants' information to the congressional intelligence committees. That past practice permitted complainants in the Intelligence Community to contact the congressional intelligence committees directly, in an authorized and protected manner, as intended by the urgent concern statute.<sup>91</sup>

If ICIG Atkinson had not chosen to act as he did, Congress may never have been made aware of Trump's foreign campaign pressure, which ultimately led to his impeachment.<sup>92</sup> The decisions made by ICIG Atkinson with respect to the Ukraine whistleblower complaint likely cost him his job when he was unceremoniously fired by President Trump in a Friday night massacre-type event.<sup>93</sup> When asked to comment on Atkinson's firing, the president cited the former ICIG's actions saying, "I thought he did a terrible job. ... He took a fake report and he brought it to Congress."<sup>94</sup>

Raising additional concerns, once OLC's opinion became public, more than 65 inspectors general signed on to a letter from the Council of the Inspectors General on Integrity and Efficiency objecting to OLC's "urgent concern" interpretation, stating:

The ICIG showed that the DNI has a broad legal mandate to address intelligence matters related to national security, as well as the specific responsibility to assess instances of possible foreign interference in United States elections and identify, to the maximum extent possible, the methods used and persons and foreign governments involved in the interference. These responsibilities support the ICIG's conclusion that the protection of federal elections from foreign interference is squarely within the DNI's "operations". The legal authorities cited in his letter also support the ICIG's determination that the whistleblower raised a claim of a serious or flagrant problem that relates to an intelligence activity within the DNI's jurisdiction. It surely cannot be the case that the DNI has responsibilities related to foreign election interference but is prohibited from reviewing the cause of any such alleged interference.<sup>95</sup>

Attorney General Barr was not only directly implicated in the Ukraine whistleblower complaint, but Giuliani's associate Lev Parnas subsequently revealed that Mr. Barr was "on the team" of those

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<sup>91</sup> *Id.*

<sup>92</sup> Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019).

<sup>93</sup> *See Atkinson: Trump fired me because I handled whistleblower complaint properly*, POLITICO (Apr. 5, 2020), <https://www.politico.com/news/2020/04/05/atkinson-trump-fired-whistleblower-complaint-167371> ("Atkinson's ouster occurred as Trump moved to remake the ranks of inspectors general, naming a handful to vacant posts late Friday").

<sup>94</sup> *Id.*

<sup>95</sup> Letter from Michael E. Horowitz, Chair, Council of the Inspectors General on Integrity and Efficiency & DOJ Inspector General, & Allison C. Lerner, Vice Chair, CIGIE, & 65 Other Inspectors Gen. to Assistant Att'y Gen. Steven A. Engel (Oct. 22, 2019) (on file at [https://ignet.gov/sites/default/files/files/CIGIE\\_Letter\\_to\\_OLC\\_Whistleblower\\_Disclosure.pdf](https://ignet.gov/sites/default/files/files/CIGIE_Letter_to_OLC_Whistleblower_Disclosure.pdf)).

involved with the Ukraine pressure campaign.<sup>96</sup> Former National Security Advisor John Bolton also reported that he shared concerns about Giuliani's involvement in the Ukraine pressure campaign with Mr. Barr following the president's Ukraine call.<sup>97</sup> Additional reporting indicates that Mr. Barr set up a back channel with Giuliani to "intake" damaging information received from Ukrainian sources about Vice President Biden.<sup>98</sup>

Given Mr. Barr's apparent involvement in the Ukraine scandal, he should not have been involved in the DOJ's subsequent handling of this matter. Concerns over Mr. Barr's failure to recuse on the Ukraine matter led the New York City Bar Association to call publicly for him to recuse or resign—advice that he ignored. CREW also filed a complaint with the DOJ's inspector general calling for an investigation based on possible violations of the financial conflicts of interest statute, 18 U.S.C. 208, and other ethics laws and principles, which appear to have tainted DOJ advice and actions resulting from the complaint.<sup>99</sup>

The most concerning substantive issue with the Ukraine scandal was DOJ involvement in the first place. Consider President Trump's suggestion to the president of Ukraine that he contact Attorney General Barr and Rudy Giuliani about an investigation of Joe Biden and Hunter Biden and re-opening the Russia election-meddling investigation. What was Mr. Barr's role in assisting the president with the proposal that Ukraine dig up dirt on Trump's political rivals? If so, would this be bribery or otherwise illegal? Would this violate the Hatch Act? Did the DOJ have a role in putting pressure on Ukraine? Should the DOJ have been working with Giuliani and other private lawyers—including lawyers for political campaigns—on its investigations? Congress must investigate if we are to get answers to these consequential questions.

In sum, two aspects of the Ukraine matter are of grave concern. First, President Trump in his phone call with the president of Ukraine described Attorney General Barr as having a role that is entirely inappropriate for any DOJ lawyer including the attorney general: investigating the president's political opponents and possibly coordinating with Rudy Giuliani, a private lawyer representing the president's political campaign. To the extent that the president's conduct was criminal, it is important to know whether Mr. Barr was involved. Congress should investigate. Second, the implication that Mr. Barr played a role in getting OLC to opine that the inspector general should not report facts learned from the Ukraine whistleblower to Congress is incredibly concerning. Congress should investigate this as well.

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<sup>96</sup> Phil Helsel, *Giuliani associate Parnas says Trump 'knew exactly what was going on'*, NBC NEWS (Jan. 15, 2020), <https://www.nbcnews.com/news/us-news/giuliani-associate-parnas-says-trump-knew-exactly-what-was-going-n1116731>.

<sup>97</sup> Maggie Haberman & Michael S. Schmidt, *Trump Tied to Ukraine Aid to Inquiries He Sought, Bolton Book Says*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/01/26/us/politics/trump-bolton-book-ukraine.html>.

<sup>98</sup> Matt Zapotosky & Devlin Barrett, *Barr acknowledges Justice Dept. has created 'intake process' to vet Giuliani's information on Bidens*, WASHINGTON POST (Feb. 10, 2020), [https://www.washingtonpost.com/national-security/barr-acknowledges-justice-dept-has-created-intake-process-to-vet-giulianis-information-on-bidens/2020/02/10/0fba553a-4c1e-11ea-bf44-f5043eb3918a\\_story.html](https://www.washingtonpost.com/national-security/barr-acknowledges-justice-dept-has-created-intake-process-to-vet-giulianis-information-on-bidens/2020/02/10/0fba553a-4c1e-11ea-bf44-f5043eb3918a_story.html).

<sup>99</sup> Letter from Noah Bookbinder to DOJ Inspector General Michael E. Horowitz (Oct. 7, 2019) (on file at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/10/07163909/10-7-19-DOJ-IG-Barr-recusal-whistleblower-complaint.pdf>).

### 3. Counter-Investigations and Possible Coordination Across the Branches

Attorney General Barr's conduct and statements raise concern that he has used 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 assisting Australia in a hostage negotiation with Iran to Australia helping the DOJ with an investigation into the origins of the Russia investigation.<sup>100</sup> The focus was a recorded conversation between Trump campaign operative George Papadopoulos and a high-ranking Australian diplomat who Trump supporters accused of spying on Papadopoulos.<sup>101</sup> A committee should ask Mr. Barr 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 FBI Director Christopher Wray and DOJ Inspector General Michael Horowitz refuted this claim.<sup>102</sup> Mr. Barr should be asked about his support of the "Obamagate" accusations and whether the DOJ is still involved in investigating disproven 2016 "spying" allegations. Did Mr. Barr agree 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>103</sup>

According to several news reports, Mr. Barr has assigned a DOJ prosecutor to investigate Obama era requests to "unmask" the names of U.S. persons communicating with foreign intelligence targets.<sup>104</sup> We need specific information regarding how many DOJ officials have been assigned full or part time to "Obamagate" investigations and the reasons for these assignments.

#### a. Origins of the Durham Investigation

On June 8, 2018, having reached the end of his career in the private sector, Mr. Barr wrote a memorandum addressed to then-Deputy Attorney General Rod Rosenstein. In this aforementioned memorandum, titled "Mueller's 'Obstruction' Theory," Mr. Barr described himself as "a former official deeply concerned with the institutions of the Presidency and the Department of Justice"

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<sup>100</sup> Erin Banco & Lachlan Cartwright, *Barr Pressed Australia for Help on Mueller Review as DOJ Worked to Free Its Hostages*, THE DAILY BEAST (Jun. 16, 2020), <https://www.thedailybeast.com/bill-barr-pressed-australia-for-help-on-mueller-review-as-doj-worked-to-free-its-hostages>.

<sup>101</sup> *Id.*

<sup>102</sup> Erin Durkin & Joanna Walters, *William Barr says 'spying did occur' on Trump campaign during Obama era*, THE GUARDIAN (Apr. 10, 2019), <https://www.theguardian.com/us-news/2019/apr/10/william-barr-says-spying-did-occur-on-trump-campaign-during-obama-era>; Adam Edelman, *FBI chief Wray refutes Barr, says no 'spying' on Trump campaign*, NBC NEWS (May 7, 2019), ; Adam Goldman, *Russia Inquiry Review Is Expected to Undercut Trump Claim of F.B.I. Spying*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/27/us/politics/fbi-trump-campaign-inspector-general.html?smtyp=cur&smid=tw-nytimes>. <https://www.nbcnews.com/politics/white-house/fbi-chief-wray-says-spying-didn-t-occur-trump-campaign-n1002806>; Adam Goldman, *Russia Inquiry Review Is Expected to Undercut Trump Claim of F.B.I. Spying*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/27/us/politics/fbi-trump-campaign-inspector-general.html?smtyp=cur&smid=tw-nytimes>.

<sup>103</sup> 5 U.S.C. § 7323 (2020)

<sup>104</sup> Rebecca Klar, *Barr asks US attorney to further investigate 'unmasking' in 2016*, THE HILL (May 27, 2020), <https://thehill.com/homenews/administration/499865-barr-asks-us-attorney-to-look-into-unmasking-issue>.

and, notwithstanding that he was “in the dark about many of the facts,” proffered his views on why Robert Mueller’s theory of possible presidential obstruction of justice was “fatally misconceived.”<sup>105</sup>

Many commentators viewed this unsolicited document as an application to succeed embattled Attorney General Jeff Sessions, but whether or not this was the case, the memorandum was sent after Mr. Barr had made overtures to persons influential with the president.<sup>106</sup> The memorandum surely struck a note with the president, who had been irate with Sessions for recusing himself from matters related to Mueller’s ongoing investigation of Russian interference in the 2016 presidential election.<sup>107</sup> When Sessions ultimately resigned in November 2018, after a brief interlude with Matthew Whitaker serving as acting attorney general, President Trump nominated Mr. Barr in December 2018 to head the DOJ for a second time.

During his confirmation hearing on January 15, 2019, Mr. Barr promised the Senate Judiciary Committee that he would examine the FBI’s counterintelligence investigation against the Trump campaign, saying “the best policy is to allow light to shine in.”<sup>108</sup> Whether Special Counsel Robert Mueller recognized it or not, his investigation, then months short of concluding, was already in the crosshairs of the incoming attorney general.

The Special Counsel closed his investigation and submitted his final report to Mr. Barr on March 22, 2019, roughly one month after he was sworn into office.<sup>109</sup> Two days later, eschewing any notion of abstaining from comment while the DOJ reviewed the report internally, Mr. Barr sent his own controversial summary of the report to Congress in which he inaccurately “summarize[d] the principal conclusions reached by the Special Counsel and the results of his investigation.” Mueller contradicted Mr. Barr three days after his March 24, 2019, summary, writing to Mr Barr that “the summary letter that the Department sent to Congress and released to the public late in the

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<sup>105</sup> Memorandum from Bill Barr to Deputy Assistant Att’y Gen. Rod Rosenstein and Assistant Att’y Gen. Steve Engel on Mueller’s “Obstruction Theory” (Jun. 8, 2018) (on file at <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf>).

<sup>106</sup> See Ariane de Vogue, *Barr sent or discussed controversial memo with Trump lawyers*, CNN (Jan. 15, 2019), <https://www.cnn.com/2019/01/14/politics/barr-mueller-letter/index.html> (In “a letter to Senate Judiciary Chairman Lindsey Graham” William Barr admitted that he “shared a controversial memo last year with nearly all of President Donald Trump’s lawyers”); see also Mikhaila Fogel, Benjamin Wittes, *Bill Barr’s Very Strange Memo on Obstruction of Justice*, LAWFARE (Dec. 20, 2018), <https://www.lawfareblog.com/bill-barrs-very-strange-memo-obstruction-justice> (“Barr sent his memo to Rosenstein and Assistant Attorney General for the Office of Legal Counsel Steven Engel”).

<sup>107</sup> See Peter Baker, *Why Is Trump Mad at Sessions? A Tweet Provides the Answer*, N.Y. TIMES (Jun. 5, 2018), <https://www.nytimes.com/2018/06/05/us/politics/trump-sessions-tweet-russia.html> (explaining Trump’s intense anger at Sessions for stepping away from the investigation). Indeed, Trump’s ire at Jeff Sessions may have cost him a Senate comeback attempt against Tommy Tuberville. See James Arkin, *Sessions Crashes into Tuberville, Trump in Alabama Runoff*, POLITICO (Jul. 13, 2020), <https://www.politico.com/news/2020/07/13/sessions-tuberville-alabama-359995>.

<sup>108</sup> Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Att’y General of the United States, *Hearing Before the Sen. Comm. on the Judiciary*, S. Hrg. 116-65, 116<sup>th</sup> Cong., (statement of William Barr), <https://www.congress.gov/116/chr/CHRG-116shrg36846/CHRG-116shrg36846.htm>.

<sup>109</sup> Sharon LaFraniere & Katie Benner, *Mueller Delivers Report on Trump-Russia Investigation to Attorney General*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/us/politics/mueller-report.html>.

afternoon of March 24 did not fully capture the context, nature, and substance of this Office’s work and conclusions.”<sup>110</sup>

Ignoring Mueller, the attorney general reiterated his inaccurate summary during a televised April 2019 press conference while disseminating a redacted version of the report. Stating no fewer than nine times that the special counsel’s investigation did not find that the president or his campaign had conspired or coordinated with the Russian government to interfere in the 2016 election, Mr. Barr declared, “[t]his is something that all Americans can and should be grateful to have confirmed.”<sup>111</sup>

Mr. Barr then offered a strident defense of the president’s conduct during the special counsel’s investigation, noting that the president was angry and frustrated at having his presidency undermined by political opponents and pervasive leaks.<sup>112</sup> He made no mention of the fact that the Mueller Report had set forth at least six potentially cognizable instances of collusion or obstruction, or the fact that the only stated reason for Mueller’s not proceeding further was the OLC opinion blocking the indictment of a sitting president.<sup>113</sup> Nor did Mr. Barr mention the events that had prompted the appointment of a special counsel in the first place: the president’s request for loyalty from, and his subsequent firing of, FBI director James Comey; false statements that were made to the press about contacts between his campaign and the Russians; or Trump’s public call during the 2016 campaign for the Russians to steal Hillary Clinton’s e-mails.<sup>114</sup>

Unbeknownst to the public, on March 25, 2019, between the release of the attorney general’s tendentious summary of the Mueller Report in his March 24th letter to Congress and Mueller’s March 27th letter questioning the accuracy of that summary, DOJ records show that Mr. Barr and his close advisors met with U.S. Attorney for the District of Connecticut John Durham along with three members from DOJ’s logistics and staffing division.<sup>115</sup> While these DOJ records offer no indication of what Mr. Barr and Durham discussed that day, it now seems apparent that the conversation broached the topic of the investigation that Mr. Barr would soon tap Durham to lead. Still other DOJ records reflect that Mr. Barr and Durham had at least 18 subsequent scheduled meetings and three scheduled phone calls in 2019.<sup>116</sup> Whether additional unscheduled contacts occurred is not publicly known but, by any measure, Durham was afforded considerable direct contact with the attorney general in 2019.

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<sup>110</sup> Letter from Robert Mueller, Special Counsel, to William Barr, Att’y General (Mar. 27, 2019) (on file at [https://www.washingtonpost.com/context/special-counsel-mueller-s-letter-to-attorney-general-barr/e32695eb-c379-4696-845a-1b45ad32fff1/?itid=lk\\_inline\\_manual\\_2](https://www.washingtonpost.com/context/special-counsel-mueller-s-letter-to-attorney-general-barr/e32695eb-c379-4696-845a-1b45ad32fff1/?itid=lk_inline_manual_2)).

<sup>111</sup> Matthew Kahn, *Document: Bill Barr’s Prepared Remarks at Press Conference on the Mueller Report*, LAWFARE (Apr. 18, 2019), <https://www.lawfareblog.com/document-bill-barrs-prepared-remarks-press-conference-mueller-report>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Katelyn Polantz & Marshall Cohen, *Exclusive: Barr met with prosecutor now reviewing Russia probe immediately after Mueller investigation ended, documents reveal*, CNN POLITICS (May 20, 2020), <https://www.cnn.com/2020/05/20/politics/barr-russia-prosecutor-mueller/index.html>.

<sup>116</sup> DEP’T OF JUSTICE, Meeting List (Last Accessed Sept. 25, 2020) (on file at [https://www.justice.gov/oip/foia-library/general\\_topics/communications\\_durham\\_06\\_19\\_20/download](https://www.justice.gov/oip/foia-library/general_topics/communications_durham_06_19_20/download)).

## b. John Durham and His Task Force

John Durham currently serves as the U.S. Attorney for the District of Connecticut. He is a long-tenured figure in the DOJ, having served as a federal prosecutor since 1982, with involvement in several highly publicized prosecutions.<sup>117</sup>

He has had four previous appointments to serve as a special investigator for the DOJ. In 1999, Durham was appointed to oversee an investigation of the FBI's Boston field office and, in 2002, he helped secure the conviction of retired FBI agent John J. Connolly, Jr., on federal racketeering charges.<sup>118</sup>

In 2008, Attorney General Michael Mukasey appointed Durham to investigate the destruction of CIA videotapes taken of terrorist detainee interrogations.<sup>119</sup> Two years later, in November 2010, Durham closed that investigation without recommending that criminal charges be filed.<sup>120</sup>

Subsequently, in 2009, while still handling the CIA videotape investigation, Durham's mandate was expanded by Attorney General Eric Holder to include examining the legality of the CIA's use of so-called "enhanced techniques" in its interrogation of detainees.<sup>121</sup> Durham's announced instructions were to examine only those interrogations that had transgressed "the officially sanctioned guidelines," with Holder announcing that interrogators who had acted in "good faith," based on the guidance found in the torture memos issued by the Bush administration, were not to be prosecuted.<sup>122</sup> In June 2011, the DOJ issued a press release stating that Durham's investigation had "examined any possible CIA involvement with the interrogation of 101 detainees who were in United States custody subsequent to the terrorist attacks of September 11, 2001."<sup>123</sup> According to the DOJ press release, Durham recommended that a full criminal investigation be conducted with respect to two of those detainees who had died in custody, but the criminal probe was concluded with no criminal charges filed.<sup>124</sup>

Based upon Attorney General Barr's running commentary and media reports, it appears that Durham and his team are engaged in a sweeping global probe of the circumstances surrounding the investigation of the Trump campaign's connections with Russia, an undertaking which

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<sup>117</sup> See Liam Stack, *Who Is John Durham, the Prosecutor Investigating the Russia Inquiry*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/us/politics/who-is-john-durham-attorney.html> ("Mr. Durham, the top federal prosecutor in Connecticut, has investigated potential wrongdoing by the F.B.I. and C.I.A. for the Clinton, Bush, Obama and Trump administrations").

<sup>118</sup> *Id.*

<sup>119</sup> Press Release, U.S. Dep't of Just., Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel (Jan. 2, 2008) (on file at [https://www.justice.gov/archive/opa/pr/2008/January/08\\_opa\\_001.html](https://www.justice.gov/archive/opa/pr/2008/January/08_opa_001.html)).

<sup>120</sup> Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. TIMES (Nov. 9, 2010), <https://www.nytimes.com/2010/11/10/world/10tapes.html>.

<sup>121</sup> Pam Benson, Elaine Quijano, Kevin Bohn, & Gloria Borger, *Top prosecutor orders probe into interrogations; Obama shifts onus*, CNN POLITICS (Aug. 24, 2009), <https://www.cnn.com/2009/POLITICS/08/24/us.terror.interrogations/index.html>.

<sup>122</sup> *Id.*

<sup>123</sup> Press Release, U.S. Dep't of Just., Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees (Jun. 30, 2011) (on file at <https://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees>).

<sup>124</sup> *Id.*

apparently embraces the activities of both the FBI, in its Crossfire Hurricane counterintelligence investigation, and the continuation of that probe by Special Counsel Robert Mueller.<sup>125</sup> Reports indicate that Durham’s investigative portfolio has repeatedly expanded and now extends to leaks viewed as harmful to the beginning of the Trump administration, to the purported unmasking of Michael Flynn, to activities in Ukraine that almost certainly include alleged activities of Hunter Biden, and, more broadly, to the Intelligence Community’s assessment that Russia sought to help Trump win the presidency.

With one notable exception, Durham himself has been consistently tight-lipped about his activities. But, as noted above, Durham’s boss, Mr. Barr, and his boss, President Trump, have been considerably less reticent. Mr. Barr indeed promised during his confirmation hearing that he would examine the FBI’s counterintelligence investigation against the Trump campaign, saying “the best policy is to allow light to shine in.”<sup>126</sup> This was a foreshadowing of his repeated commentary on the nature, purpose, and scope of the Durham investigation and, in this recounting of many of those comments, it bears remembering that, as expressed in the Justice Manual, the policy of the DOJ remains that “DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations.”<sup>127</sup>

Following the highly orchestrated April 2019 press conference announcing the release of the redacted Mueller Report, Mr. Barr continued his commentary attacking the FBI’s Crossfire Hurricane counterintelligence investigation and, by implication, the findings and conclusions produced by Mueller’s investigation. Just days after the public release of the redacted Mueller Report, Mr. Barr told a Senate Appropriations subcommittee that he intended to review “both the genesis and the conduct of intelligence activities directed at the Trump campaign during 2016.”<sup>128</sup> He further intimated that the inquiry would cover the FBI’s investigation of Trump and “intelligence agencies more broadly” and justified the inquiry by saying that “spying on a political campaign is a big deal” and “did occur” in the 2016 inquiry launched at the Trump campaign.<sup>129</sup>

Two days after this Senate subcommittee hearing, records show that a top Barr aide, Seth DuCharme, e-mailed DOJ Inspector General Michael Horowitz thanking Horowitz for affording

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<sup>125</sup> See, e.g. Adam Goldman, Charlie Savage, & Michael S. Schmidt, *Barr Assigns U.S. Attorney in Connecticut to Review Origins of Russia Inquiry*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html>; Sadie Gurman, *Barr Taps Prosecutor to Investigate Origins of FBI Trump-Russia Probe*, WALL. ST. J. (May 13, 2019), <https://www.wsj.com/articles/barr-taps-prosecutor-to-investigate-origins-of-fbi-trump-russia-probe-11557799239>; Katie Benner & Adam Goldman, *Justice Dept. Is Said to Open Criminal Inquiry Into Its Own Russia Investigation*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html>; Elizabeth Williamson, *Durham Surprises Even Allies With Statement on F.B.I.’s Trump Case*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/23/us/politics/john-durham-fbi-russia.html>; Katie Benner & Julian Barnes, *Durham Is Scrutinizing Ex-C.I.A. Director’s Role in Russian Interference Findings*, N.Y. TIMES (Dec. 19, 2019), <https://www.nytimes.com/2019/12/19/us/politics/durham-john-brennan-cia.html>.

<sup>126</sup> Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Att’y Gen. of the United States, *Hearing Before the Sen. Comm. on the Judiciary*, S. Hrg. 116-65, 116<sup>th</sup> Cong., (statement of William Barr), <https://www.congress.gov/116/chr/CHRG-116shrg36846/CHRG-116shrg36846.htm>.

<sup>127</sup> JUSTICE MANUAL 1-7.400 (U.S. DEP’T OF JUSTICE APR. 2018).

<sup>128</sup> Andrew Prokop, *What does Bill Barr mean when he says he’ll review US “spying” on Trump’s campaign?*, VOX (Apr. 10, 2019), <https://www.vox.com/2019/4/10/18304627/bill-barr-trump-russia-fbi-spying-fisa>.

<sup>129</sup> *Id.*

the opportunity to have him “explain what John and [redacted] and I are working on.”<sup>130</sup> The e-mail was copied to “Durham, John (USACT) [i.e., U.S. Attorney for Connecticut].”<sup>131</sup> Notably, by this time in April 2019, Inspector General Horowitz had already spent more than a year conducting his own investigation into the origins and operational aspects of the FBI’s Crossfire Hurricane investigation while also having completed and reported upon another investigation by the DOJ Inspector General into “Various Actions Taken by the Federal Bureau of Investigation and the Department of Justice in Advance of the 2016 Election.”<sup>132</sup> Put more plainly, the well-publicized events surrounding the 2016 presidential election represented ground already well plowed both by Special Counsel Mueller’s 22-month probe and by the two separate inquiries initiated by the DOJ’s Inspector General.

In May 2019, *The New York Times* reported that Mr. Barr had assigned Durham “to examine the origins of the Russia investigation,” and *The Wall Street Journal* expanded that description, saying that Durham had been tasked with evaluating “whether the government’s intelligence-gathering efforts in the early stages of the [FBI’s] probe were legal and appropriate.”<sup>133</sup> According to DOJ officials, Durham’s probe quietly absorbed a separate investigation by the U.S. attorney in Utah, John Huber, who had also been examining the FBI’s surveillance of Carter Page and other FBI conduct.<sup>134</sup> Mr. Barr told Fox News that he wanted to know whether “it [the FBI investigation] was adequately predicated” because “the use of foreign intelligence capabilities and counterintelligence capabilities against an American political campaign to me is unprecedented and it’s a serious red line that’s been crossed.”<sup>135</sup> He additionally stated that he was determined to find out whether “government officials abused their power and put their thumb on the scale” at the outset of the Russia probe.<sup>136</sup>

At this point, Durham’s investigation was still termed a “review” and lacked subpoena power, but the attorney general was busily pulling levers to get Durham any access he considered necessary

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<sup>130</sup> AMERICAN OVERSIGHT, *Documents We Obtained Show Barr Met With Prosecutor Examining Mueller Investigation — Immediately After Mueller Investigation Ended* (May 20, 2020), <https://www.americanoversight.org/documents-we-obtained-show-barr-met-with-prosecutor-examining-mueller-investigation-immediately-after-mueller-investigation-ended>.

<sup>131</sup> *Id.*

<sup>132</sup> Matt Zapotosky, *Justice Dept. inspector general to review surveillance of former Trump campaign adviser*, WASHINGTON POST (Mar. 28, 2018), [https://www.washingtonpost.com/world/national-security/inspector-general-announces-he-will-review-justice-departments-surveillance-of-former-trump-campaign-adviser/2018/03/28/23651efe-32bb-11e8-94fa-32d48460b955\\_story.html](https://www.washingtonpost.com/world/national-security/inspector-general-announces-he-will-review-justice-departments-surveillance-of-former-trump-campaign-adviser/2018/03/28/23651efe-32bb-11e8-94fa-32d48460b955_story.html); Sharon LaFraniere, Eileen Sullivan, & Michael S. Schmidt, *Highlights From the Horowitz Report on the Russia Investigation*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/us/politics/horowitz-ig-report.html>.

<sup>133</sup> Adam Goldman, Charlie Savage, & Michael S. Schmidt, *Barr Assigns U.S. Attorney in Connecticut to Review Origins of Russia Inquiry* N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html>; Sadie Gurman, *Barr Taps Prosecutor to Investigate Origins of FBI Trump-Russia Probe*, WALL ST. J. (May 13, 2019), <https://www.wsj.com/articles/barr-taps-prosecutor-to-investigate-origins-of-fbi-trump-russia-probe-11557799239>.

<sup>134</sup> See Andy Sullivan, Mark Hosenball, Sarah N. Lynch, *Explainer: Barr investigates the investigators of Russian meddling*, REUTERS (Oct. 8, 2019), <https://www.reuters.com/article/us-usa-trump-whistleblower-barr-explaine/explainer-barr-investigates-the-investigators-of-russian-meddling-idUSKBN1WN2FN> (“Huber has ceded some portions of his probe to Durham and is waiting for Horowitz to finish his review”).

<sup>135</sup> Victor Garcia, *AG Bill Barr tells Fox News public must know if officials 'put their thumb on the scale' in Russia probe*, FOX NEWS (May 16, 2019), <https://www.foxnews.com/politics/fox-news-exclusive-attorney-general-barr-on-getting-answers-about-the-russia-investigation>.

<sup>136</sup> *Id.*

for his probe. Mr. Barr leaned on CIA Director Gina Haspel and FBI Director Christopher Wray to provide assistance, and, on May 23, 2019, President Trump announced that, at Mr. Barr's request, the Intelligence Community had been directed "to quickly and fully cooperate with the Attorney General's investigation into surveillance activities during the 2016 presidential election."<sup>137</sup> He supplemented this directive by issuing a presidential memorandum authorizing Mr. Barr to "declassify, downgrade, or direct the declassification or downgrading of information or intelligence that relates [to the Durham probe]."<sup>138</sup> This represented an unprecedented delegation of authority to the attorney general with respect to the protection of intelligence sources, methods, and tradecraft—a responsibility that Congress has statutorily assigned to the Director of National Intelligence.

Unsurprisingly, *The New York Times* reported that Durham's inquiry "provoked anxiety in the ranks at the CIA," but CIA Director Haspel pledged the agency's cooperation while assuring her own employees they should work to protect critical pieces of intelligence whose disclosure could jeopardize sources, reveal collection methods or disclose information provided by allies.<sup>139</sup> Still, it is unlikely that frayed nerves at the CIA were calmed when, on May 17th, the president tweeted that his presidential campaign "was conclusively spied on," adding, ominously, "TREASON means long jail sentences, and this was TREASON!"<sup>140</sup>

The attorney general and Durham proceeded to crisscross the globe, seeking, as Mr. Barr stated, "the underlying intelligence that sparked the bureau's decision to open the counterintelligence investigation, as well as the actions officials took based on that intelligence."<sup>141</sup> Among other peregrinations, in the second half of 2019, Mr. Barr was in Rome at least twice and visited London once, while also having the president contact British Prime Minister Boris Johnson to ensure Durham received any necessary assistance. Mr. Barr reached out to the Australian government to secure Durham the opportunity to interview Alexander Downer, the Australian government official with whom George Papadopoulos had met.<sup>142</sup> Then, in the infamous July 25, 2019, telephone call between President Trump and Ukrainian President Volodymyr Zelenskyy, the president requested that Zelenskyy speak with the attorney general and Rudy Giuliani.<sup>143</sup>

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<sup>137</sup> Press Release, Statement from the Press Secretary (May 23, 2019), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-58/>.

<sup>138</sup> Memorandum on Agency Cooperation with the Attorney General's Review of Intelligence Activities Relating to the 2016 Presidential Campaigns for Various Executive Officials (May 23, 2019) (on file at <https://www.whitehouse.gov/presidential-actions/memorandum-agency-cooperation-attorney-generals-review-intelligence-activities-relating-2016-presidential-campaigns/>).

<sup>139</sup> Julian E. Barnes, Katie Benner, Adam Goldman, & Michael S. Schmidt, *Justice Dept. Seeks to Question C.I.A. in Its Own Russia Investigation*, N.Y. TIMES (Jun. 12, 2019), <https://www.nytimes.com/2019/06/12/us/politics/russia-investigation-cia.html>.

<sup>140</sup> Donald J. Trump (@realDonaldTrump) TWITTER (May 17, 2019, 7:11AM), <https://twitter.com/realDonaldTrump/status/1129343742748569601>.

<sup>141</sup> Sadie Gurman & Aruna Viswanatha, *Barr Says Review of Origins of Russia Probe Could Lead to Rule Changes*, WALL ST. J. (May 17, 2019), [https://www.wsj.com/articles/barr-review-of-origins-of-fbis-trump-russia-probe-could-lead-to-rule-changes-11558090803?mod=hp\\_lead\\_pos4](https://www.wsj.com/articles/barr-review-of-origins-of-fbis-trump-russia-probe-could-lead-to-rule-changes-11558090803?mod=hp_lead_pos4).

<sup>142</sup> See Sharon LaFraniere, Mark Mazzetti, & Matt Apuzzo, *How the Russia Inquiry Began: A Campaign Aide, Drinks and Talk of Political Dirt*, N.Y. TIMES (Dec. 30, 2017), <https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html> (George Papadopoulos . . . made a startling revelation to Australia's top diplomat in Britain: Russia had political dirt on Hillary Clinton).

<sup>143</sup> White House Memorandum, *supra* note 71 (on file at <https://bit.ly/2n4ZFBg>).

Moreover, former White House Chief of Staff Mick Mulvaney later suggested that the president's queries to Zelenskyy were related to Durham's investigation.<sup>144</sup>

By October 2019, *The New York Times* was reporting that Durham's inquiry was pursuing the existence of anti-Trump bias and "whether CIA officials might have somehow tricked the FBI into opening the Russia investigation" while describing Mr. Barr as "closely managing" the probe.<sup>145</sup> On the same day that this reporting appeared in *The New York Times* (October 19th), NBC reported that Durham "expressed his intent to interview a number of current and former intelligence officials involved in examining Russia's effort to interfere in the 2016 presidential election, including former CIA director John Brennan and former director of national intelligence James Clapper."<sup>146</sup>

All of this followed an October 17, 2019, tweet by President Trump decrying the victimization of his 2016 campaign by "rogue bureaucrats of the Deep State"—a term Trump and his supporters repeatedly use to discredit the U.S. Intelligence Community.<sup>147</sup>

Days later, *The New York Times* reported that Durham's probe had morphed into a criminal investigation and that some CIA officials had retained criminal defense lawyers in anticipation of being interviewed; although, neither *The New York Times*, *The Washington Post*, nor *The Wall Street Journal* was able to say just what crime Durham was investigating or when the transition to a criminal probe had occurred.<sup>148</sup> Later press reports suggested that the transition was triggered, at least in part, by Inspector General Horowitz's referral to Durham of his discovery that a lawyer in the FBI's Office of General Counsel had materially altered an e-mail from the CIA that was subsequently relied upon in one of the FBI's FISA applications seeking authority to surveil Carter Page after he left the Trump campaign.<sup>149</sup> No official order, memorandum, or internal directive

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<sup>144</sup> Michael Shear & Katie Rogers, *Mulvaney Says, Then Denies, That Trump Held Back Ukraine Aid as Quid Pro Quo* (Nov. 5, 2019), <https://www.nytimes.com/2019/10/17/us/politics/mick-mulvaney-trump-ukraine.html>. The Justice Department has said that Barr had no contemporaneous knowledge of the July 25, 2019 call between Trump and Zelenskyy, and "has not communicated with Ukraine on any topic". Katie Benner, *Justice Dept.'s Dismissal of Ukraine Call Raises New Questions About Barr*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/us/politics/william-barr-trump-ukraine.html>.

<sup>145</sup> Katie Benner & Adam Goldman, *Justice Dept. Is Said to Open Criminal Inquiry Into Its Own Russia Investigation*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html>.

<sup>146</sup> Ken Dilanian, Julia Ainsley, & Tom Winter, *AG Barr expands mysterious review into origin of Russia investigation*, NBC NEWS (Oct. 19, 2019), <https://www.nbcnews.com/politics/justice-department/ag-barr-expands-controversial-review-origin-russia-investigation-n1068971>.

<sup>147</sup> Donald J. Trump (@realDonaldTrump) TWITTER (Oct. 17, 2019, 11:06 PM), <https://twitter.com/realDonaldTrump/status/1185029472132698113>. See also Natasha Bertrand & Daniel Lippman, *Trump tightens his grip on intelligence*, POLITICO (Feb. 26, 2020), <https://www.politico.com/news/2020/02/26/trump-tightens-his-grip-on-intelligence-117451> (arguing that President Trump's 'deep state' rhetoric fuels his actions in the intelligence realm to "shield the public from intelligence that could be politically damaging").

<sup>148</sup> Katie Benner & Adam Goldman, *Justice Dept. Is Said to Open Criminal Inquiry Into Its Own Russia Investigation*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html>.

<sup>149</sup> Jen Kirby, *An inspector general reportedly finds that FBI employee altered a document in Russia investigation*, VOX (Nov. 22, 2019), <https://www.vox.com/2019/11/22/20977630/inspector-general-report-carter-page-russia-investigation>. To date, that former FBI lawyer, Kevin Clinesmith, is the only person against whom Durham has filed

initiating the Durham investigation or appointing Durham to run it, if any exists, has ever been disclosed by the DOJ.

Since the initial drafting of this report, there have been multiple developments regarding the Durham Report. On October 6, 2020, DOJ changed its policies to allow prosecutors more discretion to file indictments and announce investigations prior to the election.<sup>150</sup> In addition, the president said in a phone call on October 8, 2020 on Fox News and Fox Business that Mr. Barr has “all the information he needs” in order to bring indictments of top Democrats like Joe Biden and Barak Obama.<sup>151</sup> Several news outlets have reported that Mr. Barr has said that the Durham report will not be ready until after the election.<sup>152</sup> Reporting suggests that Mr. Trump is disappointed in Mr. Barr on this point, saying, “Unless Bill Barr indicts these people for crimes, the greatest political crime in the history of our country, then we’re going to get little satisfaction unless I win and we’ll just have to go, because I won’t forget it,” a thinly veiled threat to Mr. Barr. The following day, on October 9, President Trump ratcheted up his pressure on the Department of Justice in a radio interview with Rush Limbaugh, calling the delayed Durham report “a disgrace,” and said that Hillary Clinton should be “jailed.”<sup>153</sup>

Meanwhile, there have been additional developments having to do with the declassification of materials relating to the Russia probe by John Ratcliffe. This may be an indication that strategy has shifted away from using the Durham investigation as the primary vehicle for prosecutorial election interference.<sup>154</sup>

### c. The Horowitz Report

In December 2019, Horowitz released a redacted version of his report entitled “Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation” (the

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criminal charges in his ongoing probe. Clinesmith, whose conduct was originally uncovered by DOJ Inspector General Michael Horowitz’s investigation, pled guilty to a single-count Criminal Information on August 19, 2020. Matt Zapotosky & Ann Marimow, *Ex-FBI lawyer admits to falsifying document in probe of Trump’s campaign*, WASHINGTON POST (Aug. 19, 2020), [https://www.washingtonpost.com/national-security/kevin-clinesmith-fbi-pleads-guilty/2020/08/19/6c0dec54-e0a0-11ea-8dd2-d07812bf00f7\\_story.html](https://www.washingtonpost.com/national-security/kevin-clinesmith-fbi-pleads-guilty/2020/08/19/6c0dec54-e0a0-11ea-8dd2-d07812bf00f7_story.html).

<sup>150</sup> See Justice Dept. Eases Election Fraud Inquiry Constraints as Trump Promotes False Narrative, Michael S. Schmidt and Katie Benner, *New York Times*, October 7, 2020 accessible at <https://www.nytimes.com/2020/10/07/us/politics/justice-department-election-fraud.html>

<sup>151</sup> Peter Baker and Maggie Haberman, *Trump Lashes Out at His Cabinet With Calls to Indict Political Rivals*, *The New York Times*, Oct. 8, 2020. <https://www.nytimes.com/2020/10/08/us/politics/trump-calls-to-indict-political-rivals.html>

<sup>152</sup> Alayna Treene, *Barr Tells Republicans Durham Report Won’t Be Ready by Election*, Oct. 9, 2020. <https://www.axios.com/barr-durham-report-election-3c02ec6a-7613-4083-b35c-4844de6da16b.html>.

<sup>153</sup> Anne Gearan, et. al., *Trump, Lagging in Polls, Pressure Justice Department to Target Democrats and Criticizes Barr*. Oct. 9, 2020. [https://www.washingtonpost.com/politics/trump-barr-durham-russia/2020/10/09/05ed9842-0a40-11eb-a166-dc429b380d10\\_story.html](https://www.washingtonpost.com/politics/trump-barr-durham-russia/2020/10/09/05ed9842-0a40-11eb-a166-dc429b380d10_story.html)

<sup>154</sup> See John Ratcliffe Pledged to Stay Apolitical. Then He Began Serving Trump’s Political Agenda, Julian E. Barnes and Adam Goldman, *The New York Times*, October 9, 2020 accessible at <https://www.nytimes.com/2020/10/09/us/politics/john-ratcliffe-intelligence.html>

“Horowitz Report”).<sup>155</sup> The DOJ announced the opening of the Inspector General’s investigation in March 2018. The report recounts the broad access afforded Horowitz’s team that led to the inspector general’s investigators examining more than one million documents and conducting over 170 interviews of more than 100 witnesses, reflecting a massive undertaking by the inspector general.

The Horowitz Report did not reference the Durham investigation, but among the findings and conclusions reached in the investigation, those most closely encroaching upon the areas Durham is pursuing are Horowitz’s conclusion that Crossfire Hurricane was adequately authorized and predicated under the prevailing DOJ and FBI policies and that, according to the inspector general, he “did not find documentary or testimonial evidence that political bias or improper motivation influenced [the FBI’s decision to open the Crossfire Hurricane counterintelligence investigation].”<sup>156</sup>

As the Horowitz Report notes, the predication requirement under the existing DOJ and FBI guidelines “is not a legal requirement but a prudential one imposed by Department and FBI policy.”<sup>157</sup> Despite the prudential discretion understandably afforded in opening a national security counterintelligence investigation, however, Mr. Barr was quick to contradict his inspector general, asserting inaccurately that “[t]he Inspector General’s report now makes clear that the FBI launched an intrusive investigation of a U.S. presidential campaign on the thinnest of suspicions that, in my view, were insufficient to justify the steps taken.”<sup>158</sup>

Then, shortly after the release of Barr’s statement, Durham, through the DOJ released his own comments, stating: “...[I]ast month, we advised the inspector general that we do not agree with some of the report’s conclusions as to predication and how the FBI case was opened.”<sup>159</sup>

Continuing, Durham noted that, unlike the resources available to Horowitz, his inquiry had access to “developing information from other persons and entities, both in the U.S. and outside of the U.S.”<sup>160</sup> *The New York Times* reported that even Durham’s allies expressed surprise at his decision

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<sup>155</sup> REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI’S CROSSFIRE HURRICANE INVESTIGATION, U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN. (Dec. 2019) (hereinafter HORIWITZ REPORT), <https://www.justice.gov/storage/120919-examination.pdf>.

<sup>156</sup> *Id.* at iii.

<sup>157</sup> *Id.* at ii.

<sup>158</sup> Press Release, Statement by Att’y Gen. William P. Barr on the Inspector General’s Report of the Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation (Dec. 9, 2019) (on file at <https://www.justice.gov/opa/pr/statement-attorney-general-william-p-barr-inspector-generals-report-review-four-fisa>).

<sup>159</sup> Press Release, Statement of U.S. Att’y John H. Durham (Dec. 9, 2019) (on file with <https://www.justice.gov/usao-ct/pr/statement-us-attorney-john-h-durham>); Teleconference Interview with David Laufman, the former head of the Counterintelligence and Export Control Section in the Justice Department’s National Security Division (Aug. 20, 2020). Mr. Laufman, who worked on the Justice Department investigations into both Hillary Clinton’s private email server and Russian interference in the 2016 election, told the CERL working group, “I’d be surprised if John Durham decided on his own to issue that statement. Certainly, it had to be coordinated with the Attorney General. I would expect that the White House had cognizance that Durham was going to issue that statement that day. I thought it was a shocking departure from Department policy and decorum.”

<sup>160</sup> *Id.*

to speak out while conducting what the *Times* described as “the most politically charged role in [Durham’s] career.”<sup>161</sup>

Days after the release of the Horowitz Report, Inspector General Horowitz testified before the Senate Judiciary Committee where he disclosed that Durham had informed him that Durham did “not necessarily agree” with Horowitz’s conclusion that a sufficient basis existed to open Crossfire Hurricane as a “full” counterintelligence investigation, but that Durham did agree that there was enough information to have opened a “preliminary” investigation.<sup>162</sup> As the Horowitz Report explains, a principal difference between a “full” and “preliminary” investigation lies in the approved use of certain more intrusive law enforcement techniques: electronic surveillance and/or physical search pursuant to judicial order or warrant is available for use only in “full” investigations.<sup>163</sup> But, as Horowitz pointedly noted in reference to Durham’s agreement that the preliminary investigation was sufficiently predicated, “investigative steps such as confidential human source activity that occurred here are allowed under a preliminary investigation or under a full investigation.”<sup>164</sup>

Undeterred, the attorney general has persisted in offering public commentary on Horowitz’s findings while emphasizing the continued need for Durham’s investigation. In a television interview on December 10, 2019, Mr. Barr insisted that the FBI had “spied upon” the Trump presidential campaign and that its Russia investigation was “completely baseless,” “built on speculation,” and a “bogus narrative.”<sup>165</sup> According to Mr. Barr, the possibility that the errors identified by Horowitz had been made in “bad faith” required that Durham’s review determine whether the conduct had, in fact, been prompted by “improper motive.”<sup>166</sup> Mr. Barr left no doubt that he disagreed with Horowitz’s conclusion that Crossfire Hurricane was adequately predicated, insisting that Durham’s inquiry was necessary to ascertain all the facts relevant to that decision because the FBI’s predication was “rubbish” and a “complete sham,” which led to “very serious” and “gross abuses” of the FISA process.<sup>167</sup> Further, while avoiding disclosing specific “targets” of Durham’s inquiry, Mr. Barr volunteered that former FBI director James Comey was a possible witness whose testimony could be compelled by Durham, if necessary.<sup>168</sup>

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<sup>161</sup> Elizabeth Williamson, *Durham Surprises Even Allies With Statement on F.B.I.’s Trump Case*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/23/us/politics/john-durham-fbi-russia.html>.

<sup>162</sup> Adam Goldman & Charlie Savage, *Horowitz Hearing Highlights: Watchdog Warns Against Exonerating F.B.I. in Russia Inquiry, Pointing to Flaws*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/us/politics/fbi-ig-hearing.html>.

<sup>163</sup> HOROWITZ REPORT supra n. \_\_

<sup>164</sup> *Id.*

<sup>165</sup> Interview by Pete Williams, Journalist, with William Barr, U.S. Att’y Gen. (Dec. 10, 2019), <https://www.youtube.com/watch?v=LRKFo0JmuBc>.

<sup>166</sup> *Id.* See also Tobias Hoonhout, *Barr Says IG ‘Hasn’t Decided the Issue of Improper Motive’ in Report on FBI Russia Probe*, NATIONAL REVIEW (Dec. 10, 2019), <https://www.nationalreview.com/news/barr-says-ig-hasnt-decided-the-issue-of-improper-motive-in-report-on-fbi-russia-probe/>.

<sup>167</sup> Nancy LeTourneau, *Barr Makes It Clear That the Durham Investigation Is a Sham*, WASHINGTON MONTHLY (Apr. 10, 2020), <https://washingtonmonthly.com/2020/04/10/barr-makes-it-clear-that-the-durham-investigation-is-a-sham/>.

<sup>168</sup> See Jerry Dunleavy & Daniel Chaitin, *James Comey says he ‘can’t imagine’ being a ‘target’ of John Durham’s investigation*, WASHINGTON EXAMINER (Aug. 23, 2020), <https://www.washingtonexaminer.com/news/james-comey-says-he-cant-imagine-being-a-target-of-john-durhams-investigation> (explaining how Comey might be called as a witness due to purported involvement in the activities investigated in the report).

Since the release of the Horowitz Report, the attorney general's persistent complaint has been that Crossfire Hurricane was initiated on the "thinnest of suspicions" that were, in his eyes, "insufficient to justify the steps taken."<sup>169</sup> It is a theme to which he has repeatedly returned, describing the origins of Crossfire Hurricane as "completely baseless," "built on speculation," "rubbish," "a complete sham," and a "bogus narrative."<sup>170</sup> Mirroring Mr. Barr's complaint, Durham's only public comment, to date, on his inquiry has been the statement issued in his name following the release of the Horowitz Report in which he says, "we advised the inspector general that we do not agree with some of the report's conclusions as to predication and how the FBI case was opened."

Inspector General Horowitz examined in detail the origin of Crossfire Hurricane, and whether it was sufficiently "predicated" as that term is understood by the FBI. "Predication," as the Horowitz Report notes, "is not a legal requirement but rather a prudential one imposed by Department and FBI policy."<sup>171</sup> In other words, it is a judgment call worthy of support unless there is a factual basis demonstrating that the exercised judgment was deliberately faulty or so clearly erroneous that no reasonable person could have reached a similar conclusion. Mr. Barr's criticism notwithstanding, that certainly was not the case here as the Horowitz Report definitively shows. Instead, Horowitz's exhaustive inquiry reveals that "Crossfire Hurricane was opened as a Full Investigation and all the senior FBI officials who participated in discussions about whether to open a case told us the information warranted opening it."<sup>172</sup>

Put differently, every senior FBI official who engaged in the determination of whether to open this counterintelligence investigation agreed with the decision.

For that matter, Durham agrees with the decision, too. Inspector General Horowitz confirmed this during his testimony before the Senate Judiciary Committee in December 2019.<sup>173</sup> According to Horowitz, the dispute to which Durham referred in his issued statement was that Durham believed the known facts supported opening only a "preliminary" investigation as opposed to a "full" investigation.<sup>174</sup> But, with respect to Crossfire Hurricane, this is essentially a distinction without a difference, since the only law enforcement investigative technique used in Crossfire Hurricane that would not have been available if it was conducted as a "preliminary" investigation is the FISA electronic surveillance employed against Carter Page.

Although the Horowitz Report scrupulously exposes the defects of the Page surveillances and other material errors committed by the FBI in connection with those four FISA applications, these errors

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<sup>169</sup> Interview by Pete Williams, Journalist, with William Barr, U.S. Att'y Gen. (Dec. 10, 2019), <https://www.youtube.com/watch?v=LRKFo0JmuBc>; Tim Hains, *AG Bill Barr Criticizes Inspector General Report On The Russia Investigation*, REALCLEARPOLITICS (Dec. 11, 2019), [https://www.realclearpolitics.com/video/2019/12/11/full\\_interview\\_ag\\_bill\\_barr\\_criticizes\\_inspector\\_general\\_report\\_on\\_the\\_russia\\_investigation.html](https://www.realclearpolitics.com/video/2019/12/11/full_interview_ag_bill_barr_criticizes_inspector_general_report_on_the_russia_investigation.html).

<sup>170</sup> *Id.*

<sup>171</sup> HOROWITZ REPORT at ii.

<sup>172</sup> HOROWITZ REPORT at iii. *See also Id.* at 410 ("we found that Crossfire Hurricane was opened for an authorized investigative purpose and with sufficient factual predication").

<sup>173</sup> Adam Goldman & Charlie Savage, *Horowitz Hearing Highlights: Watchdog Warns Against Exonerating F.B.I. in Russia Inquiry, Pointing to Flaws*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/us/politics/fbi-ig-hearing.html>.

<sup>174</sup> *Id.*

were immaterial to the propriety of undertaking at least a preliminary investigation.<sup>175</sup> Subsequent events justified going further. In any event, given the detailed scope of Inspector General Horowitz's work, it is difficult to discern what new insight John Durham could provide on the origins or operation of Crossfire Hurricane that would represent anything other than inflammatory talking points for use in Barr pronouncements or Trump campaign commercials.

Still, further definitive evidence of the absence of political motive in the FBI's counterintelligence investigation was recently provided by former Deputy Attorney General Sally Yates in testimony before the Senate Judiciary Committee on August 5, 2020.<sup>176</sup> Yates cogently described the FBI's investigation of former national security adviser Michael Flynn (the FBI had opened a separate counterintelligence investigation on Flynn in August 2016 shortly after opening Crossfire Hurricane), the Russia investigation, and the alleged politicization of the DOJ.<sup>177</sup>

*The Washington Post* summarized Yates's testimony as follows:

1) The Trump transition team was not being surveilled, nor was Flynn. While she could not say why because of national security concerns, it was obvious that then-Russian ambassador Sergei Kislyak was the one being monitored. Flynn wound up being recorded when he spoke with Kislyak; 2) Flynn was attempting to undercut sanctions (per Yates's testimony: "General Flynn had essentially neutered the U.S. government's message of deterrence"); 3) Flynn lied to the vice president about his calls; 4) The FBI's investigation was a counterintelligence — not criminal — investigation; 5) The investigation was not closed on Jan. 4 precisely because the FBI learned of Flynn's conversation with Kislyak; 6) Flynn's lying to the FBI was material and indeed at the core of the counterintelligence investigation, contrary to Attorney General William P. Barr's assertion in trying to undo Flynn's guilty plea by dismissing the case; and 7) It was highly abnormal and unprecedented for the

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<sup>175</sup> See generally *id.* It bears noting that the Inspector General continued his review of FBI FISA applications and associated "Woods" files following the release of his report in December 2019. In March 2020, the Inspector General released a memorandum identifying additional errors in the FBI FISA applications reviewed by his office. Devlin Barrett & Ellen Nakashima, *Problems with FBI surveillance extended far beyond probe of Trump campaign*, *Justice Dept. inspector general says*, WASHINGTON POST (Mar. 31, 2020), [https://www.washingtonpost.com/national-security/fbi-surveillance-trump-russia-inspector-general/2020/03/31/22274dd0-735c-11ea-a9bd-9f8b593300d0\\_story.html](https://www.washingtonpost.com/national-security/fbi-surveillance-trump-russia-inspector-general/2020/03/31/22274dd0-735c-11ea-a9bd-9f8b593300d0_story.html). Subsequently, the Assistant Attorney General for National Security at the Justice Department reported that a further Justice Department review of the additional applications identified by the Inspector General concluded that "all [FISA applications] contained sufficient basis for probable cause and uncovered only two material errors, neither of which invalidated the authorizations granted by the FISA Court." Press Release, U.S. Dep't of Just., Statement of Assistant Attorney General for National Security John C. Demers on the Public Release of the Department's Findings with Respect to the 29 FISA Applications that Were the Subject of the March 2020 OIG Preliminary Report (Aug. 3, 2020) (on file at <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-national-security-john-c-demers-public-release>).

<sup>176</sup> Hearing on Review of FBI Russia Investigation: *Hearing Before Sen. Comm. on the Judiciary*, 116<sup>th</sup> Cong. (testimony of Sally Yates), <https://www.c-span.org/video/?474339-1/acting-attorney-general-sally-yates-testifies-russia-investigation>.

<sup>177</sup> *Id.*

attorney general to step in to rescue a friend of the president in this way, an action that damages the Justice Department's credibility.<sup>178</sup>

Between the copious details of the Horowitz Report and the precise recounting of events by Yates, Mr. Barr may have concluded that, as the calendar turned to 2020, his preordained conclusions and improper comments had been seriously undercut. Thus, the attorney general continued stuffing Durham's portfolio with an expanded "wish-list" intended to undermine the investigation into Russian interference in the 2016 election and validate President Trump's erroneous insistence that the investigation was a "total hoax on the American public."<sup>179</sup>

#### d. Durham Investigates the Intelligence Community

Soon after the release of the Horowitz Report, *The New York Times* reported that Durham was "examining the role of the former CIA director John O. Brennan in how the IC assessed Russia's 2016 election interference," attributing the revelation to three unnamed sources who were "briefed on the inquiry."<sup>180</sup> Subsequent reports in the *Times* and other media outlets described Durham as focused on the internal deliberations within the IC that preceded the January 2017 release of the IC assessment titled "Assessing Russian Activities and Intentions in Recent U.S. Elections" (the "ICA"), as well as interagency disputes over intelligence sharing in terms of both product and sources related to the information included in that ICA.<sup>181</sup> According to these reports, Durham's focus was directed toward three specific areas of inquiry:

- (1) what Brennan had told others, including FBI Director James Comey, about the CIA's views regarding the Steele Dossier;
- (2) whether, privately, Brennan had contradicted public comments he had made regarding Russian interference in the election; and
- (3) the specifics of the debate that preceded the issuance of the ICA's specific assessments that the Russians had developed a preference for, and aspired to assist in, the election of Donald Trump.<sup>182</sup>

Follow-up media reports indicated that Durham's probing was hardly superficial and had extended to examining intelligence sources and analyses, including alleged "clashes between analysts at

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<sup>178</sup> Jennifer Rubin, *Sally Yates blows up Republican conspiracies and falsehoods*, WASHINGTON POST (Aug. 6, 2020), <https://www.washingtonpost.com/opinions/2020/08/06/truth-telling-sally-yates-testifies-about-flynn-russia-barr/>.

<sup>179</sup> LAWFARE, *Donald Trump's Statements on Putin/Russia/Fake News Media* <https://www.lawfareblog.com/donald-trumps-statements-putinrussiafake-news-media> (last accessed Sept. 16, 2020).

<sup>180</sup> Katie Benner & Julian Barnes, *Durham Is Scrutinizing Ex-C.I.A. Director's Role in Russian Interference Findings*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/19/us/politics/durham-john-brennan-cia.html>.

<sup>181</sup> See generally DIRECTOR OF NAT'L INTEL., BACKGROUND TO "ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS": THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

<sup>182</sup> *Id.*

different intelligence agencies over who could see each other’s highly sensitive secrets” as well as interpretations of the data derived from certain intelligence sources.<sup>183</sup>

By early April of this year, *The Wall Street Journal* reported that “people familiar with the matter” said that Durham had examined individuals working at the National Intelligence Council, a unit within the office of the Office of the Director of National Intelligence (ODNI) that coordinated the preparation of the ICA.<sup>184</sup> While these interviews were described as “not adversarial,” the same sources reported that “[i]ncreasingly, investigators are focused on former CIA Director John Brennan, examining whether he pushed for a blunter assessment about Russia’s motivations than others in the IC felt was warranted.”<sup>185</sup> Durham’s interviews may not have been “adversarial,” but Mr. Barr has continued to repeat that Durham’s job is not to “prepare a report” but “to bring to justice people who are engaged in abuses if he can show that they were criminal violations, and that’s what the focus is on.”<sup>186</sup> In an April interview with Fox News, Mr. Barr went on to say, “My own view is that the evidence shows that we’re not dealing with just mistakes or sloppiness. There is something far more troubling here, and we’re going to get to the bottom of it. And if people broke the law, and we can establish that with the evidence, they will be prosecuted.”<sup>187</sup>

The attorney general followed with this tendentious assessment of the merits of the matters Durham is investigating:

I think what happened to [Trump] was one of the greatest travesties in American history. Without any basis, they started this investigation of his campaign, and even more concerning, actually is what happened after the campaign, a whole pattern of events while he was president. So I – to sabotage the presidency, and I think that – or at least have the effect of sabotaging the presidency.<sup>188</sup>

On April 24, 2020, *The New York Times* reported that Durham’s mandate had been broadened to include “leaks” related to several news articles published early in 2017 that the Trump administration “blame[d] for prompting the chaos that dominated the early days of the Trump presidency.”<sup>189</sup> At the top of this list is David Ignatius’s *Washington Post* column revealing the existence of the calls between national security advisor (in waiting) Michael Flynn and Russian

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<sup>183</sup> Charlie Savage, Adam Goldman, & Julian E. Barnes, *Justice Dept. Is Investigating C.I.A. Resistance to Sharing Russia Secrets*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/durham-cia-russia.html>.

<sup>184</sup> Aruna Viswanatha, Warren P. Strobel, & Sadie Gurman, *Investigation Into Origins of Trump-Russia Probe Continues Despite Coronavirus*, WALL ST. J. (Apr. 2, 2020), <https://www.wsj.com/articles/investigation-into-origins-of-trump-russia-probe-continues-despite-coronavirus-11585868529>.

<sup>185</sup> *Id.*

<sup>186</sup> Ian Schwartz, *Barr: Russian Collusion Probe Into Trump “One of the Greatest Travesties in American History”*, REAL CLEAR POLITICS (Apr. 10, 2020), [https://www.realclearpolitics.com/video/2020/04/10/barr\\_russian\\_collusion\\_probe\\_into\\_trump\\_one\\_of\\_the\\_greatest\\_travesties\\_in\\_american\\_history.html](https://www.realclearpolitics.com/video/2020/04/10/barr_russian_collusion_probe_into_trump_one_of_the_greatest_travesties_in_american_history.html).

<sup>187</sup> Interview by Laura Ingraham, Fox News Host, with William Barr, Att’y Gen. of the United States, FOX NEWS (Apr. 9, 2020), <https://youtu.be/asLCEg4Ik7E>.

<sup>188</sup> *Id.*

<sup>189</sup> Adam Goldman, Julian E. Barnes, & Katie Benner, *Durham Inquiry Includes Scrutiny of a Media Leak*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/us/politics/john-durham-ignatius-column.html>.

ambassador Sergey Kislyak in December 2016, which later proved so problematic for Flynn.<sup>190</sup> Durham is reportedly also investigating the list of Obama administration officials who allegedly requested the “unmasking” of Flynn in intelligence reports.<sup>191</sup> In mid-May, Mr. Barr confirmed that these Flynn-related matters are now in Durham’s “portfolio,” while announcing that, although neither Obama nor Biden are the subjects of Durham’s criminal investigation, “[o]ur concern over potential criminality is focused on others.”<sup>192</sup>

More recently, Mr. Barr has enlisted John Bash, U.S. Attorney for the Western District of Texas, to complement Durham’s efforts.<sup>193</sup> Bash’s mandate is to probe requests by members of the Obama administration to “unmask” the identities of U.S. persons contained in intelligence reports because, according to Mr. Barr, “the high number of unmaskings” includes “some that do not readily appear in the normal line of business.”<sup>194</sup>

As the November election draws closer, evidence increasingly supports the notion that the Durham investigation is a key element of the Trump campaign strategy and that Mr. Barr is contemplating some form of “November surprise.”<sup>195</sup> This inference took on greater weight when, in his July 28, 2020, testimony before the House Judiciary Committee, Mr. Barr refused to concede that he would not release any consequential investigative report before the election.<sup>196</sup>

DOJ policies and tradition generally prohibit any public revelation of the status or activity of a criminal investigation close enough to an election where such information might affect the outcome.<sup>197</sup> In his typical quibbling manner, the attorney general appears to focus on the fact that

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<sup>190</sup> *Id.* For the original piece from Ignatius, see David Ignatius, *Why did Obama dawdle on Russia’s hacking?*, WASHINGTON POST (Jan. 12, 2017), [https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e\\_story.html](https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e_story.html).

<sup>191</sup> Quint Forgey, *Barr taps U.S. attorney to investigate ‘unmasking’ as part of Russia probe review*, POLITICO (May 28, 2020), <https://www.politico.com/news/2020/05/28/barr-russia-probe-attorney-286920>.

<sup>192</sup> Dustin Volz, *Barr Says U.S. Attorney’s Probe Won’t Likely Lead to Investigation of Obama, Biden*, WALL ST. J. (May 18, 2020), <https://www.wsj.com/articles/barr-says-probe-wont-likely-lead-to-investigation-of-obama-biden-11589818134>.

<sup>193</sup> WSJ Ed. Board, *Bill Barr’s Other Prosecutor*, WALL ST. J. (Jul. 28, 2020), <https://www.wsj.com/articles/bill-barrs-other-prosecutor-11595978614>.

<sup>194</sup> *Id.*

<sup>195</sup> See Carrie Johnson, *Democrats Worry Attorney General Has An ‘October Surprise’ In The Making*, NPR (Aug. 7, 2020), <https://www.npr.org/2020/08/07/900279687/barr-promises-doj-wont-try-to-influence-2020-election> (“Democrats and department veterans aren’t so sure” that Barr will not use the Durham investigation to influence the election); Chris Smith, *Bill Barr is Running an October-Surprise Factory at Justice*, VANITY FAIR (Jul. 10, 2020), <https://www.vanityfair.com/news/2020/07/bill-barr-is-running-an-october-surprise-factory-at-justice> (“The attorney general’s probe of the Russia probes will inevitably arrive in the midst of campaign season—just one small detail of the Justice Department’s ugly politicization under Barr”).

<sup>196</sup> Hearing on Justice Department Mission and Programs: *Hearing Before H. Comm. on the Judiciary*, 116<sup>th</sup> Cong. (testimony of William Barr, Att’y General), <https://www.c-span.org/video/?473384-1/attorney-general-barr-testifies-justice-department-mission-programs>.

<sup>197</sup> See Ryan Goodman, *Bill Barr’s Hidden Truths About Justice Department’s Rule of Forbearance in an Election*, Just Security (Aug. 31, 2020), <https://www.justsecurity.org/72243/bill-barrs-hidden-truths-about-justice-departments-rule-of-forbearance-in-an-election/> (discussing the history of the DOJ’s rule of forbearance, which seeks to steer the department clear of perceived interference in an election outcome); see also Michelle Onibokun & Chuck Rosenberg, *The Justice Department’s Policy Against Election Interference is Open to Abuse*, LAWFARE (Sept. 11, 2020), <https://www.lawfareblog.com/justice-departments-policy-against-election-interference-open-abuse> (“In the absence of a clear and unambiguous policy, prosecutors and agents have always relied on the “norms” of the

no candidate is a subject of the Durham investigation, which, according to him, is only intended to provide a truthful recounting of law enforcement's mistreatment of Trump's 2016 presidential campaign. Ignoring the potential effect of a report that might be focused on an opposing political party or a member of a candidate's family, Mr. Barr, when asked by a member of Congress to commit to not releasing any product produced by Durham prior to the election, curtly answered, "No."<sup>198</sup>

e. Barr's Ongoing Commentary on the Durham Investigation

One can readily grasp the affront that Attorney General Barr's running commentaries on Durham's work pose to the rule of law and to the DOJ's avowed mission of ensuring the independence and integrity of DOJ prosecutions. As Mr. Barr told the Senate Judiciary Committee at his first confirmation hearing in 1991, the attorney general "holds in trust the fair and impartial administration of justice" and bears responsibility "to enforce the law evenhandedly and with integrity."<sup>199</sup> He also noted that the attorney general "must ensure that the administration of justice . . . is above and away from politics," and that "could be more destructive of our system of government, of the rule of law, or the Department of Justice as an institution, than any toleration of political interference with the enforcement of the law."<sup>200</sup> Yet, today, no attorney general in recent memory has offered such extended, incendiary, apocryphal public commentary on an ongoing investigation as Mr. Barr has spewed regarding the Durham inquiry.

Mr. Barr's extensive and repeated pronouncements on the Durham investigation appear to violate several DOJ rules and norms. Section 1-7.400.B of the Justice Manual states, "DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations. Except as provided in subparagraph C of this section, DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed."<sup>201</sup>

Significantly, the carveouts in subparagraph C apply only where "the community needs to be reassured that the appropriate law enforcement agency is investigating a matter" or where "release of information is necessary to protect the public safety" concerns that Barr surely knows do not apply to the Durham investigation. Then, in Section 1-7.610, the Justice Manual unambiguously commands: "DOJ personnel shall not make any statement or disclose any information that reasonably could have a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>202</sup>

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Justice Department to do their work . . . But Barr has routinely ignored norms to serve a president who has continually and improperly interfered in the work of the Justice Department").

<sup>198</sup> Hearing on Justice Department Mission and Programs: *Hearing Before H. Comm. on the Judiciary*, 116<sup>th</sup> Cong. (testimony of William Barr, Att'y General), <https://www.c-span.org/video/?473384-1/attorney-general-barr-testifies-justice-department-mission-programs>.

<sup>199</sup> See Confirmation Hearing on the Appointment of William Barr: *Hearing before the Sen. Comm. on the Judiciary*, 102<sup>nd</sup> Cong., S. HRG. 102-505 (Nov. 12-13, 1991), <http://civilrightsdocs.info/pdf/ag-vacancy/1991-AG-Nomination-Hearing-Transcript.pdf> (transcribing the confirmation hearing).

<sup>200</sup> Confirmation Hearing on the Appointment of William Barr: *Hearing before the Sen. Comm. on the Judiciary*, 102<sup>nd</sup> Cong., S. HRG. 102-505 (Nov. 12-13, 1991).

<sup>201</sup> JUSTICE MANUAL 1-7.400 (U.S. DEP'T OF JUSTICE APR. 2018).

<sup>202</sup> JUSTICE MANUAL 1-7.610 (U.S. DEP'T OF JUSTICE APR. 2018).

Mr. Barr has persistently and gratuitously offered his views on the very matters Durham is investigating. In doing so, he has repeatedly undermined the detailed findings and analyses produced by credible investigations of the same matters conducted by respected investigators employed by the DOJ he commands.

In public statements, Mr. Barr has contradicted key findings of the Horowitz Report by insisting that the Trump campaign was “spied upon,” under the guise of an investigation that, he insists, was “completely baseless” and built on a “bogus narrative” and “speculation.”<sup>203</sup> Notwithstanding the Horowitz Report’s specific conclusion that “we did not find document or testimonial evidence that political bias or improper motivation influenced” either the FBI’s decision to open the Crossfire Hurricane investigation or any accompanying four individual investigation (Paul Manafort, Michael Flynn, Carter Page or George Papadopoulos), Mr. Barr continues to question the “motivation” of actors both inside and outside of the FBI while insisting that some of these persons may have been acting in “bad faith.”<sup>204</sup>

DOJ regulations also state that where information “relates to the circumstances of an ... investigation [that] would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.”<sup>205</sup> Mr. Barr’s frequent comments violate these norms with almost contemptuous impunity.

Citizens for Responsibility and Ethics in Washington (CREW) addressed the attorney general’s prejudicial statements and ethical transgressions in a complaint filed with the DOJ’s Director of the Office of Professional Responsibility, noting that “Attorney General Barr’s inflammatory comments and conclusions ... reasonably could have a substantial likelihood of materially prejudicing adjudicative proceedings that may arise out of the Durham investigation.”<sup>206</sup> CREW’s complaint also observed that Mr. Barr’s insistence that the FBI’s investigation lacked sufficient “predication” was “tantamount to opining on the guilt of persons who are the focus of the Durham investigation in apparent violation of DOJ policy.”<sup>207</sup> All of Mr. Barr’s actions, CREW wrote, “cause[s] a reasonable person to question [Barr’s] impartiality” and raises “legitimate concerns that he is using his public office to further President Trump’s personal interests.”<sup>208</sup>

Given the frequency with which Mr. Barr flouts the DOJ’s most basic standards for ensuring fairness in criminal proceedings, one could be forgiven for overlooking that Mr. Barr is a lawyer

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<sup>203</sup> David Shortell, *Barr contradicts key finding in IG report, saying FBI may have acted in 'bad faith' in Russia probe*, CNN (Dec. 10, 2019), <https://edition.cnn.com/2019/12/10/politics/barr-ig-report-fbi-trump-russia-probe/index.html>.

<sup>204</sup> HOROWITZ REPORT iii *supra* note 149. See also David Shortell, *Barr contradicts key finding in IG report, saying FBI may have acted in 'bad faith' in Russia probe*, CNN (Dec. 10, 2019), <https://edition.cnn.com/2019/12/10/politics/barr-ig-report-fbi-trump-russia-probe/index.html> (“Attorney General William Barr on Tuesday discarded a key finding of the 435-page report released by the Justice Department’s watchdog”).

<sup>205</sup> 28 CFR § 50.2 (2020), <https://www.law.cornell.edu/cfr/text/28/50.2>.

<sup>206</sup> Letter to Jeffrey Ragsdale, Acting Director, DOJ Office of Professional Responsibility, & Michael Horowitz, Inspector General, Office of the Inspector General, from Noah Bookbinder, CREW Exec. Director, & Virginia Canter, CREW Chief Ethics Counsel (Feb. 14, 2020), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2020/02/13220644/2020-2-14-DOJ-OPR-OIG-Barr-Durham-investigation.pdf>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

—and not just any lawyer but the chief law enforcement officer of the United States who, by his own words, “holds in trust the fair and impartial administration of justice.” But his actions and words have strayed so far from these ethical and regulatory standards that erstwhile officials and practitioners in the DOJ have repeatedly taken to the media to condemn him while the New York City Bar Association and 27 distinguished members of the District of Columbia Bar (Barr is a member) have filed complaints regarding his professional conduct—each specifically referencing, among other transgressions, his actions and comments with respect to the Durham investigation.<sup>209</sup>

For example, by making public comments disparaging potential targets of the Durham investigation, Mr. Barr is alleged to have violated DC Rule of Professional Conduct 8.4(d), which provides “it is professional misconduct for a lawyer to: . . . (d) [e]ngage in conduct that seriously interferes with the administration of justice.”<sup>210</sup> Barr’s public comments that the “predication” for Crossfire Hurricane was “very flimsy” in a nationally televised interview “flagrantly misrepresented” the basis for that FBI investigation, and is alleged to be part of a “continuing pattern of conduct” that runs afoul of DC Rule of Professional Conduct 8.4(c), which bars a lawyer from engaging in conduct involving dishonesty, deceit or misrepresentation.”<sup>211</sup>

For years, the DOJ has taken special care to wield its investigation and prosecution power to specifically avoid even the appearance that its actions have been taken for partisan purposes or are intended to affect election outcomes. No less is required to provide the public with credible assurance that the DOJ is executing its mission “to ensure fair and impartial administration of justice for all Americans.”

As stated by George J. Terwilliger III, a deputy attorney general in the George H. W. Bush administration, “There’s a long-standing policy of not doing anything that could influence an election.”<sup>212</sup> This stated policy is exemplified by a 2008 memorandum from President George W. Bush’s then-attorney general Michael Mukasey titled “Election Year Sensitivities,” which provides:

Department of Justice employees are entrusted with the authority to enforce the laws of the United States and with the responsibility to do so in a neutral and impartial manner. This is particularly important in an election year. . . .

As Department employees, however, we must be particularly sensitive to safeguarding the Department’s reputation for fairness, neutrality and nonpartisanship.

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<sup>209</sup> Amanda Robert, *NYC bar calls for investigation into AG Barr over conduct that threatens 'impartial administration of justice'*, ABA JOURNAL (Jan. 10, 2020), <https://www.abajournal.com/news/article/new-york-city-bar-association-calls-for-investigation-into-ag-barr>; Letter from Members of the D.C. Bar to William Barr, Att’y Gen.: *Professional Responsibility Investigation of William P. Barr* (Jul. 22, 2020), <https://www.politico.com/f/?id=00000173-73b9-d36e-abff-7ffbceec00000>.

<sup>210</sup> *Id.* at 2.

<sup>211</sup> *Id.*

<sup>212</sup> Fred Wertheimer, *Barr Ignores Settled Justice Department Policies in Run-Up to 2020 Elections*, JUST SECURITY (May 7, 2020), <https://www.justsecurity.org/70041/barr-ignores-settled-justice-department-policies-in-run-up-to-2020-elections/>.

Simply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges. Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.<sup>213</sup>

Similar cautionary memoranda have been issued in March 2012 by former attorney general Eric Holder, and again in April 2016, by former attorney general Loretta Lynch.<sup>214</sup> These memoranda and the underlying policies related to election sensitivities were discussed in the report issued by DOJ Inspector General Michael Horowitz titled “A Review of Various Actions By the Federal Bureau of Investigation and the Department of Justice in Advance of the 2016 Election.”<sup>215</sup> This IG report discusses the so-called “60-Day Rule” under which prosecutors avoid public disclosure of investigative steps related to electoral matters or the return of indictments against a candidate for office within 60 days of a primary or general election.<sup>216</sup> But, as the report takes particular care to note, the “60-Day Rule” is not written or described in any DOJ policy or regulation; rather, it is a generally accepted shibboleth of admonition within the DOJ.<sup>217</sup>

“Policy” and “custom,” however, lack the compulsory character of “statute” or “regulation,” and past acknowledgements of DOJ goals with respect to election sensitivities have not impeded Mr. Barr, with his well-established record of using his authority to support the president’s political aims.

Consequently, it was no surprise when, in February 2020, Mr. Barr issued his own election-year memorandum choosing language that dramatically narrows the scope of that used in the earlier memoranda addressing election sensitivities.<sup>218</sup> Mr. Barr’s memorandum covers only the opening of a criminal or counterintelligence investigation and, unlike the previous memoranda, does not apply to other DOJ actions relating to the conduct or disposition of a criminal investigation.<sup>219</sup> Most importantly, Mr. Barr’s memorandum gives him unqualified discretion to make final determinations regarding whether or not to apply departmental policies relating to non-interference in electorally sensitive matters.<sup>220</sup> The practical effect of this self-bestowed discretion is symbolized in Mr. Barr’s flat refusal, in his July 28th appearance before the House Judiciary

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<sup>213</sup> Memorandum from The Att’y Gen. to DOJ Employees on Election Year Sensitivities (Mar. 5, 2008), <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-030508.pdf>; Memorandum on Mueller’s “Obstruction Theory” (Jun. 8, 2018) (on file at <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf>).

<sup>214</sup> Memorandum from Att’y Gen. Eric Holder to DOJ Employees on Election Year Sensitivities (Mar. 9, 2012), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf>; OVERSIGHT AND REVIEW DIVISION OF THE OFFICE OF THE INSPECTOR GENERAL OF THE U.S. DEP’T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION (JUN. 2018), <https://www.justice.gov/file/1071991/download>.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 17-18.

<sup>217</sup> *Id.*

<sup>218</sup> Memorandum from Atty General William Barr to all US Atty’s, all Dept Component Heads, & all Law Enforcement Agency Heads: *Additional Requirements for the Opening Of Certain Sensitive Investigations* (Feb. 5, 2020), [http://www.msnbc.com/sites/msnbc/files/barr\\_memo\\_200205.pdf](http://www.msnbc.com/sites/msnbc/files/barr_memo_200205.pdf).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

Committee, to commit to cabining the results of Durham’s investigation until after the 2020 election.<sup>221</sup> Instead, as he made clear in a recent radio interview, he views DOJ policy as foreclosing only the pursuit of political candidates and “I don’t think any of the people whose actions are under review by Durham fall into that category.”<sup>222</sup> Describing his personal view that DOJ policies on election sensitivities are “prudential” and not “written in stone,” Mr. Barr made it clear that he believes he has the authority to make a “judgment in each individual case.”<sup>223</sup> In every sense, Attorney General Barr has become a law unto himself.

#### f. Chilling the Intelligence Community’s Analysis

As noted earlier, the DOJ has never released any document describing the parameters of Durham’s investigation.<sup>224</sup> But media reports that Durham’s probe has extended into matters involving the IC and the ICA on Russian election interference, alludes to the dangers presented by Durham’s ever-expanding criminal probe into foreign intelligence analysis.<sup>225</sup> *The New York Times*’ June 12, 2019, article reporting Durham’s intention to interview CIA officials noted the anxiety produced amongst analysts by the prospect that investigators unschooled in foreign intelligence operations and analysis would be probing the analytic work underlying the ICA’s conclusion that there was Russian influence in the 2016 U.S. presidential election.<sup>226</sup>

Mr. Barr has leaned on other agencies to gain any information or access he considers essential to Durham’s probe. He pressed CIA Director Gina Haspel and FBI Director Christopher Wray to provide assistance and, at Mr. Barr’s behest, the president issued a presidential memorandum authorizing Mr. Barr to “declassify, downgrade, or direct the declassification or downgrading of

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<sup>221</sup> Matt Zapposky & Karoun Demirjian, *Barr says he won’t wait until after election to reveal Durham’s findings. Democrats fear a campaign-altering surprise.*, WASHINGTON POST (Jul. 29, 2020), [https://www.washingtonpost.com/national-security/john-durham-investigation-trump-russia-william-barr/2020/07/29/b9dd1e1a-d1b8-11ea-8d32-1ebf4e9d8e0d\\_story.html](https://www.washingtonpost.com/national-security/john-durham-investigation-trump-russia-william-barr/2020/07/29/b9dd1e1a-d1b8-11ea-8d32-1ebf4e9d8e0d_story.html).

<sup>222</sup> Interview by Hugh Hewitt, radio host, with William Barr, Att’y Gen. of the U.S. (Apr. 21, 2020), [https://www.youtube.com/watch?v=LTa2Za33-GM&feature=emb\\_title](https://www.youtube.com/watch?v=LTa2Za33-GM&feature=emb_title).

<sup>223</sup> *Id.*

<sup>224</sup> NOTE: The working group that produced this Report consisted of members drawn from varied backgrounds. Many members have had prior government experience in varied roles and at varying levels of authority, including some at senior levels in the Department of Justice. Others within the working group worked for agencies within the Intelligence Community. As might be expected with such a varied group bringing diverse perspectives to the matters addressed in the Report, there were topics and discussions where not all the members were in complete concurrence. The working group’s objective is to present a non-partisan Report that thoroughly explores the topics examined. Where any member of the working group has chosen to reflect disagreement with the views expressed on a particular topic, that member has been afforded the opportunity to have the Report so reflect.

<sup>225</sup> For the assessment, see DIR. OF NAT’L INTEL., *Background to “Assessing Russian Activities and Intentions in Recent US Elections”*: *The Analytic Process and Cyber Incident Attribution*, (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

<sup>226</sup> Julian E. Barnes, Katie Benner, Adam Goldman, & Michael S. Schmidt, *Justice Dept. Seeks to Question C.I.A. in Its Own Russia Investigation*, N.Y. TIMES (Jun. 12, 2019), <https://www.nytimes.com/2019/06/12/us/politics/russia-investigation-cia.html>; Teleconference Interview with Robert Litt, former General Counsel for the Director of National Intelligence (Aug. 17, 2020). Mr. Litt told the CERL working group, “I think the most dangerous part of what Durham is reportedly doing is going back and bringing intelligence analysts in and questioning them from a prosecutor’s viewpoint about their intelligence judgments.”

information or intelligence that relates [to the Durham probe].”<sup>227</sup> As noted in Section V.3.b. of this report, this action represented an unprecedented delegation of authority to the attorney general regarding the protection of intelligence sources, methods, and tradecraft.

All of this has “provoked anxiety in the ranks at the CIA” and surely for other intelligence professionals engaged in foreign intelligence analysis.<sup>228</sup> The IC has long been a favorite target of the president’s barbs—President Trump publicly embarrassed it at the infamous press conference in Helsinki in July 2018 where he essentially announced his acceptance of Vladimir Putin’s word over the assessment of the U.S. IC on Russian election interference.<sup>229</sup> Now, Mr. Barr has appointed a lifetime prosecutor with no disclosed experience in foreign intelligence analysis to scrutinize that arcane process through the lens of criminal law.

Notably, nothing in the DOJ’s voluminous Justice Manual offers pertinent guidance for use in an investigation directed at applying the standards of criminal law to the process that produces foreign intelligence product—a process painstakingly devoted not to assuring certainty but rather to reducing the uncertainty of foreign activities, capabilities, or leaders’ intentions.<sup>230</sup> The difficulty in pursuing this objective is compounded by an environment where foreign actors go to extraordinary lengths to hide or obfuscate their activities.

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<sup>227</sup> Memorandum from the President to Various Cabinet Agencies, on Agency Cooperation with Attorney General’s Review of Intelligence Activities Relating to the 2016 Presidential Campaigns (May 23, 2019) (on file at <https://www.whitehouse.gov/presidential-actions/memorandum-agency-cooperation-attorney-generals-review-intelligence-activities-relating-2016-presidential-campaigns/>).

<sup>228</sup> See Julian E. Barnes, Katie Benner, Adam Goldman, & Michael S. Schmidt, *Justice Dept. Seeks to Question C.I.A. in Its Own Russia Investigation*, N.Y. TIMES (Jun. 12, 2019), <https://www.nytimes.com/2019/06/12/us/politics/russia-investigation-cia.html> (detailing the nature of IC concerns about involving a prosecutor in the IC’s analytical work); Teleconference Interview with James Clapper, former Director of National Intelligence for President Obama (Aug. 10, 2020). General Clapper told the CERL working group that the questioning of intelligence analysts as part of a criminal probe into substantive foreign intelligence analysis issues was “unprecedented.” Clapper could cite no other instance of such a criminal inquiry in his 54 years in intelligence and noted that it was likely to have a “very chilling effect” on intelligence analysts. According to Clapper, “That just shouldn’t be; the Intelligence Community is supposed to tell the unvarnished truth as best it can, which is a hard enough job to start with.”

<sup>229</sup> See George Croner, *Fact and Denial: Trump’s Inexplicable Refutation of the U.S. Intelligence Community’s Conclusion of Russian Election Interference*, FOREIGN POL’Y RESEARCH INST. (Jul. 18, 2018), <https://www.fpri.org/article/2018/07/fact-and-denial-trumps-inexplicable-refutation-of-the-u-s-intelligence-communitys-conclusion-of-russian-election-interference/> (“The President of the United States directly juxtaposed his Director of National Intelligence against the Russian autocrat by saying: ‘[Dan Coats] came to me [and] said, they think it’s Russia;’ and, then aligned himself with the former KGB apparatchik by saying, ‘I have President Putin, he just said it’s not Russia. . . . I will say this, I don’t see any reason why it would be.’”).

<sup>230</sup> JUSTICE MANUAL (U.S. DEP’T OF JUSTICE APR. 2018). For a broader discussion of the goals of foreign intelligence, see LOCH K. JOHNSON, NATIONAL SECURITY INTELLIGENCE, IN THE OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE (Mar. 2010), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780195375886.001.0001/oxfordhb-9780195375886-e-0001> (“Although it is easy enough to state the core purpose of intelligence—providing information to policymakers—the challenge of actually gathering, assessing, and delivering useful insights to those who make decisions is an intricate matter”); Daniel Byman, *How foreign intelligence services help keep America safe*, BROOKINGS INST. (May 17, 2017), <https://www.brookings.edu/blog/markaz/2017/05/17/how-foreign-intelligence-services-help-keep-america-safe/> (“more than any other policy instrument, foreign liaison relationships play a vital role in counterterrorism”).

g. Applying Criminal Prosecution Standards to Foreign Intelligence Analysis

Tradecraft standards for analytic foreign intelligence product have been refined over the years to ensure that the IC provides U.S. policymakers, service members, and operators with the best and most accurate insight, warning, and context. Pursuit of this goal requires clearly expressing uncertainty, distinguishing between underlying information and analytic judgments and assumptions, exploring alternatives, and explaining change or consistency in judgments over time. Each step in this process employs informed analytic discretion tempered by instinct and experience.<sup>231</sup> Often, discretionary assessments are defined by phrases like “NSA doesn’t agree,” “there’s no real consensus,” “the intelligence is muddled and unclear,” “the agencies are all over the map,” and/or “there are intelligence gaps that need to be filled before we can trust the conclusions.” These represent characterizations of intelligence analysis that are not unusual, could be technically true, and reflect the mosaic-like composite that often characterizes intelligence analysis. But they also should render intelligence analysis almost immune to criminal prosecution absent direct evidence of knowing falsity or manipulation. It is an unfortunate irony, however, that this same analytic phraseology, if used in reporting the results of a criminal inquiry, for example, lends itself to opportunistic manipulation by partisans using wording to advance a particular narrative.

Picture, for example, a prosecutor telling a jury that he has “moderate” confidence in the defendant’s guilt, or that a particular piece of evidence might be probative of this fact or of a different fact, or, perhaps, that it constitutes no proof at all because it represents the defendant’s attempt at disinformation and deception. This is the world in which intelligence analysts work, but it is an environment foreign to a prosecutor trained in terms of “clear and convincing” evidence and guilt “beyond a reasonable doubt.”<sup>232</sup> Moreover, unlike a prosecutor who is duty bound to decline a prosecution that is unsupported by a good faith review of the facts, foreign intelligence analysts are required to produce their best assessment regardless of the uncertainty of the available information. Then, they generally render that judgment in an analysis reflecting both the likelihood that the event they are describing will occur and the level of confidence they can assign to that predictive judgment.

The incongruity of Durham’s effort to survey the integrity of the foreign intelligence analytic process through the lens of the criminal law has not been lost on seasoned professionals in both the legal and foreign intelligence arenas. John McLaughlin, a former deputy director and acting director of the CIA, and Robert Litt, the former general counsel for the director of national intelligence, have observed that “it is unprecedented and inappropriate to do this via Justice Department prosecutors, who will tend to apply the standards of a courtroom to the more nuanced, and often more challenging world of intelligence analysis.”<sup>233</sup> Their concerns were echoed by

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<sup>231</sup> See generally LOCH K. JOHNSON, NATIONAL SECURITY INTELLIGENCE, IN THE OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE (Mar. 2010).

<sup>232</sup> Teleconference Interview with James Clapper, former Director of National Intelligence for President Obama (Aug. 10, 2020). Former DNI James Clapper told the CERL working group, “I do have issues with that [prosecutors examining intelligence analysis] because, fundamentally, prosecuting attorneys who have never served in the Intelligence Community have a different evidentiary bar . . . .”

<sup>233</sup> Robert S. Litt & John E. McLaughlin, *Prosecutors investigating intelligence analysts is a dangerous idea*, WASHINGTON POST (Jan. 16, 2020), [https://www.washingtonpost.com/opinions/prosecutors-investigating-intelligence-analysts-is-a-dangerous-idea/2020/01/16/870e77fa-3257-11ea-91fd-82d4e04a3fac\\_story.html](https://www.washingtonpost.com/opinions/prosecutors-investigating-intelligence-analysts-is-a-dangerous-idea/2020/01/16/870e77fa-3257-11ea-91fd-82d4e04a3fac_story.html).

another former acting CIA director, Michael Morell, who called Mr. Barr's appointment of Durham "yet another destruction of norms that weakens our intelligence community" and that will "raise questions among our allies and partners about whether to share sensitive intelligence with us."<sup>234</sup> Former CIA analyst Marc Polymeropoulos, who worked on the ICA, noted that "[i]t's unprecedented for a prosecutor to be looking at an analytic call under the microscope of a criminal investigation,"<sup>235</sup> a view amplified by David Kris, the former head of the DOJ's National Security Division, who has observed that:

This [Durham's] extraordinary assignment and the reaction it has provoked shows how far we have moved from historical norms. Since the mid-1970s, the country has expected the attorney general to help oversee and enforce a system of intelligence under law, appropriately respectful of privacy and rigorously apolitical. Now, because of the president's relentless efforts to politicize law enforcement, many observers fear that the attorney general is a threat to apolitical intelligence under law.<sup>236</sup>

Almost invariably in a profession that wrestles with understanding the uncertain intentions of actors seeking to undermine the national security of the United States, retrospective review of an analytic or investigative effort will identify actions that might have been done better, more completely, or differently when viewed with the benefit of hindsight. But, much like a morbidity and mortality conference in medicine, the value of such retrospective review lies in the internal improvements that such a candid and confidential reassessment bring to the process examined—whether that be medical care or foreign intelligence analysis.

Significantly, the security concerns recounted here are neither idle nor formalistic as confirmed by one of Mr. Barr's most recent declassification decisions. On July 25, 2020, *The New York Times* reported that the attorney general ordered the declassification of an FBI interview transcript with a Russian political expert who helped provide information on the Steele Dossier predicated upon the FBI, preserving his anonymity to protect himself, his sources, and his family and friends in Russia.<sup>237</sup> After wielding his new declassification authority, Mr. Barr ordered the transcript furnished to Senator Lindsey Graham, who promptly released it publicly before denouncing the entire Russia investigation as "corrupt."<sup>238</sup> While the cooperating source's name was redacted in the released transcript, within two days an internet blog parsed through the declassified plaintext

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<sup>234</sup> Shane Harris, *Barr could expose secrets, politicize intelligence with review of Russia probe, current and former officials fear*, WASHINGTON POST (May 24, 2020), [https://www.washingtonpost.com/world/national-security/barr-could-expose-secrets-politicize-intelligence-with-review-of-russia-probe-current-and-former-officials-fear/2019/05/24/58f822f8-7e2f-11e9-8bb7-0fc796cf2ec0\\_story.html](https://www.washingtonpost.com/world/national-security/barr-could-expose-secrets-politicize-intelligence-with-review-of-russia-probe-current-and-former-officials-fear/2019/05/24/58f822f8-7e2f-11e9-8bb7-0fc796cf2ec0_story.html).

<sup>235</sup> Ken Dilanian, *Trump administration's probe of the Russia investigation may be nearing conclusion*, NBC NEWS (Aug. 5, 2020), <https://www.nbcnews.com/politics/justice-department/trump-administration-s-probe-russia-investigation-may-be-nearing-conclusion-n1235904>.

<sup>236</sup> Shane Harris, *Barr could expose secrets, politicize intelligence with review of Russia probe, current and former officials fear*, WASHINGTON POST (May 24, 2020), [https://www.washingtonpost.com/world/national-security/barr-could-expose-secrets-politicize-intelligence-with-review-of-russia-probe-current-and-former-officials-fear/2019/05/24/58f822f8-7e2f-11e9-8bb7-0fc796cf2ec0\\_story.html](https://www.washingtonpost.com/world/national-security/barr-could-expose-secrets-politicize-intelligence-with-review-of-russia-probe-current-and-former-officials-fear/2019/05/24/58f822f8-7e2f-11e9-8bb7-0fc796cf2ec0_story.html).

<sup>237</sup> Adam Goldman & Charlie Savage, *The F.B.I. Pledged to Keep a Source Anonymous. Trump Allies Aided His Unmasking*, N.Y. TIMES (Jul. 25, 2020), <https://www.nytimes.com/2020/07/25/us/politics/igor-danchenko-steele-dossier.html?smid=em-share>.

<sup>238</sup> *Id.*

and revealed the source to be Igor Danchenko. Someone who was likely one of Danchenko's sources was also publicly identified.<sup>239</sup> The next day, *RT*, the Kremlin-owned, English-language news and propaganda outlet, published an article amplifying Danchenko's identification.<sup>240</sup>

Little imagination is required to sense the reaction that this episode will inspire in other sources providing critical foreign intelligence information to the IC today.<sup>241</sup> To them, Mr. Barr's decision reflects insidious indifference to the confidentiality needed for protection of intelligence sources, their families, and their associates. His decision demonstrates that their security will be sacrificed whenever necessary to promote the Durham investigation or whatever politically driven narrative is in vogue at the White House.

Consequently, prudence suggests that unless the Durham investigation and Bash's "unmasking" inquiry reveal a knowing violation of criminal law, publicly airing the outcome of a retrospective review of intelligence analysis that produced the conclusions reflected in the ICA regarding Russian election involvement poses an unnecessary danger to ongoing intelligence efforts. This action risks exposure of sensitive intelligence sources and methods and creates a chilling effect on the future work of analysts who will surely think twice before expressing the impartial "truth to power" that must be the touchstone of unbiased intelligence analysis.<sup>242</sup> Moreover, as his disingenuous rollout of the Mueller Report and his more recent declassification of the FBI's Igor Danchenko interview transcript reveal, these considerable dangers are exacerbated by this attorney general's willingness to selectively redact and declassify while spinning facts to manage publicly available information to sway that public perception.

Mr. Barr's efforts seem particularly gratuitous, and unnecessarily dangerous, considering the analysis and conclusions reached by the Republican-controlled Senate Intelligence Committee. That committee has performed its own independent and exhaustive review of Russian election interference and of the ICA. While heavily redacted, Volume IV of the committee's report titled "Review of the Intelligence Community Assessment and Additional Views" notes that "[t]he President [Obama] directed that the [ICA] include everything the IC knew about Russian

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<sup>239</sup> See Rowan Scarborough, *Source for Steele discredited anti-Trump dossier outed*, WASHINGTON TIMES (Jul. 26, 2020), <https://www.washingtontimes.com/news/2020/jul/26/igor-danchenko-outed-steele-dossier-source/> ("Cybersleuths with the blog I Found the Primary Subsource took tidbits from the heavily redacted document and pieced together enough biographical information to name Mr. Danchenko").

<sup>240</sup> Russia Today, *'Russian agent' or Steele's patsy? 'Revealed' identity of primary sub-source for Russiagate dossier sparks fresh speculation* (Jul. 20, 2020), <https://www.rt.com/usa/495342-russiagate-steele-dossier-source/>.

<sup>241</sup> See Michael Schwartz, *Aleksei Navalny, Russian Dissident, Says He Can Walk and Speak Now*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/09/19/world/europe/navalny-russian-dissident-recovery.html> ("German authorities, backed by laboratories in France and Sweden, say Mr. Navalny was poisoned with Novichok, a class of chemical weapon developed by the Soviet Union. It was used in the attempted assassination in England two years ago of Sergei V. Skripal, a former Russian military intelligence officer who spied for the British government").

<sup>242</sup> Indeed, perhaps confirming the difficulties of trying to contour the criminal law to the process of foreign intelligence analysis, media reports in August 2020 disclosed that Durham interviewed former CIA director John Brennan for roughly 8 hours as part of his investigation. Shane Harris & Matt Zapposky, *Ex-CIA director John Brennan questioned for 8 hours in U.S. Attorney John Durham's probe, a Brennan adviser says*, WASHINGTON POST (Aug. 22, 2020), [https://www.washingtonpost.com/national-security/ex-cia-director-john-brennan-questioned-for-more-than-8-hours-in-us-attorney-john-durhams-probe-a-brennan-adviser-says/2020/08/21/a962926e-e404-11ea-8dd2-d07812bf00f7\\_story.html](https://www.washingtonpost.com/national-security/ex-cia-director-john-brennan-questioned-for-more-than-8-hours-in-us-attorney-john-durhams-probe-a-brennan-adviser-says/2020/08/21/a962926e-e404-11ea-8dd2-d07812bf00f7_story.html). During that interview, it was reported that Durham told Brennan - long a focus of President Trump's ire - that he is "not a subject or a target of the investigation" which, if accurately reported, essentially forecloses Brennan being criminally charged. *Id.*

interference in the 2016 elections” and then sets forth these unambiguous “Findings”: (1) “The Committee found the ICA presents a coherent and well-constructed intelligence basis for the case of unprecedented Russian interference in the 2016 U.S. presidential election;” (2) “The ICA reflects proper analytic tradecraft despite being tasked and completed within a compressed time frame;” (3) “The differing confidence levels on one analytic judgment are justified and properly represented;” and (4) “In all the interviews of those who drafted and prepared the ICA, the Committee heard consistently that analysts were under no politically motivated pressure to reach specific conclusions. All analysts expressed that they were free to debate, object to content, and assess confidence levels, as is normal and proper for the analytic process.”<sup>243</sup> It is difficult to conjure conclusions that more directly repudiate Mr. Barr’s unsupportable claim that the Russia investigation was “completely baseless.”

More recently, the Senate Intelligence Committee has released Volume V of its extensive report titled “Counterintelligence Threats and Vulnerabilities.”<sup>244</sup> According to *The Washington Post*, this latest volume “contains dozens of new findings that appear to show more direct links between Trump associates and Russian intelligence, and pierces the president’s long-standing attempts to dismiss the Kremlin’s intervention on his behalf as a hoax.”<sup>245</sup> For example, Volume V reveals for the first time evidence that alleged operative, Konstantin Kilimnik, may have been directly involved in the Russian plot to break into a Democratic Party computer network and provide plundered files to WikiLeaks.<sup>246</sup> Volume V also offers new proof that former national security advisor Michael Flynn lied about his conversations with Russian Ambassador Sergei Kislyak, and raises troubling questions about the decision by former Trump campaign manager Paul Manafort, who the report describes as a “grave counterintelligence threat,” to squander a plea agreement with prosecutors by lying to Special Counsel Robert Mueller.<sup>247</sup>

Perhaps most significantly given the pathological insistence of both the president and the attorney general that Crossfire Hurricane and the Mueller investigation served only to perpetuate the “Russian hoax,” the Senate report suggests that there is evidence President Trump lied about discussions he had with Roger Stone concerning the WikiLeaks release of stolen Democratic e-mails.<sup>248</sup> As *The Washington Post* quotes Norm Eisen, who recently released his book, *A Case for the American People: The United States v. Donald J. Trump*:

Collusion simply means Trump and those around him wrongly working together with Russia and its satellites, and the fact of that has long been apparent ... Indeed,

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<sup>243</sup> REPORT OF THE SEN. SELECT COMM. ON INTELLIGENCE ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION VOL. 4, 116<sup>TH</sup> CONG., 116-XX (2020).

<sup>244</sup> Press Release, Sen. Intel. Comm., Senate Intel Releases Volume 5 of Bipartisan Russia Report (Aug. 18, 2020), <https://www.intelligence.senate.gov/press/senate-intel-releases-volume-5-bipartisan-russia-report>.

<sup>245</sup> Greg Miller, Karoun Demirjian, & Ellen Nakashima, *Senate report details security risk posed by 2016 Trump campaign’s Russia contacts*, WASHINGTON POST (Aug. 18, 2020), [https://www.washingtonpost.com/national-security/senate-intelligence-trump-russia-report/2020/08/18/62a7573e-e093-11ea-b69b-64f7b0477ed4\\_story.html](https://www.washingtonpost.com/national-security/senate-intelligence-trump-russia-report/2020/08/18/62a7573e-e093-11ea-b69b-64f7b0477ed4_story.html).

<sup>246</sup> *Id.* For the full report, see REPORT OF THE SEN. SELECT COMM. ON INTELLIGENCE ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION VOL. 5: COUNTERINTELLIGENCE THREATS AND VULNERABILITIES, 116<sup>TH</sup> CONG., 116-XX (2020).

<sup>247</sup> *Id.* at vii. Manafort “lied consistently to the SCO”. See *id.* at 32.

<sup>248</sup> *Id.* at vii-viii. See also *id.* at 172 (“Trump and senior Campaign officials sought to obtain advance information about WikiLeaks through Roger Stone”).

it was clear to anyone with eyes from the moment Trump asked, ‘Russia, if you’re listening.’<sup>249</sup>

The ICA, its painstaking vetting by the Senate Intelligence Committee, that same committee’s exhaustive bipartisan Russia investigation, coupled with the extensive inquiries conducted by Special Counsel Mueller and Inspector General Horowitz, collectively, would seem unlikely to have left any material stone unturned regarding the details of Crossfire Hurricane and 2016 election interference. If there are any pebbles left for Durham to unearth, they seem highly unlikely to suffice as evidence of criminal wrongdoing or of improper political motivation. Unfortunately, this will not deter Durham from completing his tasking, which increasingly seems intended for the Trump re-election effort.

All of this politically motivated probing has a deleterious impact on intelligence work and, more broadly, on an IC demoralized by the ineffective stewardship of a revolving door of Trump partisans masquerading as directors of national intelligence (DNI).<sup>250</sup> Indeed, the Trump administration has now had four acting or confirmed DNIs in little more than a year, and the overriding importance of personal fealty to the president has not been lost on an IC that has witnessed the fate that awaits those who fail to fall in line with the president’s “alternative facts,” as presidential advisor Kellyanne Conway memorably described his uneasy relationship with the truth.<sup>251</sup>

In a piercing review published recently in *The New York Times Magazine*,<sup>252</sup> Robert Draper recounts the gymnastics that analysts and career senior officials in the IC must perform to avoid the wrath of the White House and the apparatchiks it has installed to oversee the nation’s intelligence apparatus.<sup>253</sup> Draper describes how ongoing intelligence work has convinced these experienced analysts that the Russians are currently embarked on a renewed effort to interfere in the 2020 presidential election and promote President Trump’s re-election, and how the acknowledgement of that Russian effort, and the identification of the Russians’ candidate of choice, by ODNI’s “crisis manager for election security” in a classified hearing before the House Intelligence Committee in February 2020 led to the ouster of Director of National Intelligence Joseph Maguire.<sup>254</sup> Of course, Maguire had succeeded Daniel Coats after the president had soured

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<sup>249</sup> Jennifer Rubin, *As it turns out, there really was collusion between the Trump campaign and Russia*, WASHINGTON POST (Aug. 19, 2020), [https://www.washingtonpost.com/opinions/2020/08/19/yes-there-was-collusion/?hpid=hp\\_opinions-float-right-4-0\\_opinion-card-a-right%253Ahomepage%252Fstory-ans](https://www.washingtonpost.com/opinions/2020/08/19/yes-there-was-collusion/?hpid=hp_opinions-float-right-4-0_opinion-card-a-right%253Ahomepage%252Fstory-ans).

<sup>250</sup> See Kenneth Brill, *Trump's nomination of an unqualified DNI undermines bipartisan intelligence reform*, THE HILL (Feb. 21, 2020), <https://thehill.com/opinion/national-security/484054-trumps-nomination-of-unqualified-dni-undermines-reform> (describing now-DNI Richard Grennell as “a hyper-partisan media strategist and former Fox News commentator with a thin resume in international relations”).

<sup>251</sup> Eric Bradner, *Conway: Trump White House offered 'alternative facts' on crowd size*, CNN (Jan. 23, 2017), <https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html>.

<sup>252</sup> Teleconference Interview with James Clapper, former Director of National Intelligence for President Obama (Aug. 10, 2020). Former DNI James Clapper described the Draper article in *The New York Times Magazine* as “the best piece I’ve seen written on the troubled, dysfunctional relationship between the President and the Intelligence Community.”

<sup>253</sup> See Robert Draper, *Unwanted Truths: Inside Trump’s Battles With U.S. Intelligence Agencies*, N.Y. TIMES MAG. (Aug. 25, 2020), <https://www.nytimes.com/2020/08/08/magazine/us-russia-intelligence.html> (arguing that the administration has been hostile towards the intelligence community in the wake of the Russia investigation).

<sup>254</sup> *Id.*

on Coats for having the temerity to stand up for the IC's conclusions, reflected in the ICA, that the Russian's had interfered in the 2016 election while exhibiting a preference for the president's election and "aspiring to help [Trump's] election chances."<sup>255</sup> President Trump's denial of these conclusions persisted even after Vladimir Putin's concession of his preference for the president at the infamous news conference in Helsinki in July 2018 where, when asked if he had preferred Trump's election in 2016, Putin replied bluntly, "Yes, I did."<sup>256</sup>

Coats departed at the end of July 2018 and was replaced by Maguire after Sue Gordon, Coats's widely respected principal deputy at ODNI, resigned on August 8, 2019, so that, in her words, the president could "have your team."<sup>257</sup> When Maguire was fired in February 2020, the second-ranking official at ODNI, Andrew Hallman, also departed—paving the way for the president to nominate the partisan Richard Grenell as acting DNI. Grenell, in turn, was replaced on a permanent basis by another Trump loyalist, John Ratcliffe.<sup>258</sup> The tenures of both Grenell and Ratcliffe have been marked principally by their willingness to declassify information helpful to Trump advocates and, presumably, to various aspects of Durham's investigation.

All this shuffling at the top of the IC tells those that remain that they must be acutely mindful of the risks of challenging the president's version of the "facts." As Draper describes it:

Under Trump, intelligence officials have been placed in the unusual position of being pressured to justify the importance of their work, protect their colleagues from political retribution and demonstrate fealty to a president. Though intelligence officials have been loath to admit it publicly, the cumulative result has been devastating. Representative Sean Patrick Maloney, a Democrat on the House Intelligence Committee, compared the O.D.N.I.'s decline under Trump to that of the Justice Department, where 'they have, step by step, set out to destroy one of the crown jewels of the American government,' he told me. 'And they're using the same playbook with the intelligence community.'<sup>259</sup>

The analogy to the DOJ is apt and instructive especially since the president has effectively conferred upon this attorney general the unfettered authority to declassify IC secrets.<sup>260</sup> Given the purging of anyone in the IC who has dared to speak "truth to power," can anyone realistically

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<sup>255</sup> *Id.*

<sup>256</sup> Stephanie Murray, *Putin: I wanted Trump to win the election*, POLITICO (Jul. 16, 2018), <https://www.politico.com/story/2018/07/16/putin-trump-win-election-2016-722486>.

<sup>257</sup> See Charlie Savage & Maggie Haberman, *Trump Names an Acting Spy Chief as No. 2 Intelligence Official Steps Down*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/us/politics/joseph-maguire-sue-gordon.html>.

<sup>258</sup> Mary Claire Jalonick, *Divided Senate Confirms Ratcliffe as intelligence chief*, FEDERAL NEWS NETWORK (May 21, 2020), <https://federalnewsnetwork.com/people/2020/05/senate-speeds-up-confirmation-vote-for-intelligence-director-2/>.

<sup>259</sup> See Robert Draper, *Unwanted Truths: Inside Trump's Battles With U.S. Intelligence Agencies*, N.Y. TIMES MAG. (Aug. 25, 2020), <https://www.nytimes.com/2020/08/08/magazine/us-russia-intelligence.html> (arguing that the administration has been hostile towards the intelligence community in the wake of the Russia investigation).

<sup>260</sup> Memorandum on Agency Cooperation with Attorney General's Review of Intelligence Activities Relating to the 2016 Presidential Campaigns for various Executive Officials (May 23, 2019) (on file at <https://www.whitehouse.gov/presidential-actions/memorandum-agency-cooperation-attorney-generals-reviewintelligence-activities-relating-2016-presidential-campaigns/>).

expect that career DOJ prosecutor John Durham will reach any conclusion other than the one for which Mr. Barr has been publicly campaigning since issuing his disingenuous summary of the Mueller Report in March 2019? Or that Mr. Barr would have appointed Durham and continually expanded his mandate if he were anything other than confident that the findings and conclusions Durham ultimately issues will conform precisely with those that Mr. Barr seeks?

#### h. Barr's Claims About "Unmasking"

Compounding Durham's unnecessarily dangerous probing of the IC in pursuit of the attorney general's desired narrative, Mr. Barr added the issue of "unmasking" to Durham's portfolio before subsequently handing it over to John Bash, U.S. Attorney for the Western District of Texas, for further investigation.<sup>261</sup> With the probe authorized by Mr. Barr now embracing "unmasking," the practice deserves further elaboration to understand exactly what it is that Bash is investigating.

"Unmasking" in the lexicon governing foreign intelligence reporting is the disclosure of U.S. person identities that originally are "masked," or concealed, in those reports by using a generic term or symbol substituted so that the information cannot reasonably be connected with an identifiable U.S. person.<sup>262</sup> It is one of a multitude of "minimization" practices observed by the IC to protect the privacy interests of Americans where such privacy can be preserved, as prescribed in the Foreign Intelligence Surveillance Act (FISA), "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information."<sup>263</sup>

FISA requires that every electronic surveillance conducted for foreign intelligence or counterintelligence purposes use "minimization" procedures to protect against the disclosure of U.S. person identities.<sup>264</sup> All agencies that acquire, retain, or disseminate FISA-acquired foreign intelligence information must adopt and observe minimization procedures approved by the Foreign Intelligence Surveillance Court (FISC).<sup>265</sup> In its lengthy review completed in July 2014 of the surveillance program conducted by the National Security Agency (NSA) pursuant to FISA Section 702, the Privacy and Civil Liberties Oversight Board (PCLOB) described "minimization" in the context of foreign intelligence surveillance in this way: "Minimization is one of the most confusing terms in FISA. Like traditional FISA electronic surveillance and physical search, Section 702 requires that all acquired data be subject to 'minimization procedures.' Minimization procedures

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<sup>261</sup> WALL ST. J. ED. BOARD, *Bill Barr's Other Prosecutor* (Jul. 28, 2020), <https://www.wsj.com/articles/bill-barrs-other-prosecutor-11595978614>.

<sup>262</sup> Madeleine Sheehan Perkins & Sonam Sheth, *Here's what 'unmasking' — the phrase everyone keeps using about former national security adviser Michael Flynn — means*, BUSINESS INSIDER (May 13, 2020), <https://www.businessinsider.com/what-is-unmasking-2017-4>.

<sup>263</sup> See generally 50 U.S.C. Chp. 36 (2020), <https://www.law.cornell.edu/uscode/text/50/chapter-36> (regulating the practice mentioned).

<sup>264</sup> *Id.*

<sup>265</sup> Jordan Brunner, Emma Kohse, Helen Klein Murillo, Amira Mikhail, & Ed Stein, *Foreign Intelligence Surveillance Court Approves New Targeting and Minimization Procedures: A Summary*, LAWFARE (May 15, 2017), <https://www.lawfareblog.com/foreign-intelligence-surveillance-court-approves-new-targeting-and-minimization-procedures-summary>.

are best understood as a set of controls on data to balance privacy and national security interests.”<sup>266</sup>

Consistent with FISA, minimization procedures permit the disclosure of U.S. person identities when “necessary to understand the foreign intelligence information or assess its importance.”<sup>267</sup> NSA minimization rules related to Section 702 collection, for example, permit, in certain specifically defined circumstances, for U.S. person information to be “unmasked” and disclosed by name, title, and/or context when a request for “unmasking” meets the criteria specified in NSA’s minimization procedures. Upon receiving a request from an authorized consumer for the disclosure of a U.S. person identity or identifying information, NSA will provide (i.e., “unmask”) that identity if the requester meets the specific criteria set forth in NSA’s Section 702 minimization procedures.<sup>268</sup>

An authorized consumer of intelligence product can, in a variety of circumstances, request that a “masked” identity be “unmasked” and, as DOJ spokeswoman Kerri Kupac acknowledged in an interview with the noted foreign intelligence maven Sean Hannity of Fox News, an “unmasking” request is not “inherently” wrong but can be, as she chose to describe it, “problematic.”<sup>269</sup> Actually, and more accurately, an “unmasking” request in connection with a foreign intelligence report is neither inherently wrong nor particularly uncommon, is fact and circumstance specific, and generally will depend on the context associated with a particular piece of intelligence information when viewed in association with other factors. Thus, there seems to be no plausible basis upon which Mr. Barr could reasonably predicate his opinion that “some [unmaskings] do not readily appear in the normal line of business.”<sup>270</sup>

“Masking,” and its counterpart, “unmasking” have received unusual attention in recent months in connection with intelligence collection and reporting related to former national security advisor Michael Flynn. Initially, there was considerable furor in certain segments of the media over the alleged “unmasking” of Flynn in connection with intelligence reporting on his communications with Russian ambassador Sergei Kislyak which were collected by the FBI.<sup>271</sup> After shouting by

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<sup>266</sup> PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, 50 (Jul. 2, 2014), <https://documents.pclab.gov/prod/Documents/OversightReport/823399ae-92ea-447a-ab60-0da28b555437/702-Report-2.pdf>.

<sup>267</sup> *Id.* at 54.

<sup>268</sup> See Greg Nojeim, *Section 702: What it is & how it Works*, CENTER FOR DEMOCRACY & TECHNOLOGY (Feb. 15, 2017), <https://cdt.org/insights/section-702-what-it-is-how-it-works/> (describing the reach and details of Section 702, which authorizes foreign surveillance).

<sup>269</sup> Interview by Sean Hannity with Kerri Kupec, Spokeswoman, Dept. of Just. (Jun. 10, 2020), <https://www.foxnews.com/media/kerri-kupec-americans-deserve-resolution-durham-probe>.

<sup>270</sup> WALL ST. J. ED. BOARD, *Bill Barr’s Other Prosecutor* (Jul. 28, 2020), <https://www.wsj.com/articles/bill-barrs-other-prosecutor-11595978614>.

<sup>271</sup> See e.g., *Forget Flynn’s unmasking: The bigger sin was the leak*, WASHINGTON EXAMINER (May 13, 2020), <https://www.washingtonexaminer.com/opinion/forget-flynn-s-unmasking-the-bigger-sin-was-the-leak> (arguing from a right-leaning perspective that the leak was the problem).

some that the “unmasking” of Flynn was improper, subsequent media reports confirmed that Flynn’s identity had never been masked at all in the reporting related to the Kislyak surveillance.<sup>272</sup>

Identifying Flynn by name is almost certainly attributable to the FBI considering that Flynn’s identity was considered “necessary to understand the intelligence and assess its importance.”<sup>273</sup> First, the FBI’s FISA minimization procedures generally provide that the FBI “may disseminate FISA-acquired information that reasonably appears to be foreign intelligence information, is reasonably necessary to understand foreign intelligence information or assess its importance, or is evidence of a crime.”<sup>274</sup> Consequently, intelligence reporting related to the surveillance of Flynn’s conversations did not mask him because, as former deputy attorney general Sally Yates testified, the FBI was conducting a counterintelligence investigation of the Trump campaign’s potential relationship with Russians and Flynn, the incoming national security advisor, was engaging in discussions with a senior Russian diplomat that were “essentially neutering the American sanctions” imposed by the still-serving Obama administration in retaliation for Russia’s electoral interference.<sup>275</sup> Including the identity of the U.S. person who was “essentially neutering the American sanctions” reasonably meets the twin criteria of needing the identity to understand the intelligence and assess its importance. Consequently, the FBI’s reporting derived from this surveillance did not mask Flynn’s identity nor was it required to do so.

A second series of revelations concerning the unmasking of Michael Flynn occurred in the context of the declassification and release by former acting DNI Richard Grenell of a May 4, 2020, memorandum from the director of NSA.<sup>276</sup> NSA’s memorandum responded to a request from Grenell for the number of occasions where Flynn’s identity in NSA-issued intelligence reports (likely derived from either FISA Section 702 collection or from overseas collection conducted pursuant to Executive Order 12333) had been unmasked between November 8, 2016, (the date of the 2016 presidential election) and January 31, 2017.<sup>277</sup> The NSA memorandum reveals that 16 authorized recipients of NSA intelligence reporting requested the unmasking of Flynn’s identity during the period in question although, as the NSA memorandum notes, the fact that an unmasking request was received by any of those authorized principals does not itself confirm that the requesting principal actually saw the unmasked information (since, for example, the request could

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<sup>272</sup> Andrew McCarthy, *Andrew McCarthy: Unmasking Michael Flynn — here's what the FBI was really up to*, FOX NEWS (May 24, 2020), <https://www.foxnews.com/opinion/unmasking-michael-flynn-fbi-framed-general-andrew-mccarthy>.

<sup>273</sup> PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT at 62 (Jul. 2, 2014), <https://documents.pclob.gov/prod/Documents/OversightReport/823399ae-92ea-447a-ab60-0da28b555437/702-Report-2.pdf>.

<sup>274</sup> *Id.* at 54.

<sup>275</sup> Oversight of the Crossfire Hurricane Investigation: Day 2: *Hearing before the Sen. Judiciary Comm.*, 116<sup>th</sup> Cong. (statement of Sally Yates, Former Dep. Att’y General) (on file at <https://www.judiciary.senate.gov/imo/media/doc/Yates%20Testimony.pdf>).

<sup>276</sup> Brooke Singman, *List of officials who sought to 'unmask' Flynn released: Biden, Comey, Obama chief of staff among them*, FOX NEWS (May 13, 2020), <https://www.foxnews.com/politics/grenell-releases-list-of-officials-who-sought-to-unmask-flynn-biden-comey-obama-intel-chiefs-among-them>.

<sup>277</sup> *Id.*

have been made on behalf, or at the request, of a principal for information to be used by that principal's own national security advisor or assistant).<sup>278</sup>

When the declassified NSA memorandum was subsequently publicly released, its contents, again, sparked controversy in certain segments of the media and among certain members of Congress.<sup>279</sup> However, without knowing why the requestors sought Flynn's identity or how that identity factored into their assessment of the intelligence reporting in which it was included, it is very difficult to reach any judgments about the underlying purpose of any individual unmasking request. NSA, in fact, noted that "[e]ach [requesting] individual was an authorized recipient of the original [masked] report and the unmasking was approved through NSA's standard process which includes a review of the justification for the request."

The NSA memorandum released by Grenell identifies 48 individual unmasking requests during the covered time period, but the number of requests, alone is not particularly indicative of any detail of consequence.<sup>280</sup> As former CIA deputy director Mike Morell has stated, "Unmasking is common — literally hundreds of times a year across multiple administrations ... In general, senior officials make the requests when necessary to understand the underlying intelligence ... I myself did it several times a month. You can't do your job without it."<sup>281</sup>

The numbers confirm the relative frequency with which unmaskings occur. The DNI's Statistical Transparency Report for 2020 (covering activity in CY 2019) reports that NSA unmasked 10,012 U.S. person identities in response to unmasking requests received related to intelligence reporting predicated upon Section 702 collection.<sup>282</sup> There were nearly 17,000 such unmaskings in CY 2018, 9,529 in CY 2017, and 9,217 for the period August 2015-September 2016, which was the first period for which the DNI reported this information—and, coincidentally, a period which roughly correlates to the last year of the Obama administration.<sup>283</sup>

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<sup>278</sup> Memorandum from Paul Naskone, General, U.S. Army & Dir. Of the National Security Agency, for Dir. Of Nat'l Intelligence: Follow-up Unmasking Requests *re* Former National Security Advisor (May 4, 2020) (on file at [https://www.hsgac.senate.gov/imo/media/doc/2020-05-13%20ODNI%20to%20CEG%20RHJ%20\(Unmasking\).pdf](https://www.hsgac.senate.gov/imo/media/doc/2020-05-13%20ODNI%20to%20CEG%20RHJ%20(Unmasking).pdf)).

<sup>279</sup> See e.g., Haris Alic, *Joe Biden Aide Attacks CBS Reporter for Flynn 'Unmasking' Memo*, BREITBART NEWS (May 13, 2020); Post Ed. Board, *Look who asked to 'unmask' secret reports that contained Michael Flynn's name*, N.Y. POST (May 13, 2020), <https://nypost.com/2020/05/13/look-who-asked-to-unmask-secret-reports-containing-michael-flynns-name/>; Andrew Mark Miller, *'Matter of concern': Liberal law professor hits Obama administration over Flynn unmasking memo*, WASHINGTON EXAMINER (May 13, 2020), <https://www.washingtonexaminer.com/news/matter-of-concern-liberal-law-professor-hits-obama-administration-over-flynn-unmasking-memo>.

<sup>280</sup> Memorandum from Paul Naskone, General, U.S. Army & Dir. Of the National Security Agency, for Dir. Of Nat'l Intelligence: Follow-up Unmasking Requests *re* Former National Security Advisor (May 4, 2020) (on file at [https://www.hsgac.senate.gov/imo/media/doc/2020-05-13%20ODNI%20to%20CEG%20RHJ%20\(Unmasking\).pdf](https://www.hsgac.senate.gov/imo/media/doc/2020-05-13%20ODNI%20to%20CEG%20RHJ%20(Unmasking).pdf)).

<sup>281</sup> Shane Harris & Matt Zapposky, *Acting intelligence chief Grenell gave DOJ list of Obama officials who 'unmasked' Michael Flynn*, WASHINGTON POST (May 12, 2020), [https://www.washingtonpost.com/national-security/acting-intelligence-chief-grenell-gave-doj-list-of-obama-officials-who-unmasked-michael-flynn/2020/05/12/8b7beb48-9467-11ea-82b4-c8db161ff6e5\\_story.html](https://www.washingtonpost.com/national-security/acting-intelligence-chief-grenell-gave-doj-list-of-obama-officials-who-unmasked-michael-flynn/2020/05/12/8b7beb48-9467-11ea-82b4-c8db161ff6e5_story.html).

<sup>282</sup> OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT, 21 (Apr. 2020), [https://www.dni.gov/files/CLPT/documents/2020\\_ASTR\\_for\\_CY2019\\_FINAL.pdf](https://www.dni.gov/files/CLPT/documents/2020_ASTR_for_CY2019_FINAL.pdf).

<sup>283</sup> *Id.* at 35.

In sum, other than raw statistical data and the identity of the authorized requesters, very little information about any substantive feature of unmasking is revealed in the May 2020 NSA memorandum declassified by acting DNI Richard Grenell. Indeed, the most unusual aspect of Grenell’s action was the rare decision to declassify this information in the first place since it relates to NSA’s highly sensitive Section 702 collection program, and NSA had originally classified the memorandum “SECRET NOFORN”—a categorization signifying it was classified at the “SECRET” level and that there was to be no sharing of the information with foreign allies.<sup>284</sup> Although within his authority as acting DNI at the time, Grenell’s declassification decision abrogated these security parameters without explanation or proffered justification.

As difficult as it is to assign a coherent nonpolitical reason to Grenell’s action, the operational considerations that govern the “unmasking” of U.S. person identities contained in foreign intelligence reporting suggest that the attorney general is engaging in pure speculation when he offered that “some [unmaskings] that do not readily appear in the normal line of business.”<sup>285</sup> The reality is, as explained in NSA’s 2017 report titled “Review of U.S. Person Privacy Protections in the Production and Dissemination of Serialized Intelligence Reports Derived from Signals Intelligence Collected Pursuant to Title I and Section 702 of the Foreign Intelligence Surveillance Act”:

NSA minimization procedures limit the dissemination of U.S. person information. In general, these procedures limit the dissemination of U.S. person information to those instances where the recipient has a “need to know” and the identity of the U.S. person is necessary to understand the foreign intelligence information or assess its importance.

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NSA tailors dissemination by, for example, limiting the number of authorized recipients of intelligence reports, and/or masking U.S. person information contained in the report, or a mixture of both, depending on the nature of the intelligence reports.

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NSA has a well-developed process by which it records and approves the dissemination of masked and unmasked U.S. person information to authorized recipients, allowing the Agency to be transparent and accountable to its overseers.<sup>286</sup>

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<sup>284</sup> Julian Barnes & Katie Benner, *Intelligence Chief Declassifies List of Obama-Era Names in Unusual Step*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/politics/richard-grenell-declassification-unmasking-list.html>.

<sup>285</sup> WALL ST. J. ED. BOARD, *Bill Barr’s Other Prosecutor* (July 28, 2020), <https://www.wsj.com/articles/bill-barrs-other-prosecutor-11595978614>.

<sup>286</sup> Rebecca J. Richards, *Review of U.S. Person Privacy Protections in the Production and Dissemination of Serialized Intelligence Reports Derived from Signals Intelligence Acquired Pursuant to Title I and Section 702 of the Foreign Intelligence Surveillance Act*, NSA CIVIL LIBERTIES & PRIVACY OFFICE 3 (Oct. 11, 2017),

“Unmasking” a U.S. person identity in connection with any particular intelligence report is governed by a plethora of circumstance-specific minimization rules applied by the agency originating the report—which resolves every “unmasking” request by resort to those well-defined rules. There is little reason to expect that John Bash will suddenly uncover a scandal in the “unmaskings” that occurred at the end of the Obama administration but, like Durham’s mission, the real objective is not truth but rather a plausible narrative for those already predisposed to believe the Russian “hoax” canard that the president, with Attorney General Barr as his personal surrogate, tirelessly offer as “alternative facts.”

i. Continuing Threats to National Security

No suggestion is intended here that the IC is, or should be, immune from investigation. Intelligence activities are among the most thoroughly scrutinized actions conducted by the U.S. government, are subject to multiple reporting and congressional oversight requirements (there are over a half-dozen such requirements in FISA alone), and are regularly examined by the Intelligence and Judiciary Committees in both houses of Congress. The lengthy and thorough review of “Russian Active Measures Campaigns and Interference in the 2016 Election” by the Senate Intelligence Committee reflects this demand for accountability. Within the executive branch, the Privacy and Civil Liberties Board (PCLOB) created by Congress in 2004 serves as an additional oversight body of intelligence activities.<sup>287</sup> Theoretically, executive branch oversight is also provided through the network of inspectors general populating the agencies comprising the IC; although, the treatment of inspector generals by this administration is a challenge to that notion of effective and independent oversight. And, of course, the FISC has made clear its own dissatisfaction with the executive branch process that produced the Page FISA applications, has reinforced its demand for faithful adherence to FISA, and has implemented a series of measures intended to ensure that accountability.

The point is that the protection of the nation’s intelligence sources, methods, and tradecraft is a critical national imperative, and there are existing processes in place specifically intended to furnish that protection while ensuring that the IC conducts its activities in accordance with the rule of law. Where information or available evidence indicates criminal activity within the IC, certainly the DOJ needs to play its long-standing role of investigating and prosecuting such activity. Traditional espionage prosecutions with DOJ lawyers prosecuting while assisted by liaison

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<https://www.nsa.gov/Portals/70/documents/about/civil-liberties/reports/20171011-nsa-clpo-dissemination-report.pdf>.

<sup>287</sup> See, e.g., PCLOB, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SEC7ON 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (July 2, 2014), <https://documents.pclob.gov/prod/Documents/OversightReport/823399ae-92ea-447a-ab60-0da28b555437/702-Report-2.pdf>; [https://documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program.pdf](https://documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report_on_the_Telephone_Records_Program.pdf); PCLOB, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (Jan. 23, 2014), [https://documents.pclob.gov/prod/Documents/OversightReport/8c09c647-c5dc-4ecb-b1d7-43e4dca27fb9/Recommendations\\_Assessment-Report\\_2015.pdf](https://documents.pclob.gov/prod/Documents/OversightReport/8c09c647-c5dc-4ecb-b1d7-43e4dca27fb9/Recommendations_Assessment-Report_2015.pdf); PCLOB, RECOMMENDATIONS ASSESSMENT REPORT (Jan. 29, 2015), [https://documents.pclob.gov/prod/Documents/OversightReport/87c7e900-6162-4274-8f3a-d15e3ab9c2e4/PCLOB%20USA%20Freedom%20Act%20Report%20\(Unclassified\).pdf](https://documents.pclob.gov/prod/Documents/OversightReport/87c7e900-6162-4274-8f3a-d15e3ab9c2e4/PCLOB%20USA%20Freedom%20Act%20Report%20(Unclassified).pdf); [https://documents.pclob.gov/prod/Documents/OversightReport/16f31ea4-3536-43d6-ba51-b19f99c86589/PPD-28%20Report%20\(for%20FOIA%20Release\).pdf](https://documents.pclob.gov/prod/Documents/OversightReport/16f31ea4-3536-43d6-ba51-b19f99c86589/PPD-28%20Report%20(for%20FOIA%20Release).pdf)

representatives from the IC offer a blueprint for an approach which assures that the equities of both the DOJ and the agencies of the IC are appropriately addressed.

Not since Richard Helms and Vernon Walters famously rebuffed President Richard Nixon's effort to have the CIA squash the FBI investigation of the Watergate break-in has a president, this time acting through his complicit attorney general, sought to undermine legitimate counterintelligence and foreign intelligence operations for political advantage. Sadly, there is no Helms or Walters to bar the door here.<sup>288</sup> Instead, we have seen a procession of DNIs follow President Trump's dismissal of the sturdy Dan Coats until we have reached the eminently malleable John Ratcliffe who is no match for the steamrolling attorney general.

Ratcliffe's tenuity, moreover, makes it impossible for individual heads of elements of the IC, people like Gina Haspel or General Paul Nakasone, to raise any serious resistance to an attorney general who has been given the unprecedented authority to declassify any of their secrets that he sees as necessary to further the Durham probe and the political narrative it serves. If, in fact, Mr. Barr's pressure to extract results from Durham's effort before the election regardless of the facts that led respected prosecutor Nora Dannehy to resign from Durham's team and leave the government, her action, standing alone, will not slow Mr. Barr.

From a broader perspective, however, Mr. Barr's willingness to unleash Durham to probe the very processes by which the IC produces and analyzes foreign intelligence poses the danger of a potentially fundamental reshaping of executive branch relationships that may cause intelligence professionals to recalculate their priorities in a way that undermines the integrity of their work. With a revolving door producing four different DNIs in little more than a year with each succeeding occupant more partisan and less independent than the last, there is an understandable concern that future intelligence product will increasingly be shaped more by the fear of political retribution, perceived loyalty to a president, and the protection of colleagues than by the candor essential for informed national policymaking.

Other than the FBI's now meticulously reported counterintelligence activities undertaken in connection with its adequately predicated Crossfire Hurricane investigation, no claims of spying on the 2016 Trump campaign by other U.S. intelligence agencies have ever been substantiated. But, when the premise of your relationship with the IC is grounded in the paranoid belief that you have been illegally "spied upon," and when that misguided belief is repeated over and over by the nation's chief law enforcement officer, there is little likelihood that the finest intelligence organizations in the world will be recognized by American citizens as capable and—especially when that attorney general unleashes an unconstrained investigation under the auspices of the one executive agency that historically has been viewed by the public as embodying independence, discretion, and judgment—the DOJ. The Durham investigation, however, undertaken for political reasons, ceaselessly promoted by the vocal partisan commentary of the attorney general, and pursued with little appreciation for the environment in which foreign intelligence analysis is conducted, needlessly risks the compromise of the nation's secrets while undermining the fair administration of justice and the rule of law.

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<sup>288</sup> See generally Robert M. Hathaway & Russell Jack Smith, Richard Helms as Director of Central Intelligence (1993), [https://www.cia.gov/library/readingroom/docs/helms\\_as\\_dcia.pdf](https://www.cia.gov/library/readingroom/docs/helms_as_dcia.pdf).

## 4. Politicization of DOJ Criminal Investigations and Prosecutions

### a. Veracity of Attorney General Barr

Attorney General Barr displays a tenuous relationship with the truth. His prioritization of peripheral, relatively unimportant factual points often comes at the expense of more compelling and truthful narratives. Thus, left-leaning media outlets' assertions that Mr. Barr—in justifying the dubious actions, policies, and denials of the Trump administration—is an outright liar, is something of a mischaracterization. Mr. Barr's lack of candor deserves a more nuanced assessment. The attorney general's propensity to propagate misleading narratives is consistent with the Working Group's general findings that he sees himself more as the lawyer for the president and the Trump re-election campaign than as a representative of the people of the United States. The iterative effect of this deception, intentional or otherwise, weakens respect for the rule of law, hinders fair administration of justice, and contributes to destructive divisions in American society.

A textbook example of Mr. Barr's relationship with the truth came to the attention of the Working Group that has not previously been reported in the press. He submitted the following response to the Senate questionnaire:

7. Military Service and Draft Status: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

*I have not served in the U.S. Military. I was born in 1950 and was not required to register for selective service.*

The statement is, at best, incomplete. Barr registered the day after his 18<sup>th</sup> birthday according to his Selective Service Registration card, dated May 24, 1968.<sup>289</sup> His selective service classification record shows multiple draft deferments<sup>290</sup>—each of which would have required him to initiate the deferment request. It seems highly unlikely that Mr. Barr would have forgotten both his initial registration and all his deferment requests. A fair conclusion is that Mr. Barr misrepresented his selective service status to the Senate Judiciary Committee because an affirmative answer might have prompted press inquiries that would have revealed his history of deferments.

The credibility of an attorney general is no trivial matter. As the nation's chief law enforcement officer, he should be the government's leading advocate for the rule of law, the predicate for a functioning, productive and safe society. Attorney General William Barr falls short of that

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289 Archives.Gov, *William Pelham Barr's Selective Service Draft Card and Selective Service Classification Ledger*, FOIA Archives (May, 14, 2019), <https://www.archives.gov/foia/william-pelham-barrs-selective-service-draft-card#.Xy9T2ntFZIw.email>, <https://www.archives.gov/files/foia/images/william-p-barr-selective-service-card-page1.pdf> We could not find anything indicating that Barr was asked about his selective service status or that the subject ever came up in his testimony. See UNITED STATES COMM. ON THE JUDICIARY, 116TH CONG., QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES [William Barr], [https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20(PUBLIC).pdf).

<sup>290</sup> *Id.*

expectation. Where he is truthful, he often is not truthful enough, obscuring the facts about important issues in his discussion of irrelevancies. And where he is not truthful at all, his conduct is particularly harmful.

Most of Mr. Barr's exaggeration or dissembling originates with the president's often stated complaint that a cadre of his political opponents, many of them allegedly embedded by previous administrations in government, vigorously have sought to discredit the legitimacy of his election and presidency.<sup>291</sup> According to the president, and supported by Mr. Barr, this "deep state" conspiracy takes the form of "bogus" investigations that are no more than "witch hunts."<sup>292</sup> To both men, whether it is an investigation into obstruction of justice, covert interference in American affairs by an adversarial foreign state, or protests over institutional racism, such actions only have one purpose: discrediting and terminating the Trump administration. Others disagree, holding that truthfully examining the facts and acting to solve problems benefits the rule of law and makes our country stronger, whether the problems involve cybersecurity, civil rights, or fighting corruption.

*i. Barr's Handling of the Mueller Report's Findings*

Concerns about the veracity of Attorney General Barr are raised by his refusal to release the unredacted Mueller Report and his blatant mischaracterization of its conclusions, discussed at length in Section V.1. of the report, above.

As Special Counsel Robert Mueller wrote, Mr. Barr's letter to Congress, which purportedly detailed the findings of the investigation, "did not fully capture the context, nature, and substance of this office's work and conclusions," resulting in "public confusion" and creating a false narrative

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<sup>291</sup> This mentality of blaming a "deep state" for supposedly trying to delegitimize the Trump administration has in turn become a common trope on the right-wing. See Sean Illing, *The "deep state" is real. But it's not what Trump thinks it is.*, VOX (May 13, 2020), <https://www.vox.com/policy-and-politics/2020/5/13/21219164/trump-deep-state-fbi-cia-david-rohde> ("it's extraordinarily effective political messaging that Trump uses to discredit rivals or people who question him"); Michael Gerson, Trump's ideology isn't populism. It's catastrophism, WASHINGTON POST (Feb. 25, 2019), [https://www.washingtonpost.com/opinions/trumps-ideology-isnt-populism-its-catastrophism/2019/02/25/89a1fb2e-3940-11e9-aaac-69364b2ed137\\_story.html](https://www.washingtonpost.com/opinions/trumps-ideology-isnt-populism-its-catastrophism/2019/02/25/89a1fb2e-3940-11e9-aaac-69364b2ed137_story.html) ("The ruling ideology of the Trump era, it seems, is not populism but catastrophism. Trump's intellectual vanguard, though puny in number, makes up for it in hyperventilation"). For a look into the claims of these intellectual vanguardists, see Michael Anton, *A Tyranny Perpetual and Universal?*, THE AMERICAN MIND (Aug. 31, 2020), <https://americanmind.org/essays/a-tyranny-perpetual-and-universal/> ("while facing a near-universal rebellion from every power center in our society, emphatically including the agencies he [President Donald Trump] was elected to lead, naturally he has found it very difficult to make the federal bureaucracy do what he tells it to do"). Deep states have actually existed in post-authoritarian-transition environments in countries like Egypt. See Sarah Childress, *The Deep State: How Egypt's Shadow State Won Out*, PBS Frontline (Sept. 17, 2013), <https://www.pbs.org/wgbh/frontline/article/the-deep-state-how-egypts-shadow-state-won-out/> ("Since his [Mubarak's] ouster, the military has quietly maneuvered not only to remain in power but to tighten its grip on every facet of the Egyptian bureaucracy, from the state-run media to the presidency"). However, this is very different from the United States, a democracy; various scholars and authors therefore challenge President Trump's characterization. See generally, DAVID RHODE, IN DEEP (2020); Rebecca Gordon, *What the American 'deep state' actually is, and why Trump gets it wrong*, BUSINESS INSIDER, Jan. 27, 2020), <https://www.businessinsider.com/what-deep-state-is-and-why-trump-gets-it-wrong-2020-1>.

<sup>292</sup> Marshall Cohen & Jeremy Herb, *Breaking down 'Obamagate,' Trump's latest theory about the 'deep state' and Obama's role in the Russia investigation*, CNN POLITICS (May 13, 2020), <https://www.cnn.com/2020/05/13/politics/trump-obama-obamagate-russia/index.html>.

that Trump supporters and media pundits have eagerly adopted.<sup>293</sup> Mr. Barr continued to decry the Mueller investigation as “bogus,”<sup>294</sup> and only later admitted that neither he nor his deputy, Rod Rosenstein, had reviewed the underlying evidence considered by Mueller.<sup>295</sup> Mr. Barr also told Congress that he had not exonerated the president because that was not a DOJ function.<sup>296</sup> Nevertheless, he told Congress that both he and his deputy had concluded that the “investigation did not establish that members of the Trump Campaign conspired or coordinated with Russia.”<sup>297</sup> In essence, the attorney general was “exonerating” the president—while playing down the possibility of post-presidential prosecutions for obstruction of justice.<sup>298</sup>

Obscuring the reason why Mueller reported as he did and focusing on Mueller’s decision not to make a recommendation, Mr. Barr makes several claims that simply are not supported by the facts. He claims, for example, that the president did not obstruct justice because there was no “underlying crime.”<sup>299</sup> Among the reasons why this assertion is false can be found in the fact that Special Counsel set out six or more potentially prosecutable presidential offenses and actually referred a number of cases to U.S. attorneys’ offices that resulted in convictions of Trump associates.<sup>300</sup> Mueller also pointed out that obstruction can be based upon things other than covering up a crime, e.g., attempts to avoid embarrassment.<sup>301</sup> Thus, even references to the

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<sup>293</sup> Richard Gonzales & Sasha Ingber, *Mueller's Letter To Barr Complained That Trump-Russia Report Summary Lacked 'Context'*, NPR (Apr. 30, 2019), <https://www.npr.org/2019/04/30/718883130/mueller-complained-that-barr-summary-of-trump-russia-probe-lacked-context>.

<sup>294</sup> Ken Dilanian, *Barr thinks FBI may have acted in 'bad faith' in probing Trump campaign's links to Russia*, NBC (Dec. 10, 2019), <https://www.nbcnews.com/politics/justice-department/barr-thinks-fbi-may-have-acted-bad-faith-probing-trump-n1098986>.

<sup>295</sup> Olivia Beavers, *Barr says he didn't review underlying evidence of Mueller report before making obstruction call*, THE HILL (May 1, 2019), <https://thehill.com/policy/national-security/441643-barr-says-he-didnt-review-underlying-evidence-of-mueller-report>.

<sup>296</sup> *Hearing on the Mueller Report, Before Sen. Judiciary Comm.*, 116<sup>th</sup> Cong. (2019) (statement of William Barr, Att’y Gen. of the United States), <https://www.pbs.org/newshour/politics/read-william-barrs-prepared-senate-testimony-on-mueller-report> (statement). For video of the full hearing, see *William Barr Testimony on Mueller Report Before Senate Judiciary Committee*, CSPAN (May 1, 2019), <https://www.c-span.org/video/?459922-1/william-barr-testimony-mueller-report-senate-judiciary-committee>.

<sup>297</sup> *Id.*

<sup>298</sup> See Renato Mariotti, *How Trump Could be Prosecuted After the White House*, POLITICO (Jun. 6, 2019), <https://www.politico.com/magazine/story/2019/06/06/how-trump-could-be-prosecuted-after-the-white-house-227050> (“The five-year federal statute of limitations applies to obstruction of justice, and obstructing a federal investigation is not a state crime . . . winning the election might be Trump’s best path to avoid being charged with a felony”).

<sup>299</sup> Mahita Gajanan, *'The President Was Frustrated.' Here's Why Attorney General Barr Believes Trump Did Not Obstruct Justice*, TIME MAG. (Apr. 18, 2019), <https://time.com/5573095/mueller-report-william-barr-trump-obstruction-of-justice/>.

<sup>300</sup> See Andrew Weissmann et. al, *Federal Criminal Offenses and the Impeachment of Donald J. Trump*, JUST SECURITY (Dec. 16, 2019), <https://www.justsecurity.org/67738/federal-criminal-offenses-and-the-impeachment-of-donald-j-trump/> (laying out the case on each potentially prosecutable offense); Marisa Fernandez, *All the Trump associates convicted or sentenced in the Mueller investigation*, AXIOS (Feb. 20, 2020), <https://www.axios.com/trump-associates-convicted-mueller-investigations-206295a1-5abc-4573-be25-4da19d9adcc9.html> (Listing Trump associates who have been indicted or sentenced stemming from the Mueller report, including Paul Manafort, Roger Stone, Rick Gates, Michael Flynn, 13 Russian nationals, 12 Russian military intel officers, and others).

<sup>301</sup> See Quinta Jurecic, *Obstruction of Justice in the Mueller Report: A Heat Map*, LAWFARE (Apr. 21, 2019), <https://www.lawfareblog.com/obstruction-justice-mueller-report-heat-map> (explaining how Mueller approached the issue of obstruction).

president as an unindicted co-conspirator in the Michael Cohen case should not be swept under the rug. Mr. Barr’s claim that the obstruction allegations against the president have been “proven false”<sup>302</sup> is itself false.

In congressional testimony, press interviews, and departmental communications, Mr. Barr consistently supports the president’s narrative that the Mueller investigation was nothing more than a “witch hunt,” with misleading emphasis on collateral issues.<sup>303</sup> To give a few more examples of his attempts at sleight of hand, we note that Mr. Barr rests on an assertion that all that Mueller found was substantial evidence that the president was motivated by frustration and that his presidency was being undermined.<sup>304</sup> While there was some evidence of this, Mr. Barr ignores Mueller’s findings of evidence that the president was motivated by a desire to protect himself.<sup>305</sup> Faced with evidence that the president refused to be interviewed and had the power to influence the investigation by dangling pardons, Mr. Barr nevertheless has asserted that the president did nothing to impede the completion of the Mueller investigation.

As discussed in Section V.1.c of this report, the version of the Mueller Report that has been released has been substantially redacted.<sup>306</sup> In a pending case concerning the legitimacy of the redactions in the U.S. District Court for the District of Columbia, U.S. District Court Judge Reggie Walton opined that Mr. Barr’s “misleading” statements evidenced an intention to create a “one-sided narrative” favorable to President Trump. Having later read an unredacted copy of the Mueller Report, Judge Walton remained critical of what he believed were the attorney general’s “distortions.”<sup>307</sup>

Has Mr. Barr lied about the Mueller Report’s findings and the evidence that supports them in service to the president’s false narrative that the Mueller investigation was a Democratic hoax and that the investigation exonerated him? Mr. Barr, of course, would deny having done anything of the sort. But he has obfuscated the reality that Mueller made no recommendation concerning prosecution of the president because an OLC opinion has indicated that prosecution would be unconstitutional—not because the president did not commit a crime.<sup>308</sup> Attorney General Barr not only distorts the reason why Special Counsel made no recommendation, but he ignores it, and

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<sup>302</sup> *Hearing on the Mueller Report, Before Sen. Judiciary Comm.*, 116<sup>th</sup> Cong. (2019) (statement of William Barr, Att’y Gen. of the United States), <https://www.pbs.org/newshour/politics/read-william-barrs-prepared-senate-testimony-on-mueller-report>.

<sup>303</sup> President Trump consistently makes this claim, which Robert Mueller categorically rejected. Eric Tucker, Mary Clare Jalonick, & Michael Balsamo, *Mueller rejects Trump’s claims of exoneration, ‘witch hunt’*, AP (Jul. 25, 2020), <https://apnews.com/71c78db8033540518f45baf1a6505dff>.

<sup>304</sup> See Laura Coates, *Barr’s falsehoods and fallacies undermine his own department*, CNN (Jul. 28, 2020), <https://www.cnn.com/2020/07/28/opinions/william-barr-fallacies-undermine-justice-department-coates/index.html> (rebutting various elements of Barr’s testimony).

<sup>305</sup> MUELLER REPORT, *supra* note 47.

<sup>306</sup> See generally MUELLER REPORT, *supra* note 47.

<sup>307</sup> Elec. Privacy Info. Ctr. v. DOJ, 442 F. Supp. 3d 37 (memorandum opinion) (linked at <https://epic.org/foia/doj/mueller-report/EPIC-v-DOJ-19-810-memorandum-opinion-030520.pdf>). See also Quinta Jurecic, *What’s New in the Unredacted Mueller Report?*, LAWFARE (Jul. 2, 2020), <https://www.lawfareblog.com/whats-new-unredacted-mueller-report> (discussing the unredacted version that came out of this litigation).

<sup>308</sup> Testimony of Robert S. Mueller III, former Special Counsel, *before the House Judiciary Comm.*, 116<sup>th</sup> Cong. (July 24, 2019), [https://www.washingtonpost.com/politics/transcript-of-robert-s-mueller-iiis-testimony-before-the-house-judiciary-committee/2019/07/24/7164abfe-ad96-11e9-a0c9-6d2d7818f3da\\_story.html](https://www.washingtonpost.com/politics/transcript-of-robert-s-mueller-iiis-testimony-before-the-house-judiciary-committee/2019/07/24/7164abfe-ad96-11e9-a0c9-6d2d7818f3da_story.html).

refuses to acknowledge that he prejudged the matter in a 2018 memo, concluding that a president cannot obstruct justice because he is in charge of its administration.<sup>309</sup>

ii. *Barr's Undermining of the Inspector General's Investigation and Improper Commentary on the Durham Investigation*

The attorney general's response to the Horowitz Report, discussed in greater detail in Section V.3.c of the report, is, at best, based on the half-truth that there was substantial misconduct by the FBI with respect to the FISA process. Though Mr. Barr ignores them, the findings of the investigation were confirmed not only by the Mueller Report but also by the findings of the bipartisan Senate Intelligence Committee report.

Mr. Barr's dissatisfaction with the results of the Inspector General's Crossfire Hurricane investigation and Special Counsel Mueller's investigation led him to commission John Durham to pursue a comprehensive examination of the role that the U.S. government played in investigating the Trump campaign and the subsequent spinoff investigation by John Bash into so-called "unmaskings."<sup>310</sup> The potential consequences of the Durham and Bash inquiries are discussed in detail in Section V.3. of this report. With respect to the issue of the attorney general's candor, or the lack of it, the manner and extent to which Mr. Barr and Durham have weighed in publicly on the pending Durham probe must be considered. They claim to have gained access to information not otherwise available to Horowitz or Mueller and, prejudging the matter, have asserted that various people under investigation have engaged in serious wrongdoing.<sup>311</sup>

Testifying before Congress, Mr. Barr refused to give assurance that he would not release the Durham report at a point close to the upcoming presidential election, threatening an "October surprise."<sup>312</sup> In Section V.3.e. of this report, we explain that this continuous commentary on a pending criminal investigation could violate DOJ rules and customs. However, the selective

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<sup>309</sup> Mikhaïla Fogel & Benjamin Wittes, *Bill Barr's Very Strange Memo on Obstruction of Justice*, LAWFARE (Dec. 20, 2020), <https://www.lawfareblog.com/bill-barrs-very-strange-memo-obstruction-justice> (highlighting Barr's employment application letter, an unsolicited pre-employment memo sent in June 2018 to President Donald Trump about obstruction of justice rules).

<sup>310</sup> George Croner, *What Durham Is Investigating and Why It Poses a Danger to US Intelligence Analysis*, Just Security (Jul. 25, 2020), <https://www.justsecurity.org/71647/what-durham-is-investigating-and-why-it-poses-a-danger-to-us-intelligence-analysis/>. Also see Maria Reccio, *Texas prosecutor John Bash to probe Flynn case*, Austin Statesman (Jul. 28, 2020), <https://www.statesman.com/news/20200728/texas-prosecutor-john-bash-to-probe-flynn-case>.

<sup>311</sup> See *Barr Continues To Comment On Ongoing Durham Investigation — Even As Justice Dept. Withholds Documents About It From Public*, American Oversight (Aug. 10, 2020), <https://www.americanoversight.org/barr-continues-to-comment-on-ongoing-durham-investigation-even-as-justice-dept-withholds-documents-about-it-from-public>; Charles Creitz, *Barr teases Friday 'development' in Durham probe, says investigation won't be 'dictated to' by election*, Fox News (Aug. 13, 2020), <https://www.foxnews.com/politics/barr-durham-report-development-friday-election-timing>.

<sup>312</sup> See Nancy LeTourneau, *Is Barr Planning His Own October Surprise?*, WASHINGTON MONTHLY (Aug. 6, 2020), <https://washingtonmonthly.com/2020/08/06/is-barr-is-planning-his-own-october-surprise/> ("Barr has left no doubt that he is in the midst of planning his own October surprise in a blatant attempt to benefit the incumbent president. That would be a stunning development, even for an attorney general who has already completely destroyed the independence of the Justice Department"). Surprising happenings or actions on the eve of a Presidential election can easily sway the race, hence the name "October Surprise". See Jared Keller, *The Strange History of the October Surprise*, SMITHSONIAN MAG. (Oct. 11, 2016), <https://www.smithsonianmag.com/history/strange-history-october-surprise-180960741/>.

invocation of privilege with regards to what can, should, or will be reported on the Durham investigation is reminiscent of the strategy employed by Attorney General Barr in controlling the public perception of the Mueller Report through the redaction and conclusory (as well as objectionable) summaries.

iii. *The Firing of U.S. Attorney Geoffrey Berman*

Late on Friday night, June 19, 2020, Attorney General Barr issued an announcement that Geoffrey Berman, the U.S. Attorney for the Southern District of New York (SDNY), was “stepping down” from his post.<sup>313</sup> Mr. Barr added that the president would be nominating the chairman of the Securities and Exchange Commission, a person with no prosecutorial experience, to replace him, and that in the interim, the U.S. Attorney for New Jersey would take over. While there had been discussions between Mr. Barr and Berman concerning Berman’s leaving and, perhaps taking a different post, there had been no agreed resolution of the matter, to Berman’s knowledge.<sup>314</sup> After some jousting concerning Mr. Barr’s authority to remove Berman and Barr’s subsequent statement that the president (who disclaimed knowledge of the action) had fired Berman, Berman announced his resignation.<sup>315</sup> This is discussed further in Section V.6.b of this report.

Given Berman’s understandable reaction to Mr. Barr’s precipitate announcement, Mr. Barr’s behavior and statements raise questions that should be thoroughly investigated by the DOJ’s Inspector General and by Congress. Outstanding questions regarding this event, if unanswered, threaten to excuse a pattern of conduct unbecoming of our country’s top law enforcers and may open the door to other suspect personnel changes.<sup>316</sup> Unfortunately, there were only sporadic

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<sup>313</sup> Interview by Lulu Garcia-Navarro with Mimi Rocah, former Assistant Att’y Gen., NPR (June 21, 2020) (on file at <https://www.npr.org/2020/06/21/881358553/u-s-attorney-geoffrey-berman-steps-down-after-standoff-with-attorney-general-bar>).

<sup>314</sup> See Andrew Prokop, *The firing of SDNY US Attorney Geoffrey Berman, explained*, VOX (June 22, 2020), <https://www.vox.com/2020/6/22/21298917/geoffrey-berman-sdny-fired-barr> (describing the lack of a decided solution on the issue).

<sup>315</sup> See Michael Riccardi & Jane Wester, *Geoffrey Berman Resigns as Manhattan US Attorney, Ending Standoff With William Barr*, LAW.COM (June 20, 2020), <https://www.law.com/newyorklawjournal/2020/06/20/uncharted-waters-standoff-looms-after-purported-ouster-of-geoffrey-berman-as-us-attorney-in-manhattan/> (noting Berman’s resignation).

<sup>316</sup> One other concerning personnel change of note occurred in the Eastern District of New York. On July 10, 2020, Attorney General Barr replaced E.D.N.Y. U.S. Attorney, Richard Donoghue with Barr’s former Principal Associate Deputy Attorney General, Seth DuCharme, rather than with Donoghue’s Deputy. While DuCharme previously spent twelve years in the E.D.N.Y. office, he has been responsible for “coordinating” all Ukraine-related efforts by the DOJ following the impeachment of Trump and has been heavily involved in the Durham investigation thus far. Josh Gernstein, *DOJ taps U.S. attorney to 'coordinate' Ukraine Inquiries*, POLITICO (Feb. 18, 2020). While DuCharme stated that using his office to advance a political agenda would be “inconsistent with every fiber of my[his] being”, concerns still exist around whether his appointment by the President gives the appearance of politicization, considering his experience as counsel to William Barr, where he advised him on national security issues. See Nicole Hong, *Why Barr’s Pick for Brooklyn Prosecutor Faces Scrutiny from All Sides*, N.Y. TIMES (Jul. 30, 2020), <https://www.nytimes.com/2020/07/30/nyregion/seth-ducharme-us-attorney-brooklyn.html>. See also Betsy Woodruff Swan, *Judge Swears in New Top Federal Prosecutor in Brooklyn*, POLITICO (July 10, 2020), <https://www.politico.com/news/2020/07/10/new-top-prosecutor-eastern-district-new-york-356605>. DuCharme has extensive experience with cases involving corporate espionage, national security, and cybercrime. See also Jane Wester, *New Acting US Attorney in Brooklyn Brings Local Background, Law Enforcement Experience*, N.Y. LAW. J. (July 13, 2020).

questions about the firing at the hearing where Attorney General Barr testified on July 28, 2020.<sup>317</sup> However, his claim that Berman had “stepped down,” when in fact he had been fired, was shocking.<sup>318</sup> Only when pressed did Mr. Barr acknowledge that he used “step down” to refer to a situation where an office holder is effectively forced out.

It is likely that Mr. Barr assumed that the discussion that he had with Berman should have informed the latter that it was time to go. However, while Mr. Barr’s original announcement was made in the context of describing the president’s desire to accommodate the request of the SEC Chairman to move to New York while, at the same time, praising Berman’s accomplishments, the facts suggest something more concerning. This is likely another example of the attorney general focusing on a subordinate fact that is true, in this case the intention to install the SEC Chairman in the Southern District’s U.S. Attorney’s seat, while avoiding the underlying issue of why the resistant Berman expressed concern about the integrity of ongoing investigations by his office.

*iv. Interventions in Cases Brought by the U.S. Attorney for the District of Columbia*

Attorney General Barr’s actions with respect to the U.S. Attorney for the Southern District of New York (SDNY) mirrored even more pronounced intervention in the affairs of the office of the U.S. Attorney for the District of Columbia. The SDNY is known colloquially as “The Sovereign District of New York.” The office in D.C. is known in the legal community simply as “The Office.” Both have been famously and fiercely independent. Indeed, it was in the D.C. office that the Watergate prosecutions that led to the resignation of sitting president Richard Nixon originated.

There have been numerous efforts by the attorney general to intervene on behalf of Trump associates in prosecutions pending in the District of Columbia.<sup>319</sup> In two of these cases, Mr. Barr intervened in a manner that again called his credibility into question—that of Michael Flynn and Roger Stone, who have been found guilty of felonies in the Russia investigation. This is discussed more thoroughly in Section V.4.b of this report.

In sympathetic vibration with the president’s discordant thrum, Mr. Barr claimed that Stone was being treated unfairly.<sup>320</sup> In justifying the uncharacteristic lenience towards convicted criminals, Mr. Barr fell back on his constant theme, questioning the basis for the investigation that caused the benighted Stone to commit his crimes and stating that the president’s associates “don’t deserve to be treated more harshly than other people.”<sup>321</sup>

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<sup>317</sup> Hearing with Att’y Gen. William Barr, House Comm. on the Judiciary, 116<sup>th</sup>. Cong. (July 28) (Statement of William Barr).

<sup>318</sup> *Id.*

<sup>319</sup> David Shortell, Evan Perez, Katelyn Polantz, Kaitlan Collins, & Jeremy Herb, *All 4 federal prosecutors quit Stone case after DOJ overrules prosecutors on sentencing request*, CNN Politics (Feb. 12, 2020), <https://www.cnn.com/2020/02/11/politics/roger-stone-sentencing-justice-department/index.html>.

<sup>320</sup> See Mimi Rocah & Glenn Kirschner, *Roger Stone case reveals Barr and Trump’s gross politicization of American criminal justice*, NBC NEWS THINK (Feb. 20, 2020), <https://www.nbcnews.com/think/opinion/roger-stone-case-reveals-barr-trump-s-gross-politicization-american-nca1135936> (noting that Barr stated that the initial sentence would not be appropriate the same day as President Trump tweeted that the sentence was “unfair”).

<sup>321</sup> Zack Budryk, *Justice IG investigating Stone sentencing: report*, THE HILL (Sept. 14, 2020), <https://thehill.com/regulation/court-battles/516365-justice-ig-investigating-stone-sentencing-report>.

In a *Washington Post* editorial, Robert Mueller gave no credence to Mr. Barr’s statements, writing:

I feel compelled to respond both to broad claims that our investigation was illegitimate, and our motives were improper, and to specific claims that Roger Stone was a victim of our office. The Russia investigation was of paramount importance. Stone was prosecuted and convicted because he committed federal crimes. He remains a convicted felon, and rightly so.<sup>322</sup>

Russia’s actions were a threat to America’s democracy.<sup>323</sup> It was therefore critical that they be investigated and understood. By characterizing Stone’s treatment as “harsh,” the attorney general tars the reputation of the justice system, his own U.S. attorneys and prosecutors, and a federal judge as subject to political bias while painting himself and the president as arbiters of truth and impartiality.

Mr. Barr’s conduct with respect to the Flynn case casts further doubt on the accuracy of his representations. Whatever the outcome of Flynn’s appeal, discussed further in Section V.4.b of this report, Mr. Barr’s rationale displays his cloaking technique yet again: highlighting an immaterial fact at the expense of the truth of the matter. He suggests that newly discovered evidence undermined the investigation and that Flynn was somehow entrapped into telling lies to federal agents.<sup>324</sup> The “new” evidence, was FBI misconduct disclosed in IG Horowitz’s investigation. However, the IG also found (and was later corroborated by a Senate investigation) that the FBI misconduct discovered did not negate Crossfire Hurricane, the operation that instigated the case against Flynn, which was properly instituted.<sup>325</sup> Additionally, Flynn was not compelled to lie, but when he did, it punctuated the fact that he and the administration were hiding facts concerning Russia and Ukraine.<sup>326</sup>

Writing with reference to the Stone case, but equally true as to the necessity of the Flynn prosecution, Robert Mueller explained:

We now have a detailed picture of Russia’s interference in the 2016 presidential election. The special counsel’s office identified two principal operations directed at our election: hacking and dumping Clinton campaign emails, and an online social

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<sup>322</sup>Robert Mueller, *Roger Stone remains a convicted felon, and rightly so*, WASHINGTON POST (Jul. 11, 2020), <https://www.washingtonpost.com/opinions/2020/07/11/mueller-stone-oped/?arc404=true>.

<sup>323</sup> See Michael Isikoff & David Corn, *Russian Roulette* (2018) (making a general case for why Russian meddling threatens American democracy); Franklin Foer, *Putin Is Well on His Way to Stealing the Next Election*, THE ATLANTIC (June 2020), <https://www.theatlantic.com/magazine/archive/2020/06/putin-american-democracy/610570/> (“Russians have learned much about American weaknesses, and how to exploit them. Having probed state voting systems far more extensively than is generally understood by the public, they are now surely more capable of mayhem on Election Day”).

<sup>324</sup> Aaron Keller, *Acting Solicitor General Tells Full D.C. Circuit That Barr Has Secret Reasons for Dismissing Michael Flynn Case*, LAW & CRIME (Aug. 20, 2020), <https://lawandcrime.com/high-profile/acting-solicitor-general-tells-full-d-c-circuit-barr-has-secret-reasons-for-dismissing-michael-flynn-case/>.

<sup>325</sup> Charlie Savage, Adam Goldman, & Katie Benner, *Report on F.B.I. Russia Inquiry Finds Serious Errors but Debunks Anti-Trump Plot*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/us/politics/fbi-ig-report-russia-investigation.html>.

<sup>326</sup> See Chuck Rosenberg, *The long list of people who thought Flynn’s lies were material*, WASHINGTON POST (May 10, 2020), <https://www.washingtonpost.com/opinions/2020/05/10/long-list-people-who-thought-flynn-s-lies-were-material/> (noting that even “Michael Flynn thought his lies were material”).

media campaign to disparage the Democratic candidate. We also identified numerous links between the Russian government and Trump campaign personnel — Stone among them. We did not establish that members of the Trump campaign conspired with the Russian government in its activities. The investigation did, however, establish that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome. It also established that the campaign expected it would benefit electorally from information stolen and released through Russian efforts.<sup>327</sup>

No fewer than three times in the same District Court, before three separate judges—first with respect to redactions to the Mueller Report, next in connection with the Stone sentencing, and last in attempting to end the Flynn case—Mr. Barr’s credibility has been subject to question. In each case he offered opinion or partial truth as he ignored larger truths that relevant to the matter in assessing the rule of law.

v. *Barr’s Role in Deploying and Controlling Federal Officers During Protests*

Attorney General Barr’s comments on police violence against African American communities illustrate his ability to reframe and misconstrue narratives under the guise of truth. In the wake of George Floyd’s death, Mr. Barr remarked, “more White people are shot by police than Black people.”<sup>328</sup> Although this statement is statistically true, it both fails to recognize that, as a percentage of population, African Americans are disproportionately the victims of police shootings and effectively diminishes America’s history of racism, discrimination, and violence against minority communities.<sup>329</sup> This more significant truth renders Mr. Barr’s fatuous response an irrelevancy and reveals how he avoids engaging in any useful manner with the questions of minority relations with police, changes in policing tactics, and ultimately, how better to create respect for the law in a civil society.<sup>330</sup>

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<sup>327</sup> Robert Mueller, *Roger Stone remains a convicted felon, and rightly so*, WASHINGTON POST (Jul. 11, 2020), <https://www.washingtonpost.com/opinions/2020/07/11/mueller-stone-oped/?arc404=true>.

<sup>328</sup> See Dartunorro Clark, *Barr denies systemic racism in police shootings of Black men*, NBC NEWS (Sept. 2, 2020), <https://www.nbcnews.com/politics/justice-department/barr-denies-systemic-racism-police-shootings-black-men-n1239145>.

<sup>329</sup> See Deidre McPhillips, *Deaths From Police Harm Disproportionately Affect People of Color*, U.S. NEWS (June 3, 2020), <https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color> (citing data from the Mapping Police Violence project to show that Black Americans in particular face disproportionate levels of police violence).

<sup>330</sup> For more data about the disproportionate impact of police violence on Black Americans, see Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race–ethnicity, and sex*, 34 PROCEEDINGS OF THE NAT’L ACADEMY OF SCI. OF THE UNITED STATES 116 (Aug. 20, 2019), <https://www.pnas.org/content/116/34/16793> (“Black women and men and American Indian and Alaska Native women and men are significantly more likely than white women and men to be killed by police. Latino men are also more likely to be killed by police than are white men”). See also Ian Thomsen, *The Research is Clear: White People are not More Likely Than Black People to be Killed by Police*, NEWS@NORTHEASTERN (Jul. 16, 2020), <https://news.northeastern.edu/2020/07/16/the-research-is-clear-white-people-are-not-more-likely-than-black-people-to-be-killed-by-police/> (discussing a study finding that Black people are 25% of the deaths in police shootings and just 12% of the US population); Michael Marshall, *US Police Kill up to 6 Times More Black People than White People*, NEW SCIENTIST (Jun. 24, 2020), <https://www.newscientist.com/article/2246987-us-police-kill->

The Black Lives Matter protests and demonstrations that occurred in cities, including Washington, D.C., Portland, and Chicago, during the summer of 2020 occasioned a largely-uninvited federal response. The factual background and DOJ policy issues that pervade the government's controversial action are analyzed in Section V.5 of this report. Although Attorney General Barr claims to have witnessed or been made aware of violent or disruptive actions in Washington's Lafayette Square justifying the use of force, these demonstrators represented a controllable, marginal force rather than a dominant, pervasive threat.<sup>331</sup> In fact, it has been widely reported that the clearing of Lafayette Square was for the purposes of a White House photo-op outside of St. John's Episcopal Church planned the previous day.<sup>332</sup> Not only was little was done to calm the situation or to reassure the public as intimidated, but the plaza was simply cleared—with the use of chemical agents, rubber bullets, and other extreme crowd control devices.<sup>333</sup> Mr. Barr denied that these methods were used, assertions that have been debunked by evidence on the ground.

Whatever facts, albeit exaggerated, that he relied upon at the outset, the attorney general surrendered his credibility when he attempted to disclaim responsibility for the overreaction of the government's forces. When it was reported that Mr. Barr gave the orders to clear Lafayette Square,<sup>334</sup> he asserted, "I'm not involved in giving tactical commands like that." However, he continued, "I was frustrated, and I was also worried that as the crowd grew, it was going to be harder and harder to do. So, my attitude was, get it done, but I didn't say, 'Go do it.'"<sup>335</sup> There is a Latin expression in the law, "*res ipsa loquitur*" describing a thing that speaks for itself. His hollow justification for his conduct is just that.

Mr. Barr has also purported, in sync with the president, that "antifa," shorthand for "anti-fascists," was responsible for inciting violence at protests across the country, which is more fully addressed in Section V.5.d of this report. He makes no mention of other groups who might have been—and had been reported to be—involved in such activities,<sup>336</sup> nor does he supply any evidence

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up-to-6-times-more-black-people-than-white-people/ (laying out the data on police shootings). Instead of retreating to misleading use of statistics, Barr could support bipartisan reform. See Lissandra Villa & Molly Ball, 'Never Ever Say It's Dead.' *Why Sen. Tim Scott Is Still Hopeful for Police Reforms*, TIME MAG. (Jul. 23, 2020), <https://time.com/5869166/tim-scott-police-reform-bill/> (discussing criminal justice initiatives spearheaded by a Republican Senator).

<sup>331</sup> Barbara Sprunt, 'Scared, Confused And Angry': Protester Testifies About Lafayette Park Removal, NPR (June 29, 2020), <https://www.npr.org/2020/06/29/884609432/scared-confused-and-angry-protester-testifies-about-lafayette-park-removal> (Quoting a demonstrator reflecting, "we told them we were peaceful we wanted no trouble").

<sup>332</sup> Martin Pengally, *A photo op as protests swirled: how Trump came to walk to the church*, The Guardian (June 2, 2020), <https://www.theguardian.com/us-news/2020/jun/02/trump-washington-walk-to-the-church-photo-op>.

<sup>333</sup> Marissa J. Lang, *Federal officials stockpiled munitions, sought 'heat ray' device before clearing Lafayette Square, whistleblower says*, WASHINGTON POST (Sept. 17, 2020), [https://www.washingtonpost.com/local/dc-protest-lafayette-square/2020/09/16/ca0174e4-f788-11ea-89e3-4b9efa36dc64\\_story.html](https://www.washingtonpost.com/local/dc-protest-lafayette-square/2020/09/16/ca0174e4-f788-11ea-89e3-4b9efa36dc64_story.html).

<sup>334</sup> Carol Leonnig, Matt Zaptosky, Josh Dawsey, Rebecca Tan, *Barr personally ordered removal of protesters near White House, leading to use of force against largely peaceful crowd*, WASHINGTON POST (Jun. 2, 2020), [https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b_story.html).

<sup>335</sup> Matt Zaptosky, *Barr seeks to dissociate himself from move on demonstrators outside Lafayette Square*, WASHINGTON POST (June 5, 2020), [https://www.washingtonpost.com/national-security/barr-seeks-to-dissociate-himself-from-move-on-demonstrators-outside-lafayette-park/2020/06/05/47cb96b6-a78e-11ea-bb20-ebf0921f3bbd\\_story.html](https://www.washingtonpost.com/national-security/barr-seeks-to-dissociate-himself-from-move-on-demonstrators-outside-lafayette-park/2020/06/05/47cb96b6-a78e-11ea-bb20-ebf0921f3bbd_story.html).

<sup>336</sup> Hannah Allam, *Analysts say armed groups at protests raise specter of a 'street war'*, NPR (July 30, 2020), <https://www.npr.org/2020/07/30/896770081/analysts-say-armed-groups-at-protests-raise-specter-of-a-street-war>.

concerning whether antifa is an organized group with known leadership. Instead, he claimed in an August 9, 2020, Fox News interview that it is liberals who are intent on “tearing down the system” and called protestors’ tactics “fascistic.”<sup>337</sup> And, speaking of the Black Lives Matter movement specifically, he asserted, “They are a revolutionary group that is interested in some form of socialism, communism. ... They’re essentially Bolsheviks.”<sup>338</sup> Besides offering no concrete evidence to support his opinions, Mr. Barr ignores the issue of combatting racism that the protest movement seeks to elevate. He also shows little worry or care for the difference between left-wing Bolshevism and right-wing fascism. The attorney general’s unsupported and historically inaccurate assertions stoke fear rather than inform and are deeply irresponsible.

vi. *Barr’s Unsupported Statements About Potential Election Fraud*

Attorney General Barr has made scores of unsubstantiated claims suggesting that foreign antagonists will alter election results by “manufacturing mail-in ballots.”<sup>339</sup> He has offered no proof of this beyond stating that expecting mass, successful interference by an adversary is simply “common sense.”<sup>340</sup> The available evidence, however, reveals the baselessness of these assertions.<sup>341</sup> Many states provide absentee ballots without requiring any excuse, and five states have conducted whole elections by mail-in votes without difficulty for years.<sup>342</sup> Subject matter experts within the government are also confident in the system: Christopher Krebs, Administration Director of the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency stated, in a Brookings Institution webinar, that the country is on track for “the most secure election in history.”<sup>343</sup> However, in his testimony before the Congress, Mr. Barr reiterated the president’s concern about the COVID-19-induced, boosted mail-in vote, claiming there was “high

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<sup>337</sup>Bill Barr: Antifa is ‘new form of urban guerilla warfare,’ FOX NEWS (Aug. 9, 2020), <https://www.foxnews.com/transcript/bill-barr-antifa-is-new-form-of-urban-guerrilla-warfare>.

<sup>338</sup> *Id.*

<sup>339</sup> See Zack Burdyk, *Barr casts doubt on mail-in voting: ‘There are going to be ballots floating around’*, The Hill (Sept. 10, 2020), <https://thehill.com/homenews/administration/515968-barr-casts-doubt-on-mail-in-voting-there-are-going-to-be-ballots> (“Barr has previously claimed mail-in ballots could be fabricated by foreign actors”).

<sup>340</sup> See *id.* (noting that Barr made the aforementioned claims without evidence, based solely on supposed “logic”).

<sup>341</sup> See Wendy Weiser & Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, Brennan Center for Justice (Apr. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud> (“Trump’s claims are wrong, and if used to prevent states from taking the steps needed to ensure public safety during November’s election, they will be deadly wrong. Mail ballot fraud is incredibly rare, and legitimate security concerns can be easily addressed”); see also Rachel Orey & Emma Jones, *Is Voting by Mail Safe and Reliable? We Asked State and Local Elections Officials*, Bipartisan Policy Center (Jun. 12, 2020), <https://bipartisanpolicy.org/blog/is-voting-by-mail-safe-and-reliable-we-asked-state-and-local-elections-officials/> (“All three election officials said they take numerous steps to safeguard the absentee and mail voting process”); Michael Steele, *Conservatives need to get behind vote-by-mail options in 2020 election*, Washington Times (Mar. 24, 2020), <https://www.washingtontimes.com/news/2020/mar/24/conservatives-must-get-behind-vote-by-mail-options/> (supporting mail-in voting for its safety, increasing accessibility to democracy, and not create major partisan impacts).

<sup>342</sup> See Interview by Isaac Chotiner, Journalist, and Kim Wyman, Washington Sec’y of State (GOP), *How Washington State Holds Its Elections by Mail*, NEW YORKER (Sept. 8, 2020), <https://www.newyorker.com/news/q-and-a/how-washington-state-holds-its-elections-by-mail> (“When you build a system, like Washington’s, that has a really good balance of access and security, you inspire confidence that it’s a well-run election”).

<sup>343</sup> Jacob Knutson, *DHS official claims 2020 will be “most secure” election in U.S. history*, AXIOS (Mar. 10, 2020), <https://www.axios.com/christopher-krebs-election-security-coronavirus-8449d2ef-0c5f-46cd-a51b-0444b7c17f62.html>.

risk” of fraud, while simultaneously admitting to Rep. Mary Gay Scanlon (D-Pa.) that he could cite no evidence of said activities, such as counterfeit mail-in ballots.<sup>344</sup>

#### b. Selective Dismissals and Sentencing Recommendations

Is the DOJ being used to protect President Trump’s friends, particularly those who could be potential witnesses against him? In Section V.4.a.iv we address the attorney general’s adopted role of publicly justifying the president’s intervention in the cases against Michael Flynn and Roger Stone. Our focus here, however, is the actual intervening action taken by the DOJ after Mueller departed as Special Counsel.

Based on referrals from the Mueller investigation, line career attorneys brought successful prosecutions against former national security advisor Michael Flynn and Trump friend and campaign advisor Roger Stone. Flynn pled guilty twice to lying to the FBI in the course of its investigation.<sup>345</sup> Following a jury trial, Stone was convicted of obstructing an official proceeding, tampering with a witness, and five counts of making false statements to Congress.<sup>346</sup> In both cases, line prosecutors sought sentences in line with the Federal Sentencing Guidelines and DOJ practices. And, in both cases, the attorney general has taken the highly unusual step of intervening in DOJ prosecutions and convictions.

After displacing the U.S. attorney for D.C., Jessie Liu, and installing an ally with no background in the office, Mr. Barr countermanded the sentencing recommendation of the prosecutors, causing them to resign from the case and, in one instance from the DOJ itself.<sup>347</sup> The trial judge, the Hon. Amy Berman Jackson, ignored the attorney general’s late intrusion and sentenced Stone to a term of imprisonment.<sup>348</sup> But before Stone could report to begin his sentence, the president commuted it.<sup>349</sup>

Attorney General Barr says that he opposed the Stone commutation.<sup>350</sup> We do not know, however, what legal advice he gave to President Trump or if ordinary procedures for handling such matters were followed within the DOJ, but suspect that they were not. We discuss use and abuse of the pardon power in Section V.4.c. of this report. Importantly, if there were ongoing investigations in which Stone was a material witness, and if the pardon was motivated in part by President Trump’s

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<sup>344</sup> Kyle Cheney & Natasha Bertrand, *Intel officials contradict Trump on voting by mail*, POLITICO (Aug. 26, 2020), <https://www.politico.com/news/2020/08/26/intel-officials-contradict-trump-on-voting-by-mail-402470>.

<sup>345</sup> N.Y. Times Editorial Board, *Don’t Forget, Michael Flynn Pleaded Guilty. Twice.*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/opinion/michael-flynn-charges-dropped.html>.

<sup>346</sup> Darren Samuelson & Josh Gerstein, *Roger Stone sentenced to over 3 years in prison*, POLITICO (Feb. 20, 2020), <https://www.politico.com/news/2020/02/20/roger-stone-sentenced-to-over-three-years-in-prison-116326>.

<sup>347</sup> Dartunorro Clark, Michael Kosnar, Dareh Gregorian, & Tom Winter, *All four Roger Stone prosecutors resign from case after DOJ backpedals on sentencing recommendation*, NBC NEWS (Feb. 11, 2020), <https://www.nbcnews.com/politics/politics-news/doj-backpedalling-sentencing-recommendation-trump-ally-roger-stone-n1134961>.

<sup>348</sup> Darren Samuelson & Josh Gerstein, *supra* note 340.

<sup>349</sup> Peter Baker, Maggie Haberman, & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (Jul. 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>.

<sup>350</sup> Emma Newburger, *Attorney General Barr told Trump he shouldn’t grant Roger Stone clemency*, CNBC (Jul. 11, 2020), <https://www.cnbc.com/2020/07/11/attorney-general-barr-told-trump-he-shouldnt-grant-roger-stone-clemency.html>.

desire to discourage Stone from disclosing more information to federal investigators, the sentence commutation could constitute obstruction of justice.<sup>351</sup> Attorney General Barr—if he knew about this—had an affirmative obligation not only to oppose the commutation on policy grounds but to inform President Trump that it could itself be a criminal violation of the obstruction of justice statute.

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.<sup>352</sup> Recall that the president’s effort to prevent the investigation and prosecution of Michael Flynn in 2017 was one of the reasons the president fired former FBI director James Comey.<sup>353</sup> 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.<sup>354</sup>

Flynn twice pleaded guilty before the Hon. Emmet Sullivan who vigorously interrogated him before finally accepting the plea.<sup>355</sup> On the eve of sentencing, Mr. Barr ordered his staff—and not the original prosecutors in the case—to move to dismiss what had been a successful prosecution.<sup>356</sup> Pursuant to a Federal Rule of Civil Procedure that predicates dismissal upon the court’s finding of good cause, Judge Sullivan ordered an adversarial hearing to be conducted.<sup>357</sup> The U.S. Court of Appeals for the District of Columbia Circuit, sitting *en banc*, is now considering whether Judge Sullivan can hold such a hearing or whether the attorney general has unreviewable authority to dismiss a case the prosecution of which had been completed.

John Gleeson, the retired judge appointed by Presiding Judge Sullivan as *amicus curiae* to advise on the 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

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<sup>351</sup> See 18 U.S.C. § 1503 (2020) (banning obstruction of justice).

<sup>352</sup> Kyle Cheney & Josh Gerstein, *DOJ urges appeals court to force dismissal of Flynn case*, POLITICO (Jun. 1, 2020), <https://www-politico-com.proxy.library.upenn.edu/news/2020/06/01/judge-questions-unusual-justice-department-filing-in-flynn-case-294330>.

<sup>353</sup> Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>.

<sup>354</sup> MUELLER REPORT Vol. II *supra* note 47 at 24.

<sup>355</sup> N.Y. TIMES EDITORIAL BOARD, *Don’t Forget, Michael Flynn Pleaded Guilty. Twice.*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/opinion/michael-flynn-charges-dropped.html>.

<sup>356</sup> See Charlie Savage & Adam Goldman, *Justice Dept. Defends Dropping Flynn Case and Again Asks Judge to Dismiss It*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/us/politics/justice-department-michael-flynn.html> (“the [D]epartment [of Justice] argued that even if its rationale for dropping the case were a “pretext” and the move really stemmed from improper political motivation . . . it would make no difference . . . Mr. Gleeson filed a scathing brief last week contending that prosecutors’ rationale made no sense”).

<sup>357</sup> See Fed. R. Civ. P. 41(a)(2) (an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper). For information about the judge’s order, see Megan Mineiro, *Flynnirate at Judge’s Push for Dismissal Order Rehearing*, COURTHOUSE NEWS (Jul. 20, 2020), <https://www.courthousenews.com/flynn-irate-at-judges-push-for-dismissal-order-rehearing/> (discussing Flynn’s reaction to the move).

abuse of prosecutorial power, attempting to provide special treatment to a favored friend and political ally of the President of the United States.”<sup>358</sup>

We believe that the DOJ’s conduct in these criminal cases violates, among other rules and principles, the DOJ’s Principles of Federal Prosecution, which bar DOJ prosecutors from allowing factors such as professional or personal circumstances or opinions of the person or their associates to influence their decision-making.<sup>359</sup>

### c. Pardons

Article II, Section 2, of the U.S. Constitution provides that the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>360</sup> The U.S. Supreme Court has interpreted this provision to permit different forms of relief, including what we would now call pardons and commutations (which do not disturb the criminal conviction, but provide relief from some or all of the punishment).<sup>361</sup> For purposes of this report, we use the term “pardon” to include other forms of relief, unless otherwise noted.

The attorney general has been involved in administering presidential pardons since 1789, including receiving requests and advising the president in exercising discretion.<sup>362</sup> When the DOJ was created in 1870, a component was designated for this purpose, and the Office of the Pardon Attorney (as it is now known) was established in 1891.<sup>363</sup> In addition to processing requests, the pardon attorney is responsible for creating formal recommendations to the president (via the deputy attorney general) on behalf of the DOJ.<sup>364</sup> In 1993, the current regulations setting forth processes for how the Office of the Pardon Attorney handles applications were promulgated.<sup>365</sup> For example, the regulations provide that a person seeking a pardon should not do so until five years after being released from incarceration.<sup>366</sup> These regulations do not operate as limits on the president’s authority, however, and presidents have continually issued pardons outside this process.

Presidential pardons have proven controversial, particularly when they appear to involve allies of the president or his party. Perhaps the most famous presidential pardon was that of President Richard Nixon by President Gerald Ford after Nixon resigned from office in the wake of the

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<sup>358</sup> *United States v. Flynn*, Case No. 17-cr-232, Brief for Court-Appointed *Amicus Curiae*, (Filed Jun. 10, 2020), <https://www.washingtonpost.com/context/john-gleeson-amicus-curiae-arguments-against-u-s-motion-to-dismiss-flynn-case/7e88b359-8065-42e3-914d-1dff9495052c/>.

<sup>359</sup> See Principles of Federal Prosecution 9-27.260, Dep’t of Justice (Feb. 2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.260> (Stating that in determination of prosecution, an attorney should not let the “attorney’s own personal feelings concerning the person, the person’s associates, or the victim or the possible effect of the decision on the attorney’s own professional or personal circumstances” influence their decision.)

<sup>360</sup> U.S. Const. art. III, § 2.

<sup>361</sup> *Schick v. Reed*, 419 U.S. 256, 266 (1974).

<sup>362</sup> U.S. DEP’T OF JUST., *Frequently Asked Questions*, OFFICE OF THE PARDON ATT’Y (Sept. 2, 2020), <https://www.justice.gov/pardon/frequently-asked-questions>.

<sup>363</sup> *Id.*

<sup>364</sup> U.S. DEP’T OF JUST., *About the Office*, OFFICE OF THE PARDON ATT’Y (Sept. 2, 2020) <https://www.justice.gov/pardon/about-office>.

<sup>365</sup> 28 C.F.R. § 1.1-1.11.

<sup>366</sup> 28 C.F.R. § 1.2.

Watergate scandal.<sup>367</sup> After the next major executive branch scandal, the Iran-Contra affair, President George H. W. Bush issued a series of controversial pardons to six senior officials from the Reagan administration who had been charged or convicted as a result of their actions in the Iran-Contra affair.<sup>368</sup> Independent Counsel Lawrence E. Walsh, who had led the investigation and prosecution of these officials, said of the pardons: “the Iran-contra cover-up, which has continued for more than six years, has now been completed.”<sup>369</sup> Walsh further stated: “It demonstrates that powerful people with powerful allies can commit serious crimes in high office—deliberately abusing the public trust without consequences.”<sup>370</sup> Particularly controversial was the pardon issued to Caspar Weinberger, former secretary of defense, whose trial for lying to Congress was scheduled to begin only a few weeks later. The trial was expected to include evidence of Weinberger’s private notes, which included references to then Vice-President Bush’s endorsement of the secret weapons shipments that formed a key part of the scandal.<sup>371</sup> Bush, who issued the pardons on December 24, 1992, after having lost his bid for re-election, explained his view that “sometimes the president has to make a very difficult call.”<sup>372</sup>

However, one person who apparently took a different view of the situation was then-Attorney General Barr. Mr. Barr said of the president’s decision: “I favored the broadest pardon authority. There were some people arguing just for Weinberger, and I said, ‘No—in for a penny, in for a pound.’”<sup>373</sup> However, he has also recently acknowledged that a corrupt pardon would be illegal; in response to a question from Senator Patrick Leahy at his 2019 confirmation hearing, he said that if a president issued a pardon in exchange for the recipient’s promise not to incriminate the president “[t]hat would be a crime.”<sup>374</sup>

Near the end of his term, President Bill Clinton also issued several controversial pardons, most significantly one to Marc Rich, who had fled the United States while under indictment for financial crimes, and whose former wife had made substantial donations to the Clinton library and the Democratic Party.<sup>375</sup> DOJ and federal election officials investigated the pardon and ultimately found no wrongdoing.<sup>376</sup> However, some DOJ officials have noted that the perceived political

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<sup>367</sup> Laura Holson, ‘No One Could Believe It’: When Ford Pardoned Nixon Four Decades Ago, N.Y. TIMES (Sept. 8, 2018), <https://www.nytimes.com/2018/09/08/us/politics/nixon-ford-pardon-watergate.html>.

<sup>368</sup> BROWN UNIV., *The 1992 Pardons*, UNDERSTANDING THE IRAN-CONTRA AFFAIRS (Last Accessed Sept. 14, 2020), [https://www.brown.edu/Research/Understanding\\_the\\_Iran\\_Contra\\_Affair/thepardons.php](https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/thepardons.php).

<sup>369</sup> David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails ‘Cover-Up’*, N.Y. TIMES (Dec. 25, 1992), <https://archive.nytimes.com/www.nytimes.com/books/97/06/29/reviews/iran-pardon.html>.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> Adam Clymer, *Bush Criticizes Press Treatment Of His Pardons*, N.Y. TIMES (Dec. 31, 1992), <https://www.nytimes.com/1992/12/31/us/bush-criticizes-press-treatment-of-his-pardons.html>.

<sup>373</sup> Carrie Johnson, William Barr Supported Pardons In An Earlier D.C. ‘Witch Hunt’: Iran-Contra, NPR (Jan. 14, 2019), <https://www.npr.org/2019/01/14/684553791/william-barr-supported-pardons-in-an-earlier-d-c-witch-hunt-iran-contra>; Interview by Jim Young with William Barr (Apr. 5, 2001) (on file with UVA Miller Center at <https://millercenter.org/the-presidency/presidential-oral-histories/william-p-barr-oral-history>).

<sup>374</sup> Meg Wagner, Veronica Rocha, & Amanda Wills, *Trump’s attorney general pick faces Senate hearing*, CNN (Jan. 16, 2019), [https://www.cnn.com/politics/live-news/william-barr-confirmation-hearing/h\\_b044168bb65f906231dad9bd15a33901](https://www.cnn.com/politics/live-news/william-barr-confirmation-hearing/h_b044168bb65f906231dad9bd15a33901).

<sup>375</sup> ASSOCIATED PRESS, *Pardoned financier Marc Rich dead at 78*, CBS NEWS (Jun. 26, 2013), <https://www.cbsnews.com/news/pardoned-financier-marc-rich-dead-at-78/>.

<sup>376</sup> *Id.*

damage sustained by Clinton as a result of the Marc Rich pardon nonetheless chilled the use of the pardon power by subsequent presidents, including George W. Bush and Barack Obama.<sup>377</sup> It also led both of those presidents to try to increase the role of the DOJ in vetting pardon applications.<sup>378</sup>

President Trump appears to have sharply reversed the direction of his predecessors with respect to the handling of pardons. A *Washington Post* analysis from February 2020 concluded that “[m]ost” pardons “have gone to well-connected offenders who had not filed petitions with the [Justice Department’s] pardon office or did not meet its requirements.”<sup>379</sup> Instead, “[m]oney and access have proved to be far more valuable under Trump.”<sup>380</sup> Another analysis of the 36 known pardons issued by President Trump concluded that only five of the 36 had gone through the DOJ.<sup>381</sup> Not coincidentally, these five were the only of the pardons that did not either advance the president’s political agenda, have a personal connection to him, get his attention through television or a television commentator, or appear to be based on his personal admiration for a celebrity.<sup>382</sup> While a full comparison will not be possible until President Trump’s term of office ends, it appears that he is taking a starkly different approach to his use of the pardon power from that of his two most recent predecessors, each of whom sought to increase the involvement of the DOJ in the exercise of that power as a bulwark against politicization, not to reduce it.

## 5. Potential Abuse of Federal Emergency Powers

Separation of powers—the system of checks and balances ingeniously created by the framers of the Constitution to prevent the undue concentration and exercise of dominant powers in any one branch of the federal government—is one of the essential features of the American rule of law. Another is federalism—the retention by the states of certain governmental functions often expressed in the notion of “police powers.” In this section, we analyze two specific areas of presidential overreach and examine how the DOJ under Attorney General Barr and indeed with his direct participation, has actively worked to empower the president with respect to his exercise of emergency powers under the National Emergencies Act and, more generally, in a manner that offends both fundamental principles of constitutional government: separation of powers and federalism. Incidents related include: a) DOJ support for President Trump’s emergency declaration to obtain border wall funding; b) DOJ support for the president’s attacks on the legality of governors’ stay-at-home orders and Mr. Barr’s proposal that the DOJ have the power to enact emergency measures during the COVID-19 epidemic; c) the DOJ’s role in the federal response to urban unrest following the death of George Floyd, including Insurrection Act and Posse Comitatus Act issues; and d) President Trump’s declaration that antifa is a “terrorist” organization,

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<sup>377</sup> Dafna Linzer, *The Shadow of Marc Rich*, PROPUBLICA (Dec. 3, 2011), <https://www.propublica.org/article/the-shadow-of-marc-rich>.

<sup>378</sup> *Id.*

<sup>379</sup> See Beth Reinhard & Anne Gearan, *Most Trump clemency grants bypass Justice Dept. and go to well-connected offenders*, WASHINGTON POST (Feb. 3, 2020), [https://www.washingtonpost.com/investigations/most-clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959\\_story.html](https://www.washingtonpost.com/investigations/most-clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959_story.html) (describing Trump’s pardons as “made-for-television decisions”).

<sup>380</sup> *Id.*

<sup>381</sup> Jack Goldsmith & Matt Gluck, *Trump’s Aberrant Pardons and Commutations*, LAWFARE (Jul. 11, 2020), <https://www.lawfareblog.com/trumps-aberrant-pardons-and-commutations>.

<sup>382</sup> *Id.*

a. The Southern Border

Among the showcase items on the president's political agenda is his oft-repeated intention to build a restrictive wall across the entirety of the southern border of the United States. He justifies this with a number of claims about preventing illegal immigration and the importation of illegal drugs. However problematic these things are, they are not, in the common understanding of what an "emergency" is, unforeseen matters that suddenly arise and require immediate action that does not allow legislation or even consultation among the political branches of government.<sup>383</sup> Indeed, recognizing that the fundamental power assigned to Congress in Article I of the Constitution is the power of the purse, the president initially approached Congress in February 2018 with a budget request for the appropriation of \$1.6 billion for 65 miles of border fencing. Congress then passed the 2019 Consolidated Appropriations Act (CAA), providing \$1.375 billion for construction but, denying a far larger administration request for funding, limited the area in which the amount to be appropriated could be used and otherwise rejected the additional funding that the president had requested.<sup>384</sup>

Then, claiming he somehow lawfully could act in any event to reappropriate otherwise-designated funds but that he favored expedition, the president invoked the National Emergencies Act (NEA) and issued a proclamation declaring a "national emergency" at the "southern border."<sup>385</sup> Based on that declaration, the administration announced a plan to use for wall construction at least \$3.6 billion in funds appropriated exclusively for military construction projects. Based on the dubious claim of emergency, the DOJ has argued that the NEA grants the president complete discretion in determining whether an "emergency" exists and, directly abrogating constitutional congressional appropriations powers and the specific functional limiting terms of the CAA, the right to reprogram moneys intended by Congress to support our military. As one might expect, affected parties like the Sierra Club in the Ninth Circuit and the County of El Paso, Texas, in the Fifth Circuit have mounted challenges to these actions, and various appeals and petitions to the U.S. Supreme Court are pending as of this writing. We believe that the plaintiffs in these actions have stated well-founded claims that the president's actions are unconstitutional violations of the Article I appropriations power of the Congress, as well as violations of the specific provisions of the CAA and, in any event, that the NEA should be amended to prevent the repetition of executive over-

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<sup>383</sup> See e.g. Webster's New Collegiate Dictionary 372 (8<sup>th</sup> ed. 1976).

<sup>384</sup> See Scott R. Anderson & Margaret Taylor, What Authorities is President Trump Using to Build a Border Wall?, LAWFARE (Feb. 15, 2019), <https://www.lawfareblog.com/what-authorities-president-trump-using-build-border-wall>. See also Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, 84 CFR 4949 (Feb. 20, 2019), <https://www.federalregister.gov/documents/2019/02/20/2019-03011/declaring-a-national-emergency-concerning-the-southern-border-of-the-united-states>. The DOJ, in conjunction with the emergency declaration, is using eminent domain to seize property from Rio Grande valley landowners for border wall construction. See NAT'L IMMIGRATION FORUM, *Eminent Domain Along the Southern Border: Government Seizures of Private Property* (July 26, 2019), <https://immigrationforum.org/article/eminent-domain-along-the-southern-border-government-seizures-of-private-property/>. See also Fred Barbash, *Courts Have No Say in Trump's Border-Wall Decree, Justice Department Argues*, WASHINGTON POST (Apr. 5, 2019), [https://www.washingtonpost.com/world/national-security/courts-have-no-say-in-trumps-border-wall-decree-justice-department-argues/2019/04/05/d83f80a0-579d-11e9-9136-f8e636f1f6df\\_story.html](https://www.washingtonpost.com/world/national-security/courts-have-no-say-in-trumps-border-wall-decree-justice-department-argues/2019/04/05/d83f80a0-579d-11e9-9136-f8e636f1f6df_story.html).

<sup>385</sup> Publ. L. No. 94-412, 90 Stat. 1255 (1976).

reach and to provide irrefutable instruction to the DOJ that “emergency” declarations are not a matter of whim, and that Congress, not the president, owns the power of the purse.

At the time of introduction of the initial draft of the NEA in 1974, four states of national emergency had been continuously in effect for up to 40 years, and literally hundreds of such emergencies had been declared, each conferring upon the president the authority to “control the lives of American Citizens in a host of particular ways.”<sup>386</sup>

A special committee of the Senate was formed in 1972 to review existing emergency statutes and formulate a plan by which the ship could be righted and lawmaking authority shifted back to Congress generally and, specifically, in times of actual national emergencies.<sup>387</sup> The special committee introduced the initial draft of the NEA on August 22, 1974, to the 93<sup>rd</sup> Congress, articulating two goals: to end the 40 years of continuous states of national emergency in place since 1933, and to create a procedure by which Congress and the executive might work in concert during states of national emergency in line with constitutional principles.<sup>388</sup>

The intent to limit the unfettered power of the executive was written into the text of the NEA, which provided that any state of national emergency expired after a six-month time period, barring any extension of the emergency state that may be made solely by Congress. However, this important check on the executive was eliminated by the U.S. Supreme Court, which held that the unicameral legislative veto unconstitutional.<sup>389</sup> The NEA was later amended to allow for the elimination of a state of emergency upon “joint resolution” of both houses of Congress.<sup>390</sup>

As the actions of this administration have illustrated, emergencies “afford a ready pretext for usurpation.”<sup>391</sup> “[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.”<sup>392</sup> Indeed, going back to the framing of the Constitution itself, James Madison shunned the effects of unfettered and recurrent emergencies: “They are read in every page which records the progression from a less arbitrary to a more arbitrary government, or the transition from a popular government to an aristocracy or a monarchy.”<sup>393</sup> Indeed, “excessive power in the hands of any one man is both undesirable and alien to our system of government.”<sup>394</sup>

Contrary to the Barr DOJ’s blunt assertions, the NEA does not delegate the definition of emergency to the president. While Congress did not define an “emergency” in the text of the NEA itself, it intended that the term would be defined by the individual statutes authorizing such declaration.<sup>395</sup>

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<sup>387</sup> Sen. Rpt. at 8.

<sup>388</sup> Sen. Rpt. at 2.

<sup>389</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>390</sup> See Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, P.L. 99-93, Sec. 801.

<sup>391</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

<sup>392</sup> *Id.* at 652.

<sup>393</sup> Address by James Madison on War as a Great Threat to Liberty (Apr. 20, 1795)(on file at the 10<sup>th</sup> Amendment Center, <https://tenthamendmentcenter.com/2019/09/28/james-madison-on-war-as-a-great-threat-to-liberty/>) (republished online Sept. 28, 2019).

<sup>394</sup> Hearing on the National Emergencies Act, *Hearing Before the Sen. Comm. on Gov. Operations*, 94<sup>th</sup> Cong., 84 (statement of Kansas Senator James B. Pearson) (on file at <https://tinyurl.com/pearson383>).

<sup>395</sup> *Id.* at 8.

Each statute defines “emergency” in the common-understanding dictionary sense that it is something unforeseen, unprepared for, and that requires immediate action. At the time when the NEA was being considered by Congress, the then assistant attorney general for the OLC Antonin Scalia testified that an excessive executive stance on emergencies “debases the currency” and “distorts our whole process” by “slap[ping] the label [of emergency] on something that doesn’t merit it.”<sup>396</sup> Yet that is precisely what the DOJ has done in arguing that the NEA gives the president carte blanche in declaring literally anything he wants to be an “emergency,” and then reprogramming funds that are specifically intended by Congress for the exclusive use in matters entirely unrelated to what the purported emergency is alleged to be about.

Article I, Section 1, of the Constitution vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States.” As conservatives long have argued, this text permits no delegation of those powers at least without clear standards defining and limiting what the Executive Branch is allowed to do. In the current instance, the actions of the Justice Department are contravening separation of powers embodied in the appropriations clause of Article I, violating the specific terms of an appropriations statute (the CAA), and contravening the commandment of the Constitution’s Article II, Section 1 that the executive “take Care that the Laws be faithfully executed”.<sup>397</sup>

As at least one member of the Working Group (Gerson), among others, has testified before Congress that the NEA must be amended. Among the things that the group recommends are provisions designed better to adapt to the U.S. Supreme Court’s holding in the *Chada* case in a way that might allow for a relatively short expiration date for any declaration of a national emergency, subject to renewals in exigent circumstances, but allowing for Congress effectively to exercise its powers. Congress also ought to clarify that an “emergency” means just what the dictionary says that it means. The conduct of the current administration, facilitated by the current attorney general, is an affront to separation of powers that cannot be condoned.

#### b. Coronavirus and the Federal Response

In a purported but sadly lacking effort to contain the effects of the COVID-19 pandemic, the president has invoked multiple emergency legislative tools, among them the NEA. On the face of it, those actions were entirely warranted. By any measure, the pandemic constitutes an emergency that calls for immediate, extraordinary responses by government, particularly the executive branch. The problem, however, is the manner in which the president, with the assistance of his attorney general, has mismanaged the execution of his conceded emergency powers and, in doing so, has transgressed the constitutional rule-of-law principles embodied in federalism.

Whatever powers the president might have employed to deal with the pandemic, it is the responsibility of state governments to address local conditions affecting the health and safety of their citizens.<sup>398</sup> Notwithstanding his social media tweets to the contrary, the president likely lacks the legal authority to override state-level decisions on COVID-19 induced shutdown and mask

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<sup>396</sup> Hearing on the National Emergencies Act, *Hearing Before the H. Comm. on the Judiciary Subcomm. on Admin. L. and Gov. Relations* 94<sup>th</sup> Cong., 95 (Statement of Antonin Scalia), <https://tinyurl.com/yy4dndb7>.

<sup>397</sup> U.S. CONST. art. II, § 1.

<sup>398</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that states have the power to take action to protect the health of their citizens).

orders.<sup>399</sup> Instead of supporting the clear federalism notion of state prerogatives, the DOJ and Mr. Barr instead threatened the support of lawsuits to end lockdowns.<sup>400</sup> For example, as discussed more fully below in this section, Mr. Barr directed DOJ lawyers to side with politically conservative churches fighting state-level stay-at-home orders, alleging a First Amendment right to hold large in-person gatherings despite a public health emergency.<sup>401</sup> Additionally, while we do not address this in-depth, Mr. Barr has proposed that the DOJ has the power to pause trials in any district court proceeding during times of court closure due to emergency situations. This raises the concern that people will be held without trial due to emergency measures justified by the COVID-19 epidemic.

At Attorney General Barr's behest, the DOJ has intervened in numerous COVID-19 related cases in its alleged efforts to safeguard civil liberties from the abuses of state governments. On April 14, 2020, Mr. Barr issued the following statement regarding religious practice and social distancing:

But even in times of emergency, when reasonable and temporary restrictions are placed on rights, the First Amendment and federal statutory law prohibit discrimination against religious institutions and religious believers. Thus, government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity. For example, if a government allows movie theaters, restaurants, concert halls, and other comparable places of assembly to remain open and unrestricted, it may not order houses of worship to close, limit their congregation size, or otherwise impede religious gatherings. Religious institutions must not be singled out for special burdens.<sup>402</sup>

On the same day, the DOJ filed a statement of interest in the lawsuit against the City of Greenville, Mississippi, for ostensible violation of the Free Exercise Clause. Temple Baptist Church, with support from the DOJ, argued there had been differential treatment in the city's COVID-19 response measures between drive-in church services, which were suspended, and other businesses, such as drive-in restaurants, which were allowed to operate.<sup>403</sup> The DOJ's declarative statement, "There is no pandemic exception, however, to the fundamental liberties the Constitution

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<sup>399</sup> For discussion of the legal authority to enact shutdowns, see Byron Tau, *Trump's Legal Authority to Overrule Governors on Coronavirus is Limited*, WALL ST. J. (Apr. 14, 2020) (arguing that the legal authority to overrule a state government decision is limited by the Constitution's commandeering doctrine, even in cases of national emergencies), <https://www.wsj.com/articles/trumps-legal-authority-to-overrule-governors-on-coronavirus-is-limited-11586891577>. For the Tweet, see Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 13, 2020, 10:53 AM), <https://twitter.com/realDonaldTrump/status/1249712404260421633>.

<sup>400</sup> Interview by Hugh Hewitt with William Barr, Attorney General (Apr. 21, 2020), <https://www.hughhewitt.com/attorney-general-william-barr-on-the-crisis/>. In the aforementioned interview, Barr states that "never at all" has the President done anything to concern him regarding separation of powers. *Id.*

<sup>401</sup> See Sadie Gurman, *Justice Department Tells California Its Reopening Plan Could Disfavor Churches*, WALL ST. J. (May 19, 2020), <https://www.wsj.com/articles/justice-department-tells-california-its-reopening-plan-could-disfavor-churches-11589928178> (discussing the DOJ's actions towards states in lockdown).

<sup>402</sup> *Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case*, Department of Justice Office of Public Affairs (Apr 14, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0>.

<sup>403</sup> *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV, (Apr. 14, 2020, N.D. MS.) (United States' Statement of Interest in Support of Plaintiffs) <https://www.justice.gov/opa/press-release/file/1268651/download>.

safeguards,” aptly frames its priorities when approaching cases during the pandemic.<sup>404</sup> This same zeal, however, has not manifested itself in the DOJ’s approach to police brutality protests in the wake of George Floyd’s death and the Black Lives Matter movement, as will be discussed in Section V.5.c of this report.

Mr. Barr further expounded the DOJ’s position on COVID-19 related cases in his April 27, 2020, memorandum, referred to as the “April 27, 2020 initiative” in subsequent DOJ press releases.<sup>405</sup> In his continued effort to reframe public health discourse into an issue of civil liberties, Mr. Barr wrote,

I am directing each of our United States Attorneys to also be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens.

As the Department of Justice explained recently in guidance to states and localities taking steps to battle the pandemic, even in times of emergency, when reasonable and temporary restrictions are placed on rights, the First Amendment and federal statutory law prohibit discrimination against religious institutions and religious believers. ... If a state or local ordinance crosses the line from an appropriate exercise of authority to stop the spread of COVID19 into an overbearing infringement of constitutional and statutory protections, the Department of Justice may have an obligation to address that overreach in federal court.<sup>406</sup>

The DOJ has continued to defend politically conservative churches, employing similar arguments in its May 29, 2020, statement of interest issued in response to the Colorado governor’s and the Colorado Department of Public Health and Environment’s heightened restrictions for religious services.<sup>407</sup>

DOJ intervention, however, has taken a more expansive approach beyond the defense of religious institutions. On May 22, 2020, May 29, 2020, and June 24, 2020, respectively, the DOJ filed statements of interests in opposition to Illinois Governor J.B. Pritzker’s COVID-19 response, the governor of Michigan’s “arbitrary” executive orders that “discriminate against their businesses,” Governor Janet Mills’ differential treatment of Maine residents and out-of-state residents in campgrounds and RV parks, and Hawaii’s 14-day self-quarantine that discriminated against out-of-state residents. As recently as September 21, 2020, the DOJ filed a statement of interest stating, “COVID-19 rules limiting private schools to operating at 25% of capacity but allowing public

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<sup>404</sup> *Id.*

<sup>405</sup> Memorandum from the Att’y Gen. to the Assistant Att’y Gen. for Civil Rights & All U.S. Att’ys, *Balancing Public Safety with the Preservation of Civil Rights* (Apr. 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download>.

<sup>406</sup> *Id.*

<sup>407</sup> Press Release, The Department of Justice Files Statement of Interest in Support of Freedom of Religion for Colorado Church (May 29, 2020), <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-support-freedom-religion-colorado-church>; *High Plains Harvest Church v. Jared Polis*, No. 20-cv-1480-RM-MEH, (D. Colo. May 29, 2020) (Statement of Interest in Support of Plaintiff’s Motion for TRO and Motion for Preliminary Injunction), <https://www.justice.gov/opa/press-release/file/1281611/download>.

schools to operate at 50% of capacity violate the Equal Protection Clause of the United States Constitution.”<sup>408</sup>

The unfortunate dichotomy the attorney general has constructed between implementing effective public health restrictions and preserving individual civil liberties is made evident by his public statements. In an interview with Fox News’s Laura Ingraham on April 8, 2020, Mr. Barr provided a perplexing caution, “We need to be very careful that the *draconian* measures that are being adopted are fully justified” (emphasis added).<sup>409</sup> Furthermore, he urged a reevaluation and potential curtailing of public health guidelines for May despite data suggesting the contrary: “I think when this period of time at the end of April expires, I think we have to allow people to adapt more than we have and not just tell people to go home and hide under the bed, but allow them to use other ways, social distancing and other means, to protect themselves.”<sup>410</sup> Mr. Barr said the DOJ would be “keeping a careful eye” on actions by state governments that may infringe on civil liberties, namely restrictions on religious institutions.<sup>411</sup> His statements in this interview were both predictive of the DOJ’s position in COVID-19 related lawsuits and emblematic of his unwavering endorsement of President Trump’s response measures:

It’s very disappointing because I think the president went out at the beginning of this thing and really was statesmanlike, working with all the governors, keeping his patience as he got all these snarky gotcha questions from the White House media pool. And the stridency of the partisan attacks on him has gotten higher and higher, and it’s really disappointing to see. ...

And the politicization of decisions like hydroxychloroquine has been amazing to me. Before the president said anything about it, there was fair and balanced coverage of this very promising drug and the fact that it had such a long track record

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<sup>408</sup> Press Release, Department of Justice Files Statement of Interest Challenging the Legality of Illinois Governor's Sweeping COVID-19 Orders (May 22, 2020), <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-challenging-legality-illinois-governors-sweeping>; Press Release, Department of Justice Files Statement of Interest in Support of Businesses Suffering from Arbitrary and Irrational Restrictions of Michigan Governor's COVID-19 Orders (May 29, 2020), <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-support-businesses-suffering-arbitrary-and>; Press Release, Department of Justice Files Statement of Interest Challenging the Constitutionality of Maine Governor’s COVID-19 Orders that Economically Harm Maine Campgrounds (May 29, 2020), <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-challenging-constitutionality-maine-governor-s>; Press Release, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-challenging-constitutionality-hawaii-governor-s> (June 24, 2020), <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-challenging-constitutionality-hawaii-governor-s>.

<sup>409</sup> David Shortell & Veronica Stracqualursi, *Barr calls coronavirus restrictions 'draconian' while health experts say they're helping lower death projections*, CNN (Apr. 9, 2020), <https://www.cnn.com/2020/04/09/politics/attorney-general-barr-coronavirus-social-distancing/index.html>

<sup>410</sup> Matt Zaposky, *Barr calls current restrictions 'draconian,' and suggests they should be revisited next month*, WASHINGTON POST (Apr. 9, 2020), [https://www.washingtonpost.com/national/attorney-general-barr-coronavirus-state-restrictions/2020/04/27/0a5832ce-88b9-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/national/attorney-general-barr-coronavirus-state-restrictions/2020/04/27/0a5832ce-88b9-11ea-ac8a-fe9b8088e101_story.html)

<sup>411</sup> *Id.*

that the risks were pretty well known. And as soon as he said something positive about it, the media's been on a jihad to discredit this drug. It's quite strange.<sup>412</sup>

Mr. Barr echoed these sentiments in a radio interview with Hugh Hewitt, stating that “the idea that you have to stay in your house is disturbingly close to house arrest,” and suggesting state governors’ impingement on civil liberties may necessitate federal government intervention.<sup>413</sup> Additionally, he offered a glowing commendation of the president’s character and leadership:

I think the President’s plan for getting the country back to work is really a very common-sensical approach that is based on really assessing the status of the virus in each state and each locality, and then gradually pulling back on restriction. ...

I think the President’s guidance has been, as I say, superb and very common sensical, and I think a lot of the governors are following that. And you know, to the extent that governors don’t and impinge on either civil rights or on the national commerce, our common market that we have here, then we’ll have to address that.<sup>414</sup>

Mr. Barr was asked directly about these statements in his July 28, 2020, testimony before the House Judiciary Committee to which he both abdicated responsibility for testing shortages and warned that the DOJ would take decisive action against executive overreach by state governments. He stated:

The problem with the testing system was a function of President Obama’s mishandling of the CDC and his efforts to centralize everything in the CDC when they didn’t have the capacity. ...

You have to balance the cure with the danger, which we leave to governors. I know everyone likes to lay everything at the feet of the president but this is a federal republic. And the president respected that. And our response has been largely run by governors. Now for someone who claims to be so concerned about executive overreach, I haven’t heard anyone talk about just keeping an eye on what the governors are doing. And that is what the Department of Justice is doing, especially in the area of liberty.<sup>415</sup>

Most recently, Mr. Barr drew widespread criticism when in a Constitution Day celebration hosted by Hillsdale College, he compared COVID-19 lockdowns to slavery. Casting aside public health concerns, including rising death tolls, he claimed that “a national lockdown, stay-at-home orders is [*sic*] like house arrest,” and that “[o]ther than slavery, which was a different kind of restraint,

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<sup>412</sup> Jonathan Chait, *Barr Praises Trump’s ‘Statesmanlike’ Handling of the Coronavirus*, N.Y. MAG INTELLIGENCER (Apr 9, 2020), <https://nymag.com/intelligencer/2020/04/william-barr-trump-coronavirus-travel-ban-laura-ingraham.html>

<sup>413</sup> Interview by Hugh Hewitt, radio host, with William Barr, Att’y Gen., *Attorney General William Barr On The Crisis* (Apr. 21, 2020), <https://hughhewitt.com/attorney-general-william-barr-on-the-crisis/>

<sup>414</sup> *Id.*

<sup>415</sup> Hearing before the H. Comm. on the Judiciary, 116<sup>th</sup> Cong., (July 29, 2020) (statement of William Barr), available at <https://www.rev.com/blog/transcripts/house-judiciary-committee-hearing-of-attorney-general-barr-transcript-july-28>.

this is the greatest intrusion on civil liberties in American history.”<sup>416</sup> Among Mr. Barr’s critics was Harvard Law School professor Laurence Tribe, who tweeted: “What an obscene comparison. Only an evil fool could talk that way.”<sup>417</sup> The attorney general’s moral orientation and sense of proportion aside, this is another situation where his statements and actions appear more intended to support the political agenda of the president—minimizing or even denying the scope and effect of the pandemic—than it does to supporting the constitutional doctrine of federalism that he, as a conservative icon of the Federalist Society, might otherwise be expected to espouse.

### c. Federal Action Against Protesters

Additional incidents related to these topics include the clearing of demonstrators for the June 1 St. John’s Church photo-op in Washington, D.C., and the intervention of federal officers in the unrest in Portland, Oregon. We refer to the NEA and its relation to handling domestic unrest, as well as a 2001 interview with William Barr on the federal response to Los Angeles’ 1992 riots after the acquittal of police officers accused in the beating of Rodney King.<sup>418</sup> In each of these instances, one deeply concerning common thread is the attorney general’s inconsistent positions on core constitutional rights. For this DOJ, whose ox is being gored appears more important than whether a particular federal action is legal or illegal. Mr. Barr’s willingness to allow his personal sympathies to guide his official duties are cause for concern. 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, as discussed in Section V.5.b of this report, Mr. 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 a position against peaceful protests of racist police action, a concern of moderate and left-leaning political constituents.<sup>419</sup> These actions potentially violate one of the central principles of the rule of law in a democratic nation, namely that the powers of government officials 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 report.

Another practice is the pervasive “loophole lawyering” in this administration—no doubt with advice from the DOJ—to circumvent the spirit of the law, if not the letter of the law.

We see this, for example, when the president avoids the Posse Comitatus Act, which bans the use of federal troops for law enforcement purposes unless expressly authorized by law.<sup>420</sup> The reasoning behind this act is to maintain the separation between military action and domestic law enforcement, which is “in keeping with long-standing U.S. law and policy limiting the military’s

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<sup>416</sup> *AG Bill Barr Compares COVID Lockdowns to Slavery at Hillsdale College, Criticizes Prosecutors: Transcript*, REV (Sep 17, 2020).

<sup>417</sup> Laurence Tribe (@tribelaw), TWITTER (Sept. 17, 2020, 7:18 AM), <https://twitter.com/tribelaw/status/1306553202955911170>.

<sup>418</sup> See Interview by Natalie Ermann Russell with William Barr, Attorney General (Apr. 24, 2017).

<sup>419</sup> See Sadie Gurman, *Justice Department Tells California Its Reopening Plan Could Disfavor Churches*, WALL ST. J. (May 19, 2020) (displaying Barr’s favoritism to certain institutions).

<sup>420</sup> See 18 USC § 1385 (2020).

role in domestic affairs.”<sup>421</sup> National Guard units are covered by the Posse Comitatus Act when they are “federalized”—e.g., placed under the command of the president rather than their respective governor. But as New Mexico Senator Tom Udall and Massachusetts Representative Jim McGovern observe, “when National Guard units are operating in so-called hybrid status—serving federal missions funded with federal dollars but under state governors' command and control—they are not subject to the Act and therefore are able to perform law enforcement functions, like searches and arrests.”<sup>422</sup> For obvious reasons, Congress limits the federal functions National Guard troops can perform under this “hybrid” status, but federal statute still allows “training exercises” without explicit statutory approval.

It is this loophole in the law that the attorney general used after George Floyd’s death in Minneapolis and the civil unrest that followed when President Trump sought to deploy federal troops across the country to restore order.

In preparation for an appearance by President Trump in front of St. John’s Church in Lafayette Square, news outlets reported that Mr. Barr personally ordered the use of force by U.S. Park Police and National Guard troops on peaceful demonstrators lawfully exercising their First Amendment rights in order to clear a path for the president.<sup>423</sup> Citing 32 U.S.C. § 502(f),<sup>424</sup> Mr. Barr used a training provision to deploy National Guard troops for a law enforcement function. Little pretense

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<sup>421</sup> See Charles G. Kels, *Posse Comitatus: Both More and Less than Meets the Eye*, The Rule of Law Post, CERL (July 2, 2020), <https://www.law.upenn.edu/live/news/10227-posse-comitatus-both-more-and-less-than-meets-the/news/cerl-news>. The Posse Comitatus act follows from a line of legislation after the Whiskey Rebellion which sought to limit the domestic employment of military forces for law enforcement purposes. See LEGAL INFO. INST., *Military Power in Law Enforcement: The Posse Comitatus*, CORNELL L. SCHOOL (Last accessed Sept. 3, 2020), <https://www.law.cornell.edu/constitution-conan/article-2/section-3/military-power-in-law-enforcement-the-posse-comitatus>. For more information on the background of this law, see U.S. Northern Command, *The Posse Comitatus Act*, NEWSROOM (Sept. 23, 2019), <https://www.northcom.mil/Newsroom/Fact-Sheets/Article-View/Article/563993/the-posse-comitatus-act/>. These restrictions on the use of troops in domestic settings protect against militarized, forceful reactions to citizen actions, which could cause more division, tension, and fear than necessary. See Hina Shamsi, *More Military Deployment and Terrorism Investigations are an Outrageous Response to Black Pain, Grief, and Anger*, ACLU (June 4, 2020), <https://www.aclu.org/news/criminal-law-reform/more-military-deployment-and-terrorism-investigations-are-an-outrageous-response-to-black-pain-grief-and-anger/> (exploring the negative effects of mobilizing the military on domestic soil). For a conservative-leaning perspective on why the principles of Posse Comitatus are important, see James Di Pane, *Use of 1807 Insurrection Act Should be Last Resort for Quelling Out-of-Control Protests*, HERITAGE FOUNDATION CENTER FOR NATIONAL DEFENSE (June 3rd, 2020), <https://www.heritage.org/homeland-security/commentary/use-1807-insurrection-act-should-be-last-resort-quelling-out-control> which states that the Insurrection Act exception to the Posse Comitatus Act is an “extreme measure” as “military units ... do not have the local ties to the communities that the National Guard enjoys”.

<sup>422</sup> Tom Udall & Jim McGovern, *Trump and Barr used a loophole to deploy the National Guard to U.S. cities. It’s time to close it.*, ABC NEWS (Aug. 7, 2020),

<https://www.nbcnews.com/think/opinion/trump-barr-used-loophole-deploy-national-guard-u-s-cities-ncna1236034>.

<sup>423</sup> See Carol Leonnig, Matt Zapposky, Josh Dawsey, Rebecca Tan, *Barr personally ordered removal of protesters near White House, leading to use of force against largely peaceful crowd*, WASHINGTON POST (Jun. 2, 2020), [https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b_story.html). For further details on this incident see APPENDIX A.

<sup>424</sup> Steve Vladeck, *Why Were Out-of-State National Guard Units in Washington DC? The Justice Department’s Troubling Explanation*, LAWFARE (June 9, 2020). In fact, § 502 refers to training purposes, which this does not seem to be a case of as the functions performed were “a host of law enforcement-like tasks” by units “answering ... to Secretary of Defense Mark Esper”. See *Id.*

was made to indicate that the troops were not under federal command by Secretary of Defense Mark Esper or Mr. Barr himself. As such, Mr. Barr’s attempted use of this provision was unlawful.<sup>425</sup> By law, command of federal troops for domestic law enforcement under Section 502(f) lies with the state rather than federal executive.

Police and National Guard officers deployed a chemical agent and rubber bullets on the protestors to facilitate the White House’s plan to have the president photographed holding a Bible in front of the church.<sup>426</sup> Mr. Barr defended the actions, saying that protestors had been violent earlier in the day and that pepper spray is not a “chemical irritant.”<sup>427</sup> No evidence was presented that this use of force was necessary to enable the president to walk to the church, and moreover, Mr. Barr’s argument that pepper spray is not a chemical irritant is categorically false.<sup>428</sup>

Beyond the violation of the letter of the law, the intent of Congress in the enactment of Title 32 has clearly been disregarded by the head of the DOJ. Former military officers have spoken out about the implicit danger: Retired Admiral and Seventeenth Chairman of the Joint Chiefs of Staff Mike Mullen 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.”<sup>429</sup> 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.<sup>430</sup> This incident should be investigated to determine why Mr. Barr ordered the use of force on peaceful protestors. General Milley, chairman of the Joint Chiefs of Staff, later apologized for his role

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<sup>425</sup> *Id.* “The two things that are clear, in context, are that the provision is voluntary (leaving it up to individual governors whether to provide the requested support) and that any National Guard troops so activated would be in Title 32 status—meaning they would remain under the command and control of the state, not the federal government.” *Id.*

<sup>426</sup> See Philip Bump, *Timeline: The Clearing of Lafayette Square*, WASHINGTON POST (June 5, 2020), <https://www.washingtonpost.com/politics/2020/06/02/timeline-clearing-lafayette-square/> (detailing the sequence of events at Lafayette Square).

<sup>427</sup> Lauren Egan, *Barr defends White House use of force, claims protestors were violent*, NBC NEWS (Jun. 4, 2020), <https://www.nbcnews.com/politics/justice-department/barr-defends-white-house-use-force-claims-protesters-were-violent-n1225101>. More recent reports note that federal officials in the Military Police considered using a ‘heat ray’ weapon on DC protestors, known as an “Active Denial System”. Zack Budryk, *Military leaders asked about using heat ray on protestors outside White House: report*, THE HILL (Sept. 16, 2020), <https://thehill.com/policy/defense/516819-military-leaders-asked-about-using-heat-ray-on-protesters-outside-white-house>. This weapon creates the sensation that affected peoples’ skin is burning, causing them to immediately desist. *Id.*

<sup>428</sup> Victoria Foster, *AG Bill Barr Says Pepper Spray Is Not A Chemical Irritant. Here’s Why That Is Incorrect*, FORBES (Jun. 7, 2020), <https://www.forbes.com/sites/victoriaforster/2020/06/07/ag-barr-says-pepper-spray-is-not-a-chemical-irritant-heres-why-that-is-incorrect/#22b4a0d62c0f>. Foster, a cancer research scientist, ably debunks the notion that pepper spray is not a chemical irritant because it comes from a natural substance. In fact, tear gas and pepper spray pose serious health risks to those subjected to it. See Lisa Song, *Tear Gas Is Way More Dangerous Than Police Let On — Especially During the Coronavirus Pandemic*, PROPUBLICA (Jun. 4, 2020), <https://www.propublica.org/article/tear-gas-is-way-more-dangerous-than-police-let-on-especially-during-the-coronavirus-pandemic>.

<sup>429</sup> Mike Mullen, *I Cannot Remain Silent*, THE ATLANTIC (Jun. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/american-cities-are-not-battlespaces/612553/>.

<sup>430</sup> Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, THE ATLANTIC (Jun. 3, 2020), <https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/>.

stating, “I should not have been there. My presence in that moment and in that environment created a perception of the military involved in domestic politics.”<sup>431</sup>

The circumstances surrounding the photo-op are among the many strong indications that this was a political event meant to reach out to President Trump’s political supporters.<sup>432</sup> If the photo-op was a political event, it likely violated the Hatch Act. If it was instead an official government event, the use of a Bible suggests disregard for the First Amendment’s Establishment Clause.<sup>433</sup>

At the photoshoot itself, no senior officials from the Trump campaign were present, based on photos and recordings at the event.<sup>434</sup> Many of the White House staff members who were there, however, are also active in the campaign. This raises the question of whether they attended in their official capacity or (more likely) partook in their capacity as supporters of the Trump campaign. While these figures were permitted to engage in political activity in a personal capacity, they are

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<sup>431</sup> Helene Cooper, *Milley Apologizes for Role in Trump Photo Op: ‘I Should Not Have Been There’*, N.Y. TIMES (Jun. 11, 2020), <https://www.nytimes.com/2020/06/11/us/politics/trump-milley-military-protests-lafayette-square.html>

<sup>432</sup> See Elizabeth Dias, *‘Christianity Will Have Power’*, N.Y. TIMES (Aug. 9, 2020), <https://www.nytimes.com/2020/08/09/us/evangelicals-trump-christianity.html> (“He is their protector, the bully who is on their side, the one who offered safety amid their fears that their country as they know it, and their place in it, is changing, and changing quickly”). Additionally, Tweets from campaign-aligned operatives suggest political purposes. See Team Trump (@TeamTrump), TWITTER (June 1, 2020, 7:17 PM), <https://twitter.com/TeamTrump/status/1267596277312864256>.

<sup>433</sup> See *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1985) (O’Connor, J., concurring in judgment) (quoting *Wallace v. Jaffree*, 472 U.S. 70) (“the prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’). See also *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (holding that the Free Expression Clause “does not depend upon any showing of direct government compulsion”). In a speech 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. See William P. Barr, Attorney General, United States Dep’t of Just., Remarks to the Law School and the de Nicola Center for Ethics and Culture at the U. of Notre Dame (Oct. 11, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics>. The expression “militant secularists” is a capacious category that appears to include anyone who rejects the administration’s political agenda. The above instances of insensitivity to core constitutional rights are not new to Mr. Barr. Under his tenure, the DOJ has inconsistently defended First Amendment free speech and religious liberty rights, seemingly based on political or religious favoritism.

<sup>434</sup> *Trump Church Photo Op Live Video*, KRON4 NEWS (Jun. 1, 2020), <https://external-content.duckduckgo.com/iu/?u=https%3A%2F%2Fwww.kron4.com%2Fwp-content%2Fuploads%2Fsites%2F11%2F2020%2F06%2F200601194214-trump-church-photo-op-live-video.jpg%3Fw%3D576%26h%3D324%26crop%3D1%26resize%3D1280%2C720&f=1&nofb=1>; see also Brendan Smialowski, President Trump and others walking to St. John’s Church, GETTY IMAGES (Jun. 1, 2020), <https://external-content.duckduckgo.com/iu/?u=https%3A%2F%2Fcdn.cnn.com%2Fcdnnext%2Fdam%2Fassets%2F200603172424-trump-group-walking-super-tease.jpg&f=1&nofb=1>; see also Patrick Semansky, *President Donald Trump walks from the White House to visit St. John’s Church across Lafayette Square Monday*, AP PHOTO (Jun. 1, 2020), President Donald Trump walks from the White House to visit St. John’s Church across Lafayette Square Monday, June 1, 2020 <https://i.insider.com/5ed6851b4dca680f9638d375?width=700&format=jpeg&auto=webp>; see also Video Tree, *Trump’s Surprise Visit To Lafayette Square In The Middle of Heavy Protests*, YOUTUBE (Jun. 1, 2020), <https://www.youtube.com/watch?v=JxYmILDya0A>; see also Shealah Craighead, President Trump and others in front of the White House en route to St. John’s Church, WHITE HOUSE PHOTO (Jun. 1, 2020), <https://external-content.duckduckgo.com/iu/?u=https%3A%2F%2Fyallpolitics.com%2Fwp-content%2Fuploads%2F2020%2F06%2FTump-walk-to-St-Johns-1-696x464.jpg&f=1&nofb=1>

subject to the Hatch Act in their public capacity as discussed in Section V.7.c of this report. Even stricter rules under the Hatch Act apply to the members of the military, FBI, and other law enforcement personnel present.<sup>435</sup>

President Trump’s re-election campaign quickly used the photo shoot to promote his candidacy, calling the photo-op “very symbolic” of “law and order.”<sup>436</sup> If the objectives of the violent deployment of armed forces was political—to be the champion of “law and order,” while in effect disregarding the importance of First Amendment protections for protestors—it creates a broader question as to what extent the DOJ is willing to stretch the law and sniff out legal loopholes to further the president’s political objectives rather than to fairly enforce the law and promote the national interest. By enabling the president to stage a political photo-op outside a historic church combines a dubious (and under the Hatch Act, likely illegal) motive with loophole lawyering to justify the deployment of federal troops under improper command, the attorney general has made clear that his priority is the whim of the executive rather than the rights, security, or well-being of the citizenry.<sup>437</sup>

Another very disturbing use of federal force occurred in Portland, Oregon. Although the Department of Homeland Security (DHS) played a lead role in this event, the DOJ was involved as well, with some forces under its control in Portland and also in performing its customary role of providing legal advice to the White House and to the rest of the administration.<sup>438</sup>

Yet another particularly troubling development is the surveillance of journalists by federal officers who apparently are keeping track of reporters meriting special attention. On July 31, 2020, DHS shut down an intelligence examination of reporters covering the federal response to protests in Portland. This intelligence operation, a clear infringement on First Amendment rights, was first exposed by *The Washington Post* and in part targeted *The New York Times’* release of an intelligence analysis indicating that federal agents in camouflage were deployed to quell protests in Portland, even as the administration had little understanding of the issues.<sup>439</sup> The DHS

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<sup>435</sup> The Hatch Act bars political activity by a broad segment of federal employees. *United Public Workers v. Mitchell*, 300 U.S. 75, 78 (1947). The Hatch Act applies not only in situations of political action, but there the appearance of such activism arises. *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565, 93 S. Ct. 2880, 2890, 37 L. Ed. 2d 796 (1973).

<sup>436</sup> Ayesha Rascoe & Tamara Keith, *Trump Defends ‘Law and Order’ Symbolism of Photo-Op at St. John’s Church*, NPR (June 3, 2020), <https://www.npr.org/2020/06/03/868779265/trump-defends-symbolism-of-photo-op-at-st-johns-church>. This ties into a broader theme advanced by the Trump re-election campaign. See Donald Trump, (@realDonaldTrump), TWITTER (May 31, 2020, 6:52 PM), <https://twitter.com/realDonaldTrump/status/1267227396341669889> (stating “LAW AND ORDER”).

<sup>437</sup> Federal employees, both those considered less restricted and further restricted, may not “use their official authority or influence to interfere with or affect the result of an election” or “engage in political activity ... while the employee is on duty, in any federal room or building, while wearing a uniform or official insignia, or using any federally owned or leased vehicle”. U.S. Office of Special Counsel, *Federal Employee Hatch Act Information*, OSC (Accessed Aug. 24, 2020), <https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup12>.

<sup>438</sup> See DEP’T OF JUSTICE OFFICE OF LEGAL COUNSEL, *About the Office* (Apr. 29, 2020), <https://www.justice.gov/olc> (“By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides legal advice to the President and all executive branch agencies”).

<sup>439</sup> See Shane Harris, DHS compiled ‘intelligence reports’ on journalists who published leaked documents, WASHINGTON POST (Jul. 30, 2020), <https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038->

intelligence office issued three “open-source intelligence reports” summarizing tweets from Benjamin Wittes, *New York Times* reporter and editor-in-chief of the blog *Lawfare*, noting that he had published leaked but unclassified documents.<sup>440</sup> This represents yet another deeply concerning use of federal law enforcement resources to keep tabs on members of the press who reveal information that is potentially embarrassing to the Trump administration, a theme we follow more in depth in this report’s sections about politicized use of antitrust enforcement and First Amendment issues.<sup>441</sup>

#### d. Classifying “Antifa” as a Terrorist Organization

The United States was founded on a radical truth outlined in the Declaration of Independence: that all men are created equal and that they are endowed with certain unalienable rights. Despite this noble sentiment, not all Americans have been able to fully enjoy these self-evident rights. American domestic extremist groups have often employed violence to terrorize minority populations, motivated by insidious ideologies. In recent years we have seen an ugly surge of domestic extremism, that has led to an administration that caters directly to these groups, ignoring, or even condoning, violence and regurgitating conspiracy theories with little regard for its impact on public safety.<sup>442</sup>

In the past decade, the leading domestic terror threat has come from violent, far-right extremists. The Center for Investigative Reporting found that between 2017 and 2020, 60% of plots and attacks were attributable to the far-right while just 31% involved Islamist extremism and just 4% involved left-wing extremism.<sup>443</sup> Michael Chertoff, the former homeland security secretary under President George W. Bush, recently stated in an interview that a vast majority of deaths from

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af089b63ac21\_story.html; Zolan Kanno-Youngs, Sergio Olmos, Mike Baker, & Adam Goldman, *From the Start, Federal Agents Demanded a Role in Suppressing Anti-Racism Protests*, N.Y. TIMES (Jul. 28, 2020), <https://www.nytimes.com/2020/07/28/us/federal-agents-portland-seattle-protests.html>.

<sup>440</sup> Zolan Kanno-Youngs and Marc Tracy, *Homeland Security Shuts Down ‘Intelligence’ Reports on Journalists*, N.Y. TIMES (Jul. 31, 2020), <https://www.nytimes.com/2020/07/31/us/politics/homeland-security-portland.html?smid=tw-share>.

<sup>441</sup> For a longer discussion see Section V.7.b and Section V.7.a respectively

<sup>442</sup> See Daniel Dale, *Fact Check: A guide to 9 conspiracy theories Trump is currently pushing*, CNN POLITICS (Sept. 2, 2020), <https://www.cnn.com/2020/09/02/politics/fact-check-trump-conspiracy-theories-biden-covid-thugs-plane/index.html> (listing some of the conspiracy theories the President has embraced, including many that totally lack evidence).

<sup>443</sup> See David Neiwert, *Far-right extremists have hatched far more terror plots than anyone else in recent years*, REVEAL FROM THE CENTER FOR INVESTIGATIVE REPORTING (June 22, 2017), <https://www.revealnews.org/article/home-is-where-the-hate-is/>. The report was updated in 2020. See David Neiwert, *Domestic Terror in the Age of Trump*, REVEAL FROM THE CENTER FOR INVESTIGATIVE REPORTING (July 9, 2020), <https://www.revealnews.org/article/domestic-terror-in-the-age-of-trump/>. Moreover, a separate study from CSIS found that right-wing extremists committed 2/3 of the attacks in 2019 in the US and 90% in the first few months of 2020. See Seth G. Jones, *The Escalating Terrorism Problem in the United States*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Jun. 17, 2020), <https://www.csis.org/analysis/escalating-terrorism-problem-united-states>.

terrorism in the United States in the last few years stemmed from far-right terrorism,<sup>444</sup> and new threats continue to materialize and metastasize, particularly in White supremacist circles.<sup>445</sup>

One of the greatest threats to peace has been the Alt-Right, a web of groups united by White-identity backlash politics, jingoistic nationalism, rejection of multiculturalism, and hierarchical notions of society.<sup>446</sup> These ideologies thrive in online communities marked by paranoia and disinformation, boosted in their rise by algorithms that nudge viewers towards increasingly radical content.<sup>447</sup> Thus, the constellation of groups that can be considered Alt-right poses a serious threat to security, in particular to minority groups and women.

Rapidly growing conspiracy groups threaten violence. Of these, QAnon has become more popular in American discourse.<sup>448</sup> QAnon has metastasized from the shadowy corners of the internet to the mainstream, posing a serious threat and stoking violent acts, leading Facebook and even Reddit to shut down these communities for inciting violence.<sup>449</sup> Online incitement to violence can easily translate into real-life tragedy.<sup>450</sup> Associate Fellow at the Global Network on Extremism and Technology, Julien Bellaiche notes that “increased fanaticism and unconditional belief in QAnon conspiracy theories may lead to the use of higher levels of violence among radicalized members

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<sup>444</sup> Interview by Andrea Mitchell with Michael Chertoff, former Homeland Security Secretary, MSNBC (Sept. 2, 2020), <https://www.msnbc.com/andrea-mitchell-reports/watch/fmr-dhs-secy-most-u-s-terror-deaths-have-come-from-extreme-right-wing-groups-in-recent-years-91027525885>.

<sup>445</sup> Evan Perez, *FBI has seen significant rise in white supremacist domestic terrorism in recent months*, CNN (Jun. 28, 2019), <https://www.cnn.com/2019/05/23/politics/fbi-white-supremacist-domestic-terror/index.html>.

<sup>446</sup> See generally Andrew William Jones, *The Kids are Alt-Right: The Intellectual Origins of the Alt-Right* (Aug. 2019) (Doctoral Dissertation, York University) (on file with York U. Faculty of Grad. Studies), [https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/36766/Jones\\_Andrew\\_W\\_2019\\_PhD.pdf?sequence=2&isAllowed=y](https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/36766/Jones_Andrew_W_2019_PhD.pdf?sequence=2&isAllowed=y) (providing one of the best descriptions of what the alt-right is). For further information, see generally GEORGE HAWLEY, *MAKING SENSE OF THE ALT-RIGHT* (2017); DAVID NEIWERT, *ALT-AMERICA* (2018).

<sup>447</sup> See Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online*, DATA & SOCIETY (May 15, 2017), <https://datasociety.net/library/media-manipulation-and-disinfo-online/>. Marwick and Lewis discuss various aspects of the process, including how memes, trolling, and humor allow the online right to push more extreme ideas. *Id.* at 37. Online platforms like YouTube often allow people to access increasingly extreme materials, leading to radicalization. See Manoel Horta Ribeiro et. al, *Auditing Radicalization Pathways on Youtube* (Dec. 4, 2019), <https://arxiv.org/pdf/1908.08313.pdf> (arguing that channel recommendations on YouTube lead people to more fringe far-right content over time). This explains how radicalization often follows a pathway. See Matt Lewis, *The Insidious Libertarian to Alt-Right Pathway*, THE DAILY BEAST (Aug. 23, 2017), <https://www.thedailybeast.com/the-insidious-libertarian-to-alt-right-pipeline>.

<sup>448</sup> Conspiracy theories themselves are not new, having played a role since this country’s founding. See JESSE WALKER, *THE UNITED STATES OF PARANOIA* (2014). However, the popularity of social media exacerbates their spread. See K. Mortimer, *Understanding Conspiracy Online: Social Media and the Spread of Suspicious Thinking*, 13 DALHOUSIE J. OF INTERDISCIPLINARY MANAGEMENT (2017), <https://www.mendeley.com/catalogue/DCF45AA2-D418-3CE3-B67F-A4A01FF29BD4/> (arguing that “the growth of user-specific filters and social exclusion [online] are likely factors in the spread”).

<sup>449</sup> See DW, *Facebook removes almost 800 QAnon groups for inciting violence*, DeutscheWelle (Aug. 20, 2020), <https://www.dw.com/en/facebook-removes-almost-800-qanon-groups-for-inciting-violence/a-54628881>; Brady Zadrozny & Ben Collins, *Reddit bans Qanon subreddits after months of violent threats*, NBC (Sept. 12, 2018).

<sup>450</sup> Rachel E. Greenspan, *QAnon conspiracy theorists have been linked to a killing and multiple armed stand-offs. Here are the criminal allegations connected to the movement and its followers*, INSIDER (Aug. 26, 2020), <https://www.insider.com/qanon-violence-crime-conspiracy-theory-us-allegation-arrest-killing-gun-2020-8>.

willing to take matters into their hands and fight what they perceive as an injustice.”<sup>451</sup> The government must devote more attention to these rising menaces on the far-right. Far-right militias that subscribe loosely to these ideologies are playing an increasing role in urban unrest this summer, especially in the face of COVID-19. Some of these militias purport to defend order in the streets while others, known as accelerationists, support more chaos as a prerequisite for destruction of the political order and eventually a race war.<sup>452</sup> One rising group is the “Boogaloo” movement that contains both White supremacist and radical libertarian wings, united by the shared desire to use violence in the name of accelerationism.<sup>453</sup> Because of this ideology and the presence of its armed adherents at protests, Boogaloo members pose a genuine threat to peace. Their connections to America’s longer standing militia movements are coming into view, and this threat requires far more attention.

While hard data confirms that far-right extremist violence has presented the greatest domestic terror threat for some time, the government has struggled to confront that threat. Government agencies tasked with combatting terrorism admit to lacking a common lexicon to deal with the issue.<sup>454</sup> Under the Obama administration, government officials buried a 2009 DHS report on the growing prevalence of far-right domestic terrorism as well as work done at that time proposing a common lexicon for domestic violent extremism.<sup>455</sup> Recently, some individuals in the Trump administration have finally begun to recognize the severity of the threat. In February of 2020, FBI director Christopher Wray said that the FBI is placing the risk of violence from racially motivated violent extremists “on the same footing” as the threat of foreign terrorism.<sup>456</sup> In 2019, Kevin McAleenan, the former acting DHS secretary, ordered his agency to start crafting annual homeland threat assessments. The initial draft of the threat assessment for 2020 described the threat from white supremacist violent extremists as the deadliest domestic terror threat to the United States, ranking the danger posed by those domestic violent extremists above the immediate danger posed by foreign terrorist groups.<sup>457</sup>

Efforts taken to combat the domestic terror threat from far-right violent extremists, however, have been undermined by the actions of President Trump and Attorney General Barr. Resources dedicated to combating the threat of domestic terrorism have been reduced under the Trump

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<sup>451</sup> Julien Bellaiche, *Assessing the Threat of QAnon Violence*, GLOBAL NETWORK ON EXTREMISM AND TECHNOLOGY (June 15, 2020), <https://gnet-research.org/2020/06/15/assessing-the-threat-of-qanon-violence/>.

<sup>452</sup> Daniel L. Byman, *Riots, White supremacy, and accelerationism*, BROOKINGS INST. (Jun. 2, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/02/riots-white-supremacy-and-accelerationism/>.

<sup>453</sup> Khrysgiana Pineda, *The boogaloo movement is gaining momentum. Who are the boogaloo 'bois' and what do they want?*, USA TODAY (Jun. 19, 2020), <https://www.usatoday.com/story/news/nation/2020/06/19/what-is-boogaloo-movement/3204899001/>.

<sup>454</sup> See National Counterterrorism Center, *Domestic Terrorism Conference Report 2* (Jan. 2020), [https://www.dni.gov/files/2020-01-02-DT\\_Conference\\_Report.pdf](https://www.dni.gov/files/2020-01-02-DT_Conference_Report.pdf) (“There is no whole-of-government DT threat picture, largely because the US Government does not have a common terminology to describe the threat”).

<sup>455</sup> Eric Lichtblau, *In Buried Report, U.S. Government Admits Major Failures in Confronting Domestic Terrorism*, THE INTERCEPT (Jun. 29, 2020), <https://theintercept.com/2020/06/29/antifa-trump-domestic-terrorism/>. Years of failure on this front make it all the more important for the government to focus on the threat at hand.

<sup>456</sup> Erin Donaghue, *Racially-motivated violent extremists elevated to "national threat priority," FBI director says*, CBS NEWS (Feb. 5, 2020), <https://www.cbsnews.com/news/racially-motivated-violent-extremism-isis-national-threat-priority-fbi-director-christopher-wray/>

<sup>457</sup> Betsy Woodruff Swan, *DHS draft document: White supremacists are greatest terror threat*, POLITICO (Sep. 4, 2020), <https://www.cbsnews.com/news/racially-motivated-violent-extremism-isis-national-threat-priority-fbi-director-christopher-wray/>

administration. From 2017-2019, DHS' Office of Terrorism and Prevention Partnerships faced cuts, and FBI investigations into domestic terrorism were scaled back.<sup>458</sup> Additionally, while data indicate that far-right extremist violence constitutes the greatest domestic terror threat, President Trump and Mr. Barr have undertaken a political crusade against a strand of far-left extremism which has received an overwhelming amount of attention from DOJ over the past four years—antifa. Meanwhile, as President Trump and Mr. Barr have attempted to place the terror threat posed by antifa on equal or greater footing to that of far-right violence, high-ranking members of the Trump administration have engaged in a course of conduct legitimating and empowering the far-right to carry out violence.

The name “antifa” pays homage to the antifascist movement active in Germany and the United Kingdom during the 1920s and 1930s.<sup>459</sup> In its modern form in the United States, antifa is not a unified group possessing a chain of command or stable leadership structure but rather a loose collection of local and regional groups and individuals who support active, aggressive opposition to the far-right whom they see as inherently violent.<sup>460</sup> Indeed, a statement of principles on a prominent antifa website commits to disrupting far-right activity, not relying on the police, opposing all forms of oppression and exploitation, holding themselves accountable, and supporting each other.<sup>461</sup>

Some violent incidents have been tied to antifa and individuals associated with antifa.<sup>462</sup> Many of these incidents were clashes between antifa and members of the far-right, but they also include an attack on an ICE facility, an assault on a *Hill* journalist, and violence against police officers.<sup>463</sup> In August 2020, a Trump supporter was shot and killed in Portland by a man identifying with antifa groups.<sup>464</sup> However, the actual threat posed by antifa has become muddled by hyperbolic political rhetoric. As individuals identified as antifa have garnered attention by participating in the protests after the killing of George Floyd, it has been convenient for many political actors (including President Trump) to attribute violence to antifa. However, the claim that antifa actively led and organized violent acts in the protests is doubtful. Reuters conducted an analysis of charges after the protests in early June and found “mostly disorganized acts of violence by people who have few

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<sup>458</sup> See Hearing on Federal Response to White Supremacy Before the H. Comm. On Oversight and Reform Subcomm., 116th Cong. (2019) (Statement of Brette Steele), <https://www.c-span.org/video/?461379-1/hearing-federal-response-white-supremacy>; Devlin Barrett, *FBI Faces Skepticism Over its Efforts Against Domestic Terrorism*, WASHINGTON POST (Aug. 5, 2019), [https://www.washingtonpost.com/national-security/fbi-faces-skepticism-over-its-anti-domestic-terror-efforts/2019/08/04/c9c928bc-b6e0-11e9-b3b4-2bb69e8c4e39\\_story.html](https://www.washingtonpost.com/national-security/fbi-faces-skepticism-over-its-anti-domestic-terror-efforts/2019/08/04/c9c928bc-b6e0-11e9-b3b4-2bb69e8c4e39_story.html).

<sup>459</sup> Robin Young and Serena McMahon, *What is Antifa? Separating Fact From Fiction*, WBUR (Jun. 11, 2020), <https://www.wbur.org/hereandnow/2020/06/11/what-is-antifa-trump-protests>

<sup>460</sup> *Who Are Antifa?*, ADL, <https://www.adl.org/resources/backgrounders/who-are-antifa>

<sup>461</sup> *Points of Unity*, TORCH NETWORK, <https://torchantifa.org/points-of-unity/>

<sup>462</sup> For more information, see APPENDIX B.

<sup>463</sup> Brianna Sacks, *The Man Killed In An Attack On An ICE Jail Said He Was Fighting "Against The Forces Of Evil"*, BUZZFEED NEWS (Jul. 16, 2019), <https://www.buzzfeednews.com/article/briannasacks/ice-detention-attack-killed-washington-antifa-manifesto.>; *Journalist Taylor Lorenz punched while filming aftermath of fatal attack*, U.S. PRESS FREEDOM TRACKER (Aug. 12, 2017), <https://pressfreedomtracker.us/all-incidents/journalist-taylor-lorenz-punched-while-filming-aftermath-fatal-attack/>; Jennifer Williams, *Antifa clashes with police and journalists in Charlottesville and DC*, VOX (Aug. 12, 2018).

<sup>464</sup> Stephanie Pagonis, *Portland police investigating man who allegedly identifies as '100% Antifa' in fatal shooting: report*, FOX NEWS (Aug. 31, 2020), <https://www.foxnews.com/us/portland-police-fatal-shooting-political-rally>.

obvious connections to antifa or other left-wing groups.”<sup>465</sup> The FBI even announced that they “[have] ‘no intelligence’ indicating antifa was linked to violence in the George Floyd protests.”<sup>466</sup>

Since 2017, the Trump administration has been attempting to equate the terror threat of far-left extremist violence to that of far-right extremist violence.<sup>467</sup> This effort has increased as the 2020 election nears.<sup>468</sup> On May 31, 2020, President Trump tweeted that “The United States of America will be designating ANTIFA as a Terrorist Organization.”<sup>469</sup> President Trump did not follow any established legal procedures in “designating” antifa as a domestic terrorist organization because there is no such procedure.<sup>470</sup> The federal government lacks a process for publicly designating domestic terrorist organizations, and a separate standalone federal crime of “domestic terrorism” simply does not exist.<sup>471</sup>

While there is no legal process for designating antifa as a domestic terrorist organization, Mr. Barr has nonetheless sought to operationalize the president’s tweet. Shortly after President Trump issued his proclamation, Mr. Barr issued his own statement:

Federal law enforcement actions will be directed at apprehending and charging the violent radical agitators who have hijacked peaceful protest and are engaged in violations of federal law. To identify criminal organizers and instigators, and to coordinate federal resources with our state and local partners, federal law enforcement is using our existing network of 56 regional FBI Joint Terrorism Task Forces (JTTF). The violence instigated and carried out by Antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly.<sup>472</sup>

Attorney General Barr’s remarks stopped short of giving antifa a proper legal designation as a domestic terrorist organization. Instead, his remarks indicated that he was assigning the DOJ’s existing counterterrorism task forces to investigate crimes connected to antifa.<sup>473</sup> Presently, there is no statute that restricts where the DOJ and FBI places investigative priority, giving the agencies significant discretion to combat what they perceive to be the most pressing domestic terrorist threats, regardless of whether or not hard data supports a proposed allocation of investigatory

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<sup>465</sup> Sara N. Lynch, Mark Hosenball, Mica Rosenberg, Brad Heath, *Little evidence of antifa links in U.S. prosecutions of those charged in protest violence*, REUTERS (Jun. 9, 2020), <https://www.reuters.com/article/us-minneapolis-police-extremists/little-evidence-of-antifa-links-in-us-prosecutions-of-those-charged-in-protest-violence-idUSKBN23H06J>.

<sup>466</sup> Sonam Sheth, *FBI 'has no intelligence' indicating antifa was linked to weekend violence in the George Floyd protests, despite Trump and Republicans' claims*, BUSINESS INSIDER (Jun. 2, 2020), <https://www.businessinsider.com/fbi-no-intelligence-antifa-weekend-violence-george-floyd-protests-2020-6>

<sup>467</sup> Peter Beinart, *What Trump Gets Wrong About Antifa*, THE ATLANTIC (Aug. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/08/what-trump-gets-wrong-about-antifa/537048/>

<sup>468</sup> A timeline of Trump and Barr actions and statements against Antifa appears in APPENDIX B.

<sup>469</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 31, 2020, 12:23 PM), <https://twitter.com/realDonaldTrump/status/1155205025121132545>

<sup>470</sup> Domestic Terrorism: An Overview, CONGRESSIONAL RESEARCH SERVICE, at 10 (Aug. 21, 2017), <https://crsreports.congress.gov/product/pdf/R/R44921>

<sup>471</sup> *Id.* at 5.

<sup>472</sup> *Attorney General William P. Barr's Statement on Riots and Domestic Terrorism*, U.S. DEPT. OF JUSTICE (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>

<sup>473</sup> ArLuther Lee, *FBI finds no evidence of Antifa's involvement in national unrest*, AJC (Jun. 6, 2020), <https://www.ajc.com/news/fbi-finds-evidence-antifa-involvement-national-unrest/qVI3U9wb8Q6u1QEvVsJ7AJ/>

resources.<sup>474</sup> All available data contradict the assertion made by Mr. Barr and the president that antifa is a leading domestic terror threat. “Interviews with several major police departments and a review of hundreds of newspaper articles about arrests around the country revealed no evidence of an organized political effort behind the looting and other violence.”<sup>475</sup> This has not stopped Mr. Barr and President Trump from trying to fabricate a justification for targeting antifa. Many incidents have been erroneously misattributed to antifa, and many individuals have been tied to antifa when they have no links to the ideology. The elderly man knocked down by police officers in Buffalo, New York, was panned as “antifa” by the president but was in fact a Catholic peace activist.<sup>476</sup> Moreover, much of the violence in the George Floyd protest has been linked back to far-right activists seeking to provoke conflict.<sup>477</sup> Even some accounts online purporting to be antifa were led by White supremacists.<sup>478</sup> Within antifa, there is much disagreement about tactics that incorporate intimidation and violence.<sup>479</sup> Nonetheless incidents reported in right wing media—some real and others not—form the basis for aggressive action by the Trump administration against persons claimed to be coordinating in a group called “antifa.”

Through our research, we uncovered 44 discrete incidents as of late August of President Trump making statements that enhance the threat of far-right violent extremism.<sup>480</sup> From his “both-sides” approach to Charlottesville to his suggestion that migrants be shot as they cross the border, the president’s statements are not making America safer.<sup>481</sup> Moreover, he continues to support extremist political candidates, including self-described “proud Islamophobe” Laura Loomer and QAnon fan (and likely future representative for Georgia's fourteenth congressional district) Marjorie Taylor Greene, who even shared an image suggestive of violence against left-wing members of Congress.<sup>482</sup> The onslaught of politicized hypocrisy continues. In fact, weeks ago, President Trump condemned a left-wing shooter who killed a Trump supporter in Portland but

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<sup>474</sup> See Domestic Terrorism: An Overview, CONG. RESEARCH SERVICE (Aug. 21, 2017), <https://crsreports.congress.gov/product/pdf/R/R44921>

<sup>475</sup> Neil MacFarquhar, Alan Feuer and Adam Goldman, *Federal Arrests Show No Sign That Antifa Plotted Protests*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/11/us/antifa-protests-george-floyd.html>

<sup>476</sup> Alan Feuer, *Trump Falsely Targets Buffalo Protester, 75, as ‘Antifa Provocateur’*, THE NEW YORK TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/nyregion/who-is-martin-gugino-buffalo-police.html>

<sup>477</sup> Stephanie Guerilus, *Far-right extremists hoping to turn the George Floyd protests into a ‘civil war’*, THE GRIO (May 30, 2020), <https://thegrio.com/2020/05/30/far-right-extremists-george-floyd-protest/>

<sup>478</sup> *White supremacists pose as Antifa online, call for violence in post Trump Jr. drew attention to: Twitter*, KTLA 5 (June 2, 2020), <https://ktla.com/news/nationworld/white-supremacists-pose-as-antifa-online-call-for-violence-in-post-trump-jr-drew-attention-to-twitter/>

<sup>479</sup> Natalie Orenstein, *Antifa: What is behind the masks in Berkeley?*, BERKELEYSIDE (September 11, 2017), <https://www.berkeleyside.com/2017/09/11/antifa-behind-masks-berkeley>

<sup>480</sup> APPENDIX B. Since then, numerous other incidents have occurred, including at the first Presidential Debate, in which President Trump encouraged the far-right Proud Boys to “stand back and stand by”. Rachel Levy, *Who Are the Proud Boys? Trump Tells Far-Right Group to ‘Stand Back and Stand By’*, WALL ST. J. (Sept. 30, 2020), <https://www.wsj.com/articles/who-are-the-proud-boys-trump-tells-far-right-group-to-stand-back-and-stand-by-11601485755>.

<sup>481</sup> See APPENDIX B.

<sup>482</sup> For examples of such candidates, see Zack Beauchamp, *Laura Loomer, the anti-Muslim congressional candidate praised by Trump, explained*, VOX (Aug. 19, 2020); Veronica Stracqualursi, *Marjorie Taylor Greene posts image of herself with gun alongside ‘Squad’ congresswomen, encourages going on the ‘offense against these socialists’*, CNN (Sept. 4, 2020), <https://www.cnn.com/2020/09/04/politics/marjorie-taylor-greene-gun-post-squad/index.html>; Matthew Rosenberg, Astead W. Herndon, & Nick Corasanti, *Marjorie Taylor Greene, a QAnon Supporter, Wins House Primary in Georgia*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/08/11/us/politics/marjorie-taylor-greene-qanon-georgia-primary.html>.

defended Kyle Rittenhouse, the 17-year-old who shot protestors in Kenosha.<sup>483</sup> Mainstreaming militia movements is a dangerous path to follow. In fact, the federal government’s course of action has led to “an inversion of the relationship between some elements of the armed right and the federal government” in which normally anti-government militias find common cause with an administration that enables them, leading to a “widening of the umbrella for extremist groups”.<sup>484</sup> This surfaced in Michigan where the FBI in early October uncovered a terrorist plot by a militia group to kidnap Governor Gretchen Whitmer.<sup>485</sup> It is no coincidence that this followed President Trump’s Twitter exhortations to “LIBERATE MICHIGAN”.<sup>486</sup> The threat is not only posed by violent individuals and groups but by the broader shift towards vigilantism that their rise portends.<sup>487</sup> The rule of law erodes as groups that traffic in intimidation, violence, and extremism come to the foreground.<sup>488</sup> Their march to prominence threatens our democratic norms, and the attorney general’s enabling makes the DOJ complicit in this drift.

Attorney General Barr has furthered the administration’s disproportionate attention on the far-left and concurrent neglect of the violent far-right.<sup>489</sup> As of early September, a mandatory report due to the House Committee on Homeland Security in June detailing the domestic terrorism threat environment has not been submitted to Congress.<sup>490</sup> Beyond overlooking deadlines, there has been complicity with President Trump’s actions. For example despite lacking evidence of an organized threat, Mr. Barr has called Black Lives Matter “Bolsheviks” and accused them of wanting to ruin America with a “new form of guerilla warfare.”<sup>491</sup> When President Trump falsely claimed that planes of thugs had been flown into Washington to protest the Republican National Convention,

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<sup>483</sup> Aaron Blake, *Trump’s illuminating defense of Kyle Rittenhouse*, WASHINGTON POST (Aug. 31, 2020), <https://www.washingtonpost.com/politics/2020/08/31/trumps-illuminating-defense-kyle-rittenhouse/>.

<sup>484</sup> Ryan Devereaux, *The Thin Blue Line Between Violent, Pro-Trump Militias and Police*, THE INTERCEPT (Aug. 28, 2020), <https://theintercept.com/2020/08/28/kyle-rittenhouse-violent-pro-trump-militias-police/>.

<sup>485</sup> Kyle Cheney & Nick Niedzwiadek, *FBI reveals elaborate plot by Michigan militia members to kidnap Whitmer*, POLITICO (Oct. 8, 2020), <https://www.politico.com/news/2020/10/08/gretchen-whitmer-kidnapping-plot-michigan-427953>.

<sup>486</sup> See *id* (noting the linkages between Trump’s rhetoric and militia activity in the state). Whitmer herself stated, “When our leaders meet with, encourage or fraternize with domestic terrorists they legitimize their actions, and they are complicit. When they stoke and contribute to hate speech, they are complicit”. *Id*.

<sup>487</sup> George Chidi, *As Black Vigilance Becomes Armed Vigilantism, Accountability Is Lost in Atlanta’s Streets*, THE INTERCEPT (Jun. 24, 2020), <https://theintercept.com/2020/06/24/rayshard-brooks-armed-atlanta-protesters/> (Street justice administered by people who don’t want anyone to know who they are is not a substitute for policing. The solution we find has to uphold our shared values, like those of a free press and freedom of speech. It has to be accountable”).

<sup>488</sup> See interview by Anna Nawaz, journalist, with Mary McCord, Legal Director at the Institute for Constitutional Advocacy and Protection, PBS (Aug. 31, 2020), <https://www.pbs.org/newshour/show/what-legal-standing-do-armed-civilian-groups-at-protests-have> (noting that “militias have never been lawful” under the Second Amendment and that militia groups increasingly “falsely undertak[e] the functions of law enforcement that they have no authority to undertake”).

<sup>489</sup> Press Release, Dep’t of Justice, Attorney General William P. Barr’s Statement on the Death of George Floyd and Riots (May 30, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots>. Additional support is featured in APPENDIX B.

<sup>490</sup> Press Release, Chairman Thompson: Trump Administration Continues to Politicize Homeland Security and Law Enforcement, Ignore Right-Wing Domestic Terrorism Threat (Sept. 3, 2020) (On file with author), <https://homeland.house.gov/news/press-releases/chairman-thompson-trump-administration-continues-to-politicize-homeland-security-and-law-enforcement-ignore-right-wing-domestic-terrorism-threat>.

<sup>491</sup> Jaclyn Peiser, *‘Their tactics are fascistic’: Barr slams Black Lives Matter, accuses the left of ‘tearing down the system’*, WASHINGTON POST (Aug. 10, 2020), <https://www.washingtonpost.com/nation/2020/08/10/barr-fox-antifa-blml/>.

Mr. Barr dodged questions and instead gave credence to the president’s strange claims, stating “I think there were many [individuals coming to riot] on planes” and that the DOJ was looking into people associated with antifa, although he couldn’t provide examples because (paraphrasing the reporter) “some do not identify themselves as antifa members when they are arrested”.<sup>492</sup> If the attorney general truly believes that antifa poses the greatest domestic threat to the well-being and security of the American people, he should be willing to provide concrete examples of the threat, as we have done in this report in regards to far-right terrorism. Concerning the far-right, Mr. Barr has only taken half steps. He has directed the creation of a task force on “anti-government extremists,” which presumably would direct at least some of its efforts towards investigating certain far-right extremist groups (though the task force just as easily could be used to go after antifa and related “groups”).<sup>493</sup> At the same time, Mr. Barr has spoken out against certain far-right threats like Boogaloo but has done so in a way that attempts to infer equivalency between the severity of the far-right terror threat to the supposed terror threat of antifa.<sup>494</sup>

Barr’s statements at a June 4, 2020 press conference are particularly illuminating. During the press conference, Mr. Barr characterized the source of violence following the Floyd protests in the following way: “We have evidence that antifa and other similar extremist groups, as well as actors of a variety of different political persuasions, have been involved in instigating and participating in the violent activity.”<sup>495</sup>

Antifa was the only “group” explicitly named by Mr. Barr, despite the presence of far-right groups like Boogaloo. Later, when he was asked about other groups who have been identified as contributing to violent activity, he again declined to name far-right groups by name: “I do think it’s important to point out the witches’ brew that we have of extremist individuals and groups that are involved, And that’s why in my prepared statement, I specifically said, in addition to antifa and other extremist groups like antifa, there were a variety of groups and people of a variety of ideological persuasions.”<sup>496</sup>

Not only did Mr. Barr fail to specifically state any of the other groups by name, but he managed to end his answer with another reference to “antifa,” again minimizing the far-right threat while elevating that of antifa. Further along in the press conference, Mr. Barr was specifically asked about the involvement of Boogaloo group in violence at protests by a reporter. Mr. Barr responded: “There’s some groups that want to bring about a civil war, the Boogaloo group that has been on the margin of this, as well, trying to exacerbate the violence.”<sup>497</sup>

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<sup>492</sup> Katie Benner, *Planeload of ‘Thugs’? Barr Skirts Trump’s Claim but Suggests Rioters Targeted D.C.*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/us/politics/barr-trump-protest-violence.html>.

<sup>493</sup> Kristine Phillips, *Attorney General Barr creates task force to investigate anti-government extremists*, USA TODAY (Jun. 27, 2020), <https://www.usatoday.com/story/news/politics/2020/06/26/william-barr-says-boogaloo-group-antifa-tied-violence-protests/3268527001/>.

<sup>494</sup> See Philip Bump, *The Justice Department’s rhetoric focuses on antifa, Its indictments don’t*, THE WASHINGTON POST (June 4, 2020) <https://www.washingtonpost.com/politics/2020/06/04/justice-departments-rhetoric-focuses-antifa-its-indictments-dont/> (analyzing the DOJ’s actions in the wake of street unrest).

<sup>495</sup> William Barr & Chris Wray, *DOJ Press Conference Transcript on George Floyd Death*, REV.COM (Jun. 4, 2020), <https://www.rev.com/blog/transcripts/william-barr-chris-wray-doj-press-conference-transcript-on-george-floyd-death>

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

When Mr. Barr finally does mention Boogaloo, he describes the group as “on the margin.” Philip Bump at *The Washington Post* observed that the obvious point of Mr. Barr’s rhetoric strategy is to “continually associate antifa with the worst effects of the violence even while he admitted that no cases had been brought.”<sup>498</sup> In addition to this rhetorical strategy of minimizing the threat posed by the far-right, Mr. Barr passively stands by as the administration takes steps enabling the clearly violent far-right. The data, however, militate against this equivalency, as we note.<sup>499</sup>

The normalization of the far-right endangers Americans, especially minority groups who have faced increasing violence since the dawn of President Trump’s campaign, known as the “Trump Effect.”<sup>500</sup> The president’s political rhetoric has been found to embolden prejudice against targeted groups.<sup>501</sup> An empowered extremist right endangers lives. Just days after factional shootings in Kenosha, the FBI arrested two men driving to Kenosha from Missouri with an AR-15, a shotgun, daggers, a handgun, a saw, and ammunition magazines.<sup>502</sup> When leaders like Mr. Barr support and legally justify rather than speak out against these bad faith actions, they worsen their negative effects on American society.<sup>503</sup>

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<sup>498</sup> Philip Bump, *The Justice Department’s rhetoric focuses on antifa, Its indictments don’t*, THE WASHINGTON POST (June 4, 2020) <https://www.washingtonpost.com/politics/2020/06/04/justice-departments-rhetoric-focuses-antifa-its-indictments-dont/>.

<sup>499</sup> See David Neiwert, *Far-right extremists have hatched far more terror plots*, REVEAL NEWS (June 22, 2017) (showing a rise in far-right violence in recent years).

<sup>500</sup> The “Trump Effect” has been chronicled in many sources. See Maureen B. Costello, *The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation’s Schools*, Southern Poverty Law Center (Nov. 28, 2016) (“[the] increase in targeting and harassment that began in the spring has, according to the teachers we surveyed, skyrocketed”). See also Maali Luqman, *The Trump Effect: Impacts of Political Rhetoric on Minorities and America’s Image* (2018) (Master’s thesis, Harvard Extension School) (“A conclusion that the Trump effect is detrimental on the overall stability and security of the country can be reached”). Other analyses have uncovered links between the President’s rhetoric and actions and violence. See Mike Levine, *‘No Blame?’ ABC News finds 54 cases invoking ‘Trump’ in connection with violence, threats, alleged assaults*, ABC NEWS (May 30, 2020), <https://abcnews.go.com/Politics/blame-abc-news-finds-17-cases-invoking-trump/story?id=58912889> (citing specific incidents invoking the President’s name); Ayal Feinberg, Regina Branton, & Valerie Martinez-Ebers, *Counties that hosted a 2016 Trump rally saw a 226 percent increase in hate crimes*, WASHINGTON POST (Mar. 22, 2019), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/> (Showing a correlation between Trump appearances and hate crimes).

<sup>501</sup> Christian Crandall, Jason M. Miller, & Mark H. White II, *Changing Norms Following the 2016 U.S. Presidential Election: The Trump Effect on Prejudice*, SOCIAL PSYCHOLOGY & PERSONALITY SCI. 1-7 (2018), [https://www.researchgate.net/profile/Chris\\_Crandall/publication/322549714\\_Changing\\_Norms\\_Following\\_the\\_2016\\_US\\_Presidential\\_Election\\_The\\_Trump\\_Effect\\_on\\_Prejudice/links/5a68f6a4aca2728d0f5e0c19/Changing-Norms-Following-the-2016-US-Presidential-Election-The-Trump-Effect-on-Prejudice.pdf](https://www.researchgate.net/profile/Chris_Crandall/publication/322549714_Changing_Norms_Following_the_2016_US_Presidential_Election_The_Trump_Effect_on_Prejudice/links/5a68f6a4aca2728d0f5e0c19/Changing-Norms-Following-the-2016-US-Presidential-Election-The-Trump-Effect-on-Prejudice.pdf) (The 2016 election seems to have ushered in a normative climate that favored expression of several prejudices; this shift may have played a role in the substantial increase in bias-related incidents that follow closely upon the election”). See also, Brian F. Schaffner, *Follow the Racist? The Consequences of Trump’s Expressions of Prejudice for Mass Rhetoric*, Unpublished Manuscript (Sept. 2018), [https://www.ashford.zone/images/2018/09/followtheracist\\_v2.pdf](https://www.ashford.zone/images/2018/09/followtheracist_v2.pdf) (“My findings support the theory that Trump’s remarks serve as a cue regarding the norms of what constitutes acceptable speech. Specifically, I find that whites do react to his rhetoric by saying more negative and offensive things not only about the group targeted by Trump’s remarks, but often by commenting more negatively about other groups”).

<sup>502</sup> Alexander Mallin & Meredith Deliso, *Blue Lives Matter supporters arrested with slew of firearms outside Kenosha after police received tip about possible shooting, DOJ says*, ABC NEWS (Sept. 3, 2020), <https://abcnews.go.com/US/blue-lives-matter-supporters-arrested-slew-firearms-kenosha/story?id=72808923>.

<sup>503</sup> See Benjamin Newman, Jennifer L. Merolla, Sono Shah, Danielle Casarez Lemi, *The Trump Effect: An Experimental Investigation of the Emboldening Effect of Racially Inflammatory Elite Communication*, BRITISH J. OF

As examples demonstrate, the DOJ and FBI maintain a high degree of discretion in setting law enforcement priorities and in describing their reasoning. This administration has not only exacerbated but actively encouraged selective law enforcement. Our concern here—expressed repeatedly throughout this report—is that excessive discretion can too often be employed for a purely political purpose by the executive branch. This approach endangers civil liberties and free expression when federal law enforcement resources are wielded against persons and organizations believed to be the president’s political enemies. In sum, while the merits and rationale of the DOJ and FBI prioritizing antifa as a “domestic terrorism threat” can be debated, there does not appear to be any legal mechanism that prevents such a prioritization. There is also no legal impediment to the president, using his Article II powers, to encourage such a prioritization and using whatever language he chooses despite the non-existence of a “domestic terrorist group designation.” Rule of law issues arise when the government prioritizes threats based on political agendas rather than national security imperatives and deepens extremist threats.

The developments concerning antifa return us to a central concern of this report—to what extent the DOJ under the guise of law enforcement is being used to further President Trump’s political objectives leading up to the 2020 election. We believe that the facts concerning the “designation” of antifa as a terrorist organization, coupled with the deployment of federal troops in Washington, D.C., Portland, Oregon, and elsewhere, constitute a political strategy more than a law enforcement strategy. We discuss our concerns under the Hatch Act in Section V.7.c of this report. Here, we express our grave concern that such use of the DOJ against domestic political enemies of the president is highly inappropriate, potentially corrosive to the rule of law, and threatens to obfuscate the deadliest domestic terror threats facing America. Simultaneously, the DOJ validates the administration’s aid and support of extremist actors on the far-right, bolstering their growth.

## **6. Firing of Politically Independent Federal Employees**

### **a. Firing of Inspector General Michael Atkinson**

In this section of our report, we discuss the firing of Michael Atkinson, a former inspector general of the Intelligence Community (“ICIG”) whose role in the Ukraine whistleblower complaint is discussed in Section V.2 of this report.

In the summer of 2019, President Trump, his private attorney Rudy Giuliani, and senior administration officials sought to pressure Ukraine into announcing the launch of a criminal investigation of Joe Biden, a rival candidate for president in 2020. The effort was exposed by a whistleblower complaint that was based in part on a phone call between President Trump and President Volodymyr Zelensky of Ukraine on July 25, 2019.<sup>504</sup> The whistleblower allegations

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POL. SCI. 1-22 (2020) (arguing that tacit condoning of prejudiced elite speech emboldens people to express and act upon bigotry). For a health-related focus, see Kimberly C. Grainger, *Political Rhetoric and Minority Health: Introducing the Rhetoric-Policy-Health Paradigm*, 12 ST. LOUIS U. J. HEALTH L. & POL’Y (2018).

<sup>504</sup> Letter from Whistleblower to Chairmen Burr & Smith, *Whistleblower complaint to Chairman Burr and Chairman Schiff*, (Aug. 12, 2019), [https://intelligence.house.gov/uploadedfiles/20190812\\_-\\_whistleblower\\_complaint\\_unclass.pdf](https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf).

were substantiated by a memorandum of the July 25 telephone conversation released by the White House.<sup>505</sup>

Atkinson determined that the whistleblower complaint met the standards for an “urgent concern” and forwarded it to the Acting Director of National Intelligence (Acting DNI), Joseph Maguire.<sup>506</sup> However, rather than pass the complaint along to Congress with comments, Maguire conducted a separate analysis of whether the complaint met the legal standard, concluded that it did not, and then sought advice from the DOJ’s OLC.<sup>507</sup> It is a matter of some debate however, whether the whistleblower statute at issue permits the DNI or other agency head to second-guess the ICIG’s decision before passing along a matter the ICIG determines is an “urgent concern” to Congress.<sup>508</sup> In any case, OLC agreed with the Acting DNI’s conclusion, and further concluded that a criminal referral would be the only appropriate action to take.<sup>509</sup> Accordingly, it was referred to the FBI and DOJ.<sup>510</sup> The head of DOJ’s Criminal Division Brian Benczkowski, only considering whether there was a campaign finance law violation, determined that under the DOJ’s untested interpretation of campaign finance law, the facts alleged by the whistleblower did not merit investigation beyond review of the memorandum documenting the call.<sup>511</sup>

Subsequently, Atkinson wrote a letter to Rep. Schiff and Rep. Nunes, informing them of the existence of the whistleblower complaint.<sup>512</sup> His letter also noted that past practice when the ICIG and the DNI concluded that a whistleblower’s complaint did not meet the legal standard for an “urgent concern” was for the DNI to “nevertheless provide direction to the ICIG to transmit the ICIG’s determination and the complainants’ information to the congressional intelligence committees.”<sup>513</sup> Atkinson said that this “permitted” whistleblowers “to contact the congressional

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<sup>505</sup> White House Memorandum, *supra* note. 71 (on file at <https://bit.ly/2n4ZFBg>).

<sup>506</sup> Letter from IC Inspector Gen. Michael Atkinson to Acting Dir. of Nat’l Intelligence Joseph Maguire (Aug. 26, 2019) (hereinafter “Atkinson Letter”) (on file at <https://bit.ly/2nWqjwW>).

<sup>507</sup> Testimony of Hon. Joseph Maguire, Acting Director of National Intelligence, Office of the Director of National Intelligence, *before the House Permanent Select Comm. on Intel.*, 116<sup>th</sup> Cong., at 16 (Sept. 26, 2019), <https://docs.house.gov/meetings/IG/IG00/20190926/110027/HHRG-116-IG00-Transcript-20190926.pdf>.

<sup>508</sup> Robert S. Litt, *Unpacking the Intelligence Community Whistleblower Complaint*, LAWFARE BLOG (Sep. 17, 2019), <https://www.lawfareblog.com/unpacking-intelligence-community-whistleblower-complaint>.

<sup>509</sup> Steven A. Engel, “Urgent Concern” Determination by the Inspector General of the Intelligence Community, OFF. OF LEGAL COUNSEL (Sep. 3, 2019), [https://www.justsecurity.org/wp-content/uploads/2019/11/ukraine-clearinghouse-2019.09.03-olc-urgent-concern-declass\\_0.pdf](https://www.justsecurity.org/wp-content/uploads/2019/11/ukraine-clearinghouse-2019.09.03-olc-urgent-concern-declass_0.pdf).

<sup>510</sup> Testimony of Hon. Joseph Maguire, Acting Director of National Intelligence, Office of the Director of National Intelligence, *before the House Permanent Select Comm. on Intel.*, 116<sup>th</sup> Cong., at 16 (Sept. 26, 2019), <https://docs.house.gov/meetings/IG/IG00/20190926/110027/HHRG-116-IG00-Transcript-20190926.pdf>.

<sup>511</sup> Matt Zapposky & Devlin Barrett, *Justice Dept. rejected investigation of Trump phone call just weeks after it began examining the matter*, THE WASHINGTON POST (Sep. 25, 2019), [https://www.washingtonpost.com/national-security/justice-dept-rejected-investigation-of-trump-phone-call-just-weeks-after-it-began-examining-the-matter/2019/09/25/6f7977ce-dfb5-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/national-security/justice-dept-rejected-investigation-of-trump-phone-call-just-weeks-after-it-began-examining-the-matter/2019/09/25/6f7977ce-dfb5-11e9-8dc8-498eabc129a0_story.html); *See also* Devlin Barrett, Matt Zapposky, Carol D. Leonnig & Shane Harris, *Trump offered Ukrainian president Justice Dept. help in an investigation of Biden, memo shows*, THE WASHINGTON POST (Sep. 25, 2019), [https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian-president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian-president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0_story.html).

<sup>512</sup> Letter from Michael K. Atkinson to Chairman Schiff and Ranking Member Nunes, OFFICE OF THE INTELLIGENCE COMMUNITY INSPECTOR GENERAL (Sep. 17, 2019) (on file at [https://intelligence.house.gov/uploadedfiles/20190917\\_-\\_ic\\_ig\\_second\\_letter\\_to\\_hpsc\\_on\\_whistleblower.pdf](https://intelligence.house.gov/uploadedfiles/20190917_-_ic_ig_second_letter_to_hpsc_on_whistleblower.pdf)).

<sup>513</sup> *Id.*

intelligence committees directly, in an authorized and protected manner, as intended by the urgent concern statute.”<sup>514</sup>

Several days later, Rep. Schiff issued a subpoena to Acting DNI Maguire to compel production of the whistleblower complaint and related materials.<sup>515</sup> Atkinson then wrote another letter, pursuant to his statutory obligations,<sup>516</sup> to notify Rep. Schiff and Rep. Nunes of his disagreement with the Acting DNI regarding the Acting DNI’s handling of the complaint, including the Acting DNI’s failure to follow past practices to facilitate the transmission of whistleblower complaints to Congress.<sup>517</sup> Acting DNI Maguire himself later testified that Atkinson’s handling of the whistleblower complaint was “by the book” and “followed the law.”<sup>518</sup> Ultimately, the primary facts described in the whistleblower complaint formed the basis for part of one of the articles for which President Trump was impeached.<sup>519</sup>

On Friday, April 3, 2020, President Trump notified Congress of his intent to fire Atkinson, saying that he “no longer” had “the fullest confidence” in Atkinson.<sup>520</sup> This notification reportedly followed several months of internal White House discussions in which President Trump expressed the desire to fire Atkinson because he viewed him as “disloyal.”<sup>521</sup>

In a statement after Trump’s announcement, Atkinson expressed the view that “[i]t is hard not to think that the President’s loss of confidence in me derives from my having faithfully discharged my legal obligations as an independent and impartial Inspector General, and from my commitment to continue to do so.”<sup>522</sup>

On April 9, Attorney General Barr appeared on Fox News, justifying Atkinson’s removal: “I think the president did the right thing in removing Atkinson. From the vantage point of the Department of Justice, he had interpreted his statute, which is a fairly narrow statute, that gave him jurisdiction over wrongdoing by Intelligence people, and tried to turn it in to a commission to explore anything in the government and immediately report to Congress without letting the Executive Branch look

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<sup>514</sup> *Id.*

<sup>515</sup> Letter from Chairman Adam Schiff to Acting Director Maguire, PERMANENT SELECT COMM. ON INTEL. U.S. HOUSE OF REPS (Sep. 13, 2019) (on file at [https://intelligence.house.gov/uploadedfiles/20190913\\_-\\_chm\\_schiff\\_letter\\_to\\_acting\\_dni\\_re\\_whistleblower\\_-\\_subpoena.pdf](https://intelligence.house.gov/uploadedfiles/20190913_-_chm_schiff_letter_to_acting_dni_re_whistleblower_-_subpoena.pdf)).

<sup>516</sup> 50 U.S.C. § 3033(k)(3)(A)(i).

<sup>517</sup> Letter from Michael K. Atkinson to Chairman Schiff and Ranking Member Nunes, OFFICE OF THE INTELLIGENCE COMMUNITY INSPECTOR GENERAL (*Sep. 17, 2019*) (on file at [https://intelligence.house.gov/uploadedfiles/20190917\\_-\\_ic\\_ig\\_second\\_letter\\_to\\_hpsci\\_on\\_whistleblower.pdf](https://intelligence.house.gov/uploadedfiles/20190917_-_ic_ig_second_letter_to_hpsci_on_whistleblower.pdf)).

<sup>518</sup> Testimony of Hon. Joseph Maguire, Acting Director of National Intelligence, Office of the Director of National Intelligence, *before the House Permanent Select Comm. on Intel.*, 116<sup>th</sup> Cong., at 16 (Sept. 26, 2019), <https://docs.house.gov/meetings/IG/IG00/20190926/110027/HHRG-116-IG00-Transcript-20190926.pdf>.

<sup>519</sup> H. Res. 755, 116<sup>th</sup> Cong. (2019), <https://www.congress.gov/116/bills/hres/755/BILLS-116hres755enr.pdf>.

<sup>520</sup> Letter from President Donald Trump to Chairman Burr and Vice-Chairman Warner and Letter to Chairman Schiff and Ranking Member Nunes, THE WHITE HOUSE (Apr. 3, 2020), <https://www.politico.com/f/?id=00000171-4308-d6b1-a3f1-c7d8ee3f0000>.

<sup>521</sup> Maggie Haberman and Michael S. Schmidt, *Trump Has Considered Firing Intelligence Community Inspector General*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/politics/trump-michael-atkinson-inspector-general.html>.

<sup>522</sup> Michael K. Atkinson, *Statement of Michael K. Atkinson, Inspector General of the Intelligence Community, on His Removal from Office*, N.Y. TIMES (Apr. 5, 2020), <https://int.nyt.com/data/documenthelper/6865-atkinson-statement-on-removal/339e56bc31e7c607c4b9/optimized/full.pdf#page=1>.

at it and determine whether there was any problem. He was told this in a letter from the Department of Justice, and he is obliged to follow the interpretation of the Department of Justice, and he ignored it. So, I think the president was correct in firing him.”<sup>523</sup>

After this interview, Senators Feinstein and Warner and, separately, Representatives Schiff and Nadler raised concerns about these statements to DOJ’s Inspector General and head of the Office of Professional Responsibility.<sup>524</sup> They noted that Attorney General Barr’s statements about Atkinson’s conduct were not consistent with the facts, particularly that Atkinson acknowledged that he was bound by the OLC opinion and acted in accordance with it, notwithstanding his disagreement with its conclusions, and they reiterated Acting DNI Maguire’s conclusion that Atkinson had not acted outside his legal authority.<sup>525</sup>

Several months later, the White House Counsel’s office sent a letter to Senator Grassley, one of the original signers of the letter requesting additional information from the White House justifying Atkinson’s firing; the letter included a transcript of President Trump’s remarks at the press conference. Senator Grassley concluded that this was sufficient to satisfy the requirements that had motivated him to send the letter and to subsequently object to the confirmation of an ODNI nominee.<sup>526</sup> Senator Grassley did observe, however, that he “did not agree” that the cited reasons justified Atkinson’s removal.<sup>527</sup>

Mr. Barr should be questioned about his public statements pronouncing unfounded allegations of misconduct used to justify Atkinson’s firing and to excuse retaliation against Mr. Atkinson for fulfilling his duty as an inspector general.

b. U.S. Attorney for the Southern District of New York

In this section of our report, we discuss the firing of a U.S. attorney that may amount to criminal obstruction of justice.<sup>528</sup>

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<sup>523</sup>Letter from Chairmen Adam B. Schiff & Jerrold Nadler to Jeffrey Ragsdale, Head of Office of Professional Responsibility & Inspector General Michael Horowitz (Apr. 20, 2020) (on file at [https://intelligence.house.gov/uploadedfiles/20209420\\_hpsci\\_and\\_hjc\\_letter\\_to\\_doj\\_opr\\_and\\_oig\\_re\\_barratkinson\\_final\\_pdf.pdf](https://intelligence.house.gov/uploadedfiles/20209420_hpsci_and_hjc_letter_to_doj_opr_and_oig_re_barratkinson_final_pdf.pdf)).

<sup>524</sup>Letter from Sens. Dianne Feinstein and Mark R. Warner to Head of Office of Professional Responsibility & Inspector General Michael Horowitz, (Apr. 17, 2020) (on file at [https://www.feinstein.senate.gov/public/\\_cache/files/7/4/74cc2af5-a011-41fe-b8a7-af3fa9a1f97c/97EA40385B91689933EAC2099710A202.2020.04.17-df-mw-letter-to-opr-oig-re-ag-barr-misleading-statements-final-pdf-.docx.pdf](https://www.feinstein.senate.gov/public/_cache/files/7/4/74cc2af5-a011-41fe-b8a7-af3fa9a1f97c/97EA40385B91689933EAC2099710A202.2020.04.17-df-mw-letter-to-opr-oig-re-ag-barr-misleading-statements-final-pdf-.docx.pdf)); *See also*, Adam B. Schiff and Jerrold Nadler, Letter to Head of Office of Professional Responsibility & Inspector General Michael Horowitz, (Apr. 20, 2020) (on file at [https://intelligence.house.gov/uploadedfiles/20209420\\_hpsci\\_and\\_hjc\\_letter\\_to\\_doj\\_opr\\_and\\_oig\\_re\\_barratkinson\\_final\\_pdf.pdf](https://intelligence.house.gov/uploadedfiles/20209420_hpsci_and_hjc_letter_to_doj_opr_and_oig_re_barratkinson_final_pdf.pdf)).

<sup>525</sup> *Id.*

<sup>526</sup> Chuck Grassley, Nomination Objection Withdrawal, 116th Cong., 166 C.R., 133 (Jun. 18, 2020), [https://fas.org/irp/congress/2020\\_cr/grassley-ig.html](https://fas.org/irp/congress/2020_cr/grassley-ig.html).

<sup>527</sup> *Id.*

<sup>528</sup> *See* Claire Finkelstein & Richard Painter, *The 'Friday Night Massacre' Spells the Downfall of William Barr*, NEWSWEEK (Jun. 23, 2020), <https://www.newsweek.com/friday-night-massacre-spells-downfall-william-barr-opinion-1512935>.

On June 19th and 20th, 2020, a strange sequence of events unfolded involving Attorney General Barr; Acting U.S. Attorney of the Southern District of New York (SDNY), Geoffrey Berman; and disputably President Trump.<sup>529</sup> Mr. Barr claims to have sought to remove Berman from his role to open the SDNY U.S. attorney position for the president to nominate a candidate for the permanent position. However, Barr's stated reason does not withstand logical scrutiny: there was no reason why Berman, a Republican and Trump campaign donor, could not have continued to serve until Jay Clayton, the president's and attorney general's choice for the permanent U.S. attorney position, was appointed.<sup>530</sup>

Berman objected to a temporary replacement, U.S. Attorney for New Jersey Craig Carpenito, stating that an "outsider" would impermissibly impede or delay ongoing investigations, and refused to resign.<sup>210</sup> By 6:00 p.m. on June 20, the standoff ended; Berman had "resigned"—or as Mr. Barr would later tell Congress in his July 28 testimony, "stepped down"—from his position. However, he was replaced with his former deputy, Audrey Strauss, rather than Carpenito.<sup>531</sup>

This incident became known as the "Friday Night Massacre."<sup>532</sup> Attorney General Barr attempted to fire Berman: the notion that Berman "resigned" or "stepped down" rather than being fired was false, as Mr. Barr under questioning admitted in his July 28, 2020, testimony.<sup>533</sup> After Berman refused to resign, Mr. Barr wrote a letter to Berman stating that President Trump had fired him.<sup>534</sup> "I have asked the President to remove you as of today, and he has done so," Mr. Barr wrote.<sup>535</sup> The president, however, declined to confirm this decision, insisting later that day, telling reporters "I'm not involved."<sup>536</sup> While it remains unclear whether Mr. Barr or the president had the statutory authority to fire Berman,<sup>537</sup> the highly irregular nature of the attempted firing merits inquiry as to the actual reason why Berman was displaced from the office.

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<sup>529</sup> A full timeline of the Berman firing is listed in APPENDIX E.

<sup>530</sup> See Larry Neumeister, *New York Prosecutor who Donated \$5400 to Trump Campaign Wins Over Skeptics*, CHICAGO SUN-TIMES (Feb. 26, 2019), <https://chicago.suntimes.com/2019/2/26/18396227/new-york-prosecutor-who-donated-5400-to-trump-campaign-wins-over-skeptics>. Jay Clayton was the President's top choice for this position. See Dan Mangan, *Trump fired Berman to give U.S. attorney job to SEC Chairman Clayton*, White House claims, CNBC (June 22, 2020), <https://www.cnbc.com/2020/06/22/trump-fired-berman-to-give-us-attorney-job-to-sec-chairman-white-house-claims.html>.

<sup>531</sup> See Jeremy Herb & Erica Orden, *Ousted Manhattan federal prosecutor tells House panel that Barr's plans to replace him were 'unprecedented, unnecessary and unexplained'*, CNN (July 9, 2020), <https://www.cnn.com/2020/07/09/politics/geoffrey-berman-house-testimony/index.html>.

<sup>532</sup> Alan Feuer et al., *Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html>.

<sup>533</sup> House Judiciary Comm. Hearing, July 28 116<sup>th</sup> Cong. (2020) (Statement of William Barr, Att'y Gen. of the United States), <https://www.rev.com/blog/transcripts/house-judiciary-committee-hearing-of-attorney-general-barr-transcript-july-28>.

<sup>534</sup> Letter from William Barr, Att'y Gen. of the U.S., to Geoffrey Berman, U.S. Att'y for S.D.N.Y. (June 20, 2020) (on file with The Conservative Treehouse), <https://theconservativetreehouse.files.wordpress.com/2020/06/barr-statement-1-berman-v1.jpg>.

<sup>535</sup> *Id.*

<sup>536</sup> Erica Orden et al., *Geoffrey Berman is Leaving Office Immediately After Standoff With Trump Administration*, CNN (June 20, 2020), <https://www.cnn.com/2020/06/20/politics/trump-fires-berman-barr-says/index.html>.

<sup>537</sup> It seems likely that, pursuant to 28 U.S.C. § 546(d), the statute under which Berman was appointed, only the district court may fire Berman, given that he was appointed by the District Court to fill a vacancy until the permanent position was filled. See Kate King, *Former Lawyer for Chris Christie Named Interim U.S. Attorney for*

One possibility was that Berman was fired to obstruct investigations against the president and Trump associates. After all, Berman was investigating at least half a dozen politically sensitive matters and Trump associates, including Rudy Giuliani and Lev Parnas; Jeffrey Epstein and Prince Andrew; Deutsche Bank loans to Trump; the Turkish-government-owned bank Halkbank that President Trump had previously discussed with President Recep Tayyip Erdogan; the potentially illegal use of money by the presidential inauguration committee; further activities relating to Russia and the Trump campaign; and, of course, Michael Cohen and the Stormy Daniels payoffs.<sup>538</sup> Attempting to sabotage an ongoing investigation by firing the investigating official would be obstruction of justice, a crime under federal law. This interpretation of the obstruction statute, 18 U.S.C. § 1512(c)(2), is laid out in Part II of the Mueller Report.<sup>539</sup>

The replacement plan regarding Berman made no sense unless the intent was to undermine the work of the office in the SDNY and generate as much delay as possible. Mr. Barr stated that he was trying to help SEC Chairman Jay Clayton return to New York City, and Clayton claimed that pursuing the job was his idea.<sup>540</sup> But Clayton was not qualified for the SDNY post—he had spent his career prior to government service in the general practice (corporate law) group at Sullivan & Cromwell, where the litigation department is separate and almost never crosses over into corporate

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*New Jersey*, WALL ST. J. (Jan. 3, 2018), <https://www.wsj.com/articles/former-lawyer-for-chris-christie-named-interim-u-s-attorney-for-new-jersey-1515022795>. The attorney general likely has no express ability under Section 546 to fire an acting US attorney appointed in this way. As this is a complex issue of statutory interpretation and constitutional law, it would have been most appropriate for the District Court to address. However, if Barr knowingly attempted to fire, or asked the president to fire Berman without proper authority, that would constitute an abuse of power. *See also* Stephen Collinson, *Firing of powerful NY prosecutor appears to be latest move to protect Trump*, CNN (Jun. 20, 2020), <https://www.cnn.com/2020/06/20/politics/berman-barr-trump-rule-of-law/index.html>.<sup>538</sup> *See* Rosalind S. Helderman & Tom Hamburger, *As impeachment trial ended, federal prosecutors took new steps in probe related to Giuliani, according to people familiar with case*, WASHINGTON POST (Feb. 14, 2020), [https://www.washingtonpost.com/politics/as-impeachment-trial-ended-federal-prosecutors-took-new-steps-in-probe-related-to-giuliani-according-to-people-familiar-with-case/2020/02/14/7893bfb0-4e8a-11ea-bf44-f5043eb3918a\\_story.html](https://www.washingtonpost.com/politics/as-impeachment-trial-ended-federal-prosecutors-took-new-steps-in-probe-related-to-giuliani-according-to-people-familiar-with-case/2020/02/14/7893bfb0-4e8a-11ea-bf44-f5043eb3918a_story.html). *See also* U.S. Attorney's Office, S.D.N.Y., *Statement of U.S. Attorney Geoffrey S. Berman Responding to Statement Issued Today by Law Firm Representing Prince Andrew* (June 8, 2020), <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-responding-statement-issued-today-law-firm>; Shubham Ghosh, *The Problem with Jay Clayton: Trump's New SDNY Attorney Nominee's Link to Deutsche Bank's \$10 Billion Problem*, MEAWW (Jun. 19, 2020), <https://meaww.com/jay-clayton-donald-trump-nominee-next-sdny-new-york-attorney-defended-deutsche-bank-corruption-case>; Alexander Mallin, *Bolton Suggests Possible 'Obstruction' by Trump in SDNY Turkey Investigation*, ABC NEWS (June 20, 2020), <https://abcnews.go.com/Politics/bolton-suggests-obstruction-trump-sdny-turkey-investigation/story?id=71362785>; Kenneth Vogel & William Rashbaum, *Donor to Trump Inauguration Charged With Obstructing Investigation*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/us/politics/imaad-zuberi-trump-inauguration.html>; Press Release, Department of Justice U.S. Attorney's Office, *Russian Attorney Natalya Veselnitskaya Charged With Obstruction Of Justice In Connection With Civil Money Laundering And Forfeiture Action*, S.D.N.Y. (Jan. 8, 2019), <https://www.justice.gov/usao-sdny/pr/russian-attorney-natalya-veselnitskaya-charged-obstruction-justice-connection-civil>; Grace Panetta, *Michael Cohen Says There is an Investigation Regarding Trump That Has Not Been Publicly Disclosed*, BUSINESS INSIDER (Feb. 27, 2019), <https://www.businessinsider.com/michael-cohen-testimony-prosecutors-sdny-trump-investigation-2019-2>. These investigations have been summarized in APPENDIX E.

<sup>539</sup>*See* 18 U.S.C. § 1512(C)(2) (2020), Robert Mueller III, Report on the Investigation into Russian Interference in the 2016 Presidential Election, Vol. I, U.S. DOJ (March 2019), <https://www.justice.gov/storage/report.pdf>.

<sup>540</sup>*See* Ted Knutson, *Clayton: Going After The Job As US Atty SDNY Was Entirely My Idea*, FORBES (Jun. 25, 2020), <https://www.forbes.com/sites/tedknutson/2020/06/25/clayton-going-after-the-job-as-us-atty-sdny-was-entirely-my-idea/#3017d33b200e>.

practice.<sup>541</sup> The Senate confirmation and examination of Jay Clayton’s qualifications would have likely been difficult and time consuming. Mr. Barr and the president knew this, and it is quite possibly what they intended—a rudderless ship at the SDNY.

Not only was the Clayton nomination odd, but the plans for an interim U.S. attorney also appear designed to cause disruption. Why did Mr. Barr try to bring in an outsider—U.S. Attorney for New Jersey and Chris Christie protégé Craig Carpenito—as Acting U.S. Attorney instead of having Berman’s successor Audrey Strauss take over until Senate confirmation of a new U.S. attorney?<sup>542</sup> This effort eventually failed and Strauss took over the office, but it appears to have been an effort by Mr. Barr to delay investigations, especially given that Carpenito would not have left his office in New Jersey, but was expected to run both offices.<sup>543</sup> While there are and have been legitimate reasons to replace a U.S. attorney, Berman described this replacement plan as a departure from common practice in his House Judiciary Committee interview, which should encourage further scrutiny.<sup>544</sup>

At the time of this report’s issuance, we are unable to definitively conclude that President Trump and/or Attorney General Barr fired Geoffrey Berman in order to obstruct justice in one or more investigations or that their conduct violated the criminal obstruction of justice statute. Those conducting further investigations will need access to relevant DOJ documents, including communications between the DOJ and the White House, testimony from DOJ officials involved in the firing of Berman, and documents and testimony from SDNY lawyers working on investigations and other witnesses.

We can conclude, however, that there were departures from DOJ policy and from established procedures in SDNY that raise many questions. We are deeply disturbed by the manner in which the Berman firing was carried out, and particularly with the lack of candor by Attorney General Barr and others at the DOJ. The circumstantial evidence is also deeply disturbing as well as the sheer number of pending politically sensitive investigations and subsequent developments, including the Ghislaine Maxwell arrest days later and the Stephen Bannon indictment in August 2020.

## 7. Politicization of the Intelligence Community

Two recent developments threaten to expand the attorney general’s ability to extend his pattern of politicization beyond the DOJ and into the nation’s intelligence services, the so-called Intelligence

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<sup>541</sup> Clayton sought to use the position to establish his litigation credentials in the transfer from corporate law. *See* Matthew Goldstein & Ben Protess, *Jay Clayton, Low-Profile Regulator, Is Catapulted Into a Political Fight*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/20/business/jay-clayton-sdny-sec.html>. *Cf* Penn Law Faculty, *Jay Clayton L’93* (2020), <https://www.law.upenn.edu/cf/faculty/jwclayto/> (highlighting Jay Clayton’s experience in corporate law).

<sup>542</sup> *See* Kate King, Former Lawyer for Chris Christie Named Interim U.S. Attorney for New Jersey, WALL ST. J. (Jan. 3, 2018), <https://www.wsj.com/articles/former-lawyer-for-chris-christie-named-interim-u-s-attorney-for-new-jersey-1515022795>.

<sup>543</sup> Berman discusses this in his House Judiciary Committee interview. *See* Press Release, House Judiciary Comm., House Judiciary Committee Releases Transcript of Interview with Former SDNY Prosecutor Geoffrey Berman (July 13, 2020) (on file at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3124>).

<sup>544</sup> Interview of Geoffrey Berman, H. Comm. On the Judiciary, (2020), [https://judiciary.house.gov/uploadedfiles/berman\\_transcript.pdf?utm\\_campaign=4124-519](https://judiciary.house.gov/uploadedfiles/berman_transcript.pdf?utm_campaign=4124-519).

Community (“IC”). To understand the dangers presented by this pattern of politicization, some historical perspective is useful.

The current construct governing the operation and oversight of the IC is the product of a “grand bargain” that grew out of the congressional hearings on intelligence abuses held in the 1970s under the auspices of the Church and Pike Committees. After the exposure of a multitude of misdeeds by the nation’s intelligence services, a new approach emerged regarding the conduct of intelligence operations. The arrangement can be summarized as follows: the president and the intelligence services could maintain robust clandestine surveillance and espionage capacities, including, under special control, domestically. In exchange, Congress subjected them to significant legal restrictions on how they collected, analyzed, and disseminated intelligence information. Lawyers would be placed throughout the IC and in the DOJ to monitor and enforce those restrictions; domestic surveillance required a court order from the Foreign Intelligence Surveillance Court for foreign intelligence investigations; and two new congressional committees, the Senate and House Intelligence Committees, were to be kept “fully and currently informed” of all significant intelligence activities and would exercise robust oversight authorities. The idea was that the use of the IC’s powers would be documented and watched by institutions that could be trusted to keep secrets.

In the executive branch, no single individual plays a more important role than the attorney general in the oversight mechanisms that Congress created to implement the “grand bargain.” The duties of the attorney general in the operation of FISA, for example, include insuring that the statute is faithfully implemented within the executive branch while simultaneously serving as the individual principally responsible to Congress for reporting on the legality of the nation’s intelligence activities. As an example of the role of the attorney general, when Congress added Section 702 to FISA in 2008, the authority to authorize use of this new programmatic surveillance program was vested in the attorney general, who was to act in consultation with the DNI, while Foreign Intelligence Surveillance Court oversight was limited solely to ensuring that the program operated consistently with constitutional norms.

What Congress did not anticipate was conferring this authority and responsibility upon an attorney general prepared to use the powers of the office for partisan political purposes and to denigrate the IC, including his own FBI, in a way that seriously undermines public confidence in these institutions. Such politicization puts at risk the entire structure of legitimacy built for the IC in the post-Watergate era.

With this history in mind, both the transfer of declassification authority to the attorney general and the highly questionable process used to review John Bolton’s recently published memoir, *The Room Where It Happened*, deserve special attention.

- a. Transfer of Declassification Authority to the Attorney General

President Trump’s transfer of declassification authority to Attorney General Barr immediately after the latter announced his intention to initiate a comprehensive review of all activities related

to the IC's assessment of 2016 election interference is equally unprecedented and potentially dangerous.<sup>545</sup>

To appreciate the impact of this action, it is important to keep in mind that the attorney general's announced review is much broader in scope than the meticulous criminal investigation concluded by Special Counsel Robert Mueller in March 2019. Mueller's work was limited to a criminal investigation of activities related to the 2016 election. Unfortunately, recent reporting suggests that Mueller was directed to confine his work to a criminal investigation alone rather than to consider the full range of activities related to the 2016 election.<sup>546</sup> Such an effort would necessarily have involved a counterintelligence investigation that would build on the FBI's incomplete work; instead, then-Deputy Attorney General Rod Rosenstein appears to have terminated that FBI counterintelligence investigation, leaving facts that relate to activities of the president and his business concerns in Russia unexamined.<sup>547</sup> Attorney General Barr has taken charge of the FBI's prematurely terminated counterintelligence investigation and tasked John Durham, U.S. Attorney for the District of Connecticut, to review *all* matters relevant to the 2016 election. Based on media reports, Durham's mandate now extends to reviewing Mueller's criminal investigation and the aborted counterintelligence review as well as the foreign intelligence analysis that produced the 2017 Intelligence Community Assessment addressing Russian interference in the 2016 election.<sup>548</sup> For the reasons discussed below, charging any criminal prosecutor with a review of intelligence collection and analysis activities in the course of foreign intelligence and counterintelligence investigations poses special risks. The operational considerations that govern criminal and intelligence analysis differ significantly, making it questionable whether any criminal prosecutor, no matter how accomplished, will be well-prepared to manage such a task.

The potential for conflating the standards applicable to criminal and foreign intelligence inquiries becomes more problematic now that all responsibility for declassifying relevant intelligence information has been removed and shifted from the director of national intelligence to the attorney general, another example of the Trump administration's willingness to rebalance the authority of

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<sup>545</sup> See Memorandum on Agency Cooperation With Attorney General's Review of Intelligence Activities Relating to the 2016 Presidential Campaigns (May 23, 2019) (on file at <https://www.whitehouse.gov/presidential-actions/memorandum-agency-cooperation-attorney-generals-review-intelligence-activities-relating-2016-presidential-campaigns/>) (announcing the aforementioned transfer of authority). Section 1 of the Memorandum defines the expansive scope of the Attorney General's review: "The Attorney General is currently conducting a review of intelligence activities relating to the campaigns in the 2016 Presidential election and certain related matters. The heads of elements of the intelligence community, as defined in 50 U.S.C. 3003(4), and the heads of each department or agency that includes an element of the intelligence community shall promptly provide such assistance and information as the Attorney General may request in connection with that review." *Id.*

<sup>546</sup> See Michael Schmidt, *Justice Dept. Never Fully Examined Trump's Ties to Russia, Ex-Officials Say*, N.Y. TIMES (Aug. 30, 2020), <https://www.nytimes.com/2020/08/30/us/politics/trump-russia-justice-department.html> ("The Justice Department secretly took steps in 2017 to narrow the investigation into Russian election interference and any links to the Trump campaign").

<sup>547</sup> Devlin Barrett & Matt Zapotosky, *Rosenstein resigns effective May 11, ending tumultuous run as Justice Department's second-in-command*, WASHINGTON POST (Apr. 29, 2019), [https://www.washingtonpost.com/world/national-security/rod-rosenstein-to-resign-effective-may-11/2019/04/29/1092851c-6ac5-11e9-8f44-e8d8bb1df986\\_story.html](https://www.washingtonpost.com/world/national-security/rod-rosenstein-to-resign-effective-may-11/2019/04/29/1092851c-6ac5-11e9-8f44-e8d8bb1df986_story.html) ("While it is difficult to interpret Rosenstein's remarks, he was apparently trying to mollify Trump and save his own job, or at least his reputation").

<sup>548</sup> Jack Goldsmith & Nathaniel Sobel, *The Durham Investigation: What We Know and What It Means*, LAWFARE (Jul. 9, 2020), <https://www.lawfareblog.com/durham-investigation-what-we-know-and-what-it-means>.

the DOJ and the IC for political expedience.<sup>549</sup> This runs counter to long-standing, critically important separations in the authorities for which the various operating components of the executive branch are responsible. It cavalierly upends Executive Order 13526, which carefully structures a declassification process designed to balance tensions between the competing interests of various executive branch components.<sup>550</sup>

The tension between executive branch components is a deliberate design feature. Just as the Constitution allots power among three independent branches of government creating checks and balances to prevent the consolidation and misuse of governmental power, the executive branch, too, divides power and responsibility among its various components. In this way, authority is distributed to avoid the overconcentration of government power that might lead to abuse. This division is nowhere more important than when the powers involve the nation's internal and external security functions. The historic separation of these two areas of responsibility for the nation's security is one of almost sacrosanct importance.<sup>551</sup> The transfer of declassification authority of intelligence information relevant to the Durham investigation thus raises special concerns beyond Mr. Barr's politically outspoken leadership of the nation's premier law enforcement agency.<sup>552</sup> Indeed, David Kris and Benjamin Wittes call it "extremely unusual," stating that they are "not aware of any precedent for this action."<sup>553</sup> It presages that the attorney general may now use his new role to expand his influence into the operation of the nation's vitally important foreign intelligence services if useful to support the political ends for which he is

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<sup>549</sup> President Trump's efforts to shift power from the IC to DoJ are described by George Croner in a recent series of articles published by the Foreign Policy Research Institute and on other platforms. See George Croner, *What Durham Is Investigating and Why It Poses a Danger to US Intelligence Analysis*, JUST SECURITY (Jul. 25, 2020), <https://www.justsecurity.org/71647/what-durham-is-investigating-and-why-it-poses-a-danger-to-us-intelligence-analysis/>; George Croner, *What the Russian Bounties Story Says About the National Security Process of the Trump Administration*, FOREIGN POLICY RESEARCH INST. (Jul. 13, 2020); George Croner, *A Nadir is Reached in the Politicization of U.S. Intelligence*, FOREIGN POLICY RESEARCH INST. (Aug. 2, 2020); George Croner, *Lowering the 'Barr': The Attorney General's Disappointing and Disrespectful Dissing of the U.S. Intelligence Community*, FOREIGN POLICY RESEARCH INST. (Apr. 15, 2019), <https://www.fpri.org/article/2019/04/lowering-the-barr-the-attorney-generals-disappointing-and-disrespectful-dissing-of-the-u-s-intelligence-community/>.

<sup>550</sup> The entirety of Part 3 of Executive Order 13,526 is devoted to "Declassification and Downgrading." It establishes a carefully articulated process, defining the role of the Information Security Oversight Office (ISOO), located in the National Archives, which, under the direction of the National Security Advisor and, through the interagency Security Classification Appeals Panel (ISCAP), is responsible for arbitrating competing equities between various executive branch departments when declassification is desired. Trump's May 23, 2019 order end-runs this carefully designed structure.

<sup>551</sup> The part of this Report dealing with the Posse Comitatus Act further explores this topic.

<sup>552</sup> The delegation language of Section 3(c) in the President's May 23 2019 Memorandum deserves special note. "The authority in this memorandum shall terminate upon a vacancy in the office of Attorney General, unless expressly extended by the President." Memorandum on Agency Cooperation With Attorney General's Review of Intelligence Activities Relating to the 2016 Presidential Campaigns (May 23, 2019), <https://www.whitehouse.gov/presidential-actions/memorandum-agency-cooperation-attorney-generals-review-intelligence-activities-relating-2016-presidential-campaigns/>. Thus, delegation of declassification authority has been limited to the current Attorney General alone, essentially the equivalent of a personal delegation, one which places the Attorney General in the position of the President himself.

<sup>553</sup> Davis Kris & Benjamin Wittes, *Reflections on the President's Delegation of Declassification Authority to the Attorney General*, LAWFARE (May 28, 2019), <https://www.lawfareblog.com/reflections-presidents-delegation-declassification-authority-attorney-general>.

President Trump’s principal manager. Once breached, the implications for this long-standing divide creates a precedent with ominous future implications.

The president’s disdain for the nation’s intelligence services is well documented. Beginning with the assessment by the IC of Russian influence on the 2016 election, President Trump has publicly disparaged both the quality and value of the IC and its contributions to national security and foreign policy.<sup>554</sup> He has consistently rejected IC assessments that counter his own ideas without regard to relevant facts, and he has been eager to undermine the IC’s leadership.<sup>555</sup> In sum, the statutory legal standard that “national intelligence should be timely, objective, independent of political considerations, and based upon all sources available to the IC and other appropriate entities”<sup>556</sup> carries little weight with the president. He is unlikely to restrain politically driven actions that impact the IC, such as the DNI’s recent decision to undermine congressional oversight by eliminating in-person IC briefings on foreign interference in the 2020 election.<sup>557</sup> The president should be expected to give free rein to any action by Mr. Barr.

It is important to understand the potential for harm which the president’s transfer of declassification authority to the attorney general in the Durham investigation poses. This requires a review of the constitutional roles and operational demands of the governmental structures respectively responsible for the nation’s security at home and abroad.

*i. The Importance of Separating Government Law Enforcement and National Security Powers*

A primary goal of the Constitution of the United States, set forth in its preamble, is to protect the nation from both internal and external threats. Of the three independent branches of government

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<sup>554</sup> Subsequently President Trump criticized the IC’s January 2019 threat assessment which contradicted his views about Iran, North Korea, and ISIS, tweeting on January 30, 2019 that “Intelligence should go back to school.” Donald J. Trump (@realDonaldTrump) TWITTER (Jan. 30, 2019, 8:56 AM), <https://twitter.com/realDonaldTrump/status/1090609577006112769>.

<sup>555</sup> To gain control of the IC, Trump pushed out his first Director of National Intelligence (DNI), former Senator Dan Coats (who had served on the Senate Intelligence Committee), passed over a highly qualified career intelligence officer--D/DNI Sue Gordon for the position of DNI, and then fired acting DNI and retired Admiral Joseph Maguire in February 2018 within a week of one of Maguire’s subordinates accurately testifying to the House Intelligence Committee that Russia preferred the incumbent in the upcoming 2020 election. Julian E. Barnes & Charlie Savage, *Trump Won’t Let No. 2 Spy Chief Take Over When Coats Leaves*, N.Y. TIMES (Aug. 2, 2019), <https://www.nytimes.com/2019/08/02/us/politics/john-ratcliffe-sue-gordon.html>; John Walcott, *Trump’s Latest Intelligence Meltdown Isn’t About the Facts. It’s About the Truth*, TIME MAG. (Feb. 20, 2020), <https://time.com/5788479/trump-fires-maguire/>. Trump then appointed the hyper-political Ambassador Richard Grenell as acting DNI, before finally nominating former Representative John Ratcliffe for the post. See Colum Lynch & Robbie Gramer, *Richard Grenell: Pundit, Envoy, Spokesman. Spy?*, FOREIGN POL’Y (Feb. 21, 2020), <https://foreignpolicy.com/2020/02/21/trump-grenell-intelligence-chief-ambassador-berlin-germany-controversy-diplomat/>. Ratcliffe was confirmed by the closest vote ever recorded for the post, and his principal qualification, as seen in recent actions, is as a Trump loyalist. See Brett Holmgren, *Trump’s New Director of National Intelligence Doesn’t Understand His Job*, FOREIGN POL’Y, (Jul. 16, 2020), <https://foreignpolicy.com/2020/07/16/john-ratcliffe-director-national-intelligence-trump/>.

<sup>556</sup> See 2004 Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), 50 U.S.C. §3024 (a)(2) (amending the National Security Act of 1947).

<sup>557</sup> See Dustin Volz & Brody Mullins, *U.S. Intelligence Office to Stop Briefing Congress on Election Security*, WALL ST. J. (Aug. 30, 2020), <https://www.wsj.com/articles/u-s-intelligence-office-will-no-longer-brief-congress-on-election-security-11598730496>.

created by the Constitution, the executive branch is primarily responsible for achieving these two objectives. Article II, Sections 1 and 2, of the Constitution make the president as the nation’s chief executive, responsible for an executive branch structure designed to do three things: to “take Care that the Laws be faithfully executed,” serve as Commander in Chief, and represent the nation in all foreign policy matters.<sup>558</sup> Separate subsidiary entities created by Congress or presidential executive order, implement these responsibilities.

The structural division among executive branch components prevents consolidation of governmental powers and limits the opportunity for abuse of their power. This is particularly important where entities designed for internal and external security are involved. Their organization is thus carefully regulated and controlled.

Internal or domestic security is achieved through the coordinated law enforcement efforts of many entities chartered to operate independently at either the state or federal level, together comprising ‘the law enforcement community.’<sup>559</sup> They gather information—defined as evidence—to support a continuum of responsibilities from investigation of suspected criminal activity in violation of federal or state statutes to prosecutions before federal or state independent judicial branch components. At the federal level, the president implements this internal security or law enforcement function—his responsibility for executing the laws—principally through the DOJ and the various statutorily created U.S. attorneys and their offices.<sup>560</sup> In recent decades, thanks to reforms from the Watergate Period,<sup>561</sup> the DOJ under the consistent leadership of a succession of attorneys general has evolved into an organization that implements policy set by the president but both by regulation and tradition, takes care to demonstrate its commitment to the rule of law by remaining independent from the personal and political objectives of the president.<sup>562</sup>

The president achieves external security, typically referred to as ‘national security,’ through two responsibilities: serving as Commander in Chief and as principal spokesman for the nation’s foreign affairs. The first falls under the direction of the outwardly facing secretary of defense,

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<sup>558</sup> U.S. CONST. art. II, §§ 1, 2.

<sup>559</sup> Office of the Dir. Of Nat’l Intelligence, *Law Enforcement Information Sharing*, <https://www.dni.gov/index.php/who-we-are/organizations/ise/ise-archive/ise-additional-resources/2142-law-enforcement-information-sharing> (Last accessed Sept. 10, 2020).

<sup>560</sup> Over time Congress has created numerous federal entities with specific law enforcement responsibilities, but the Department of Justice has the primary role in this structure. The Department of Justice website summarizes its history, structure, and role: “The Judiciary Act of 1789 created the Office of the Attorney General which evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government. The Attorney General represents the United States in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested. In matters of exceptional gravity or importance the Attorney General appears in person before the Supreme Court. Since the 1870 Act that established the Department of Justice as an executive department of the government of the United States the Attorney General has guided the world’s largest law office and the central agency for enforcement of federal laws.”

<sup>561</sup> See generally EDWARD H. LEVI, *RESTORING JUSTICE: THE SPEECHES OF ATTORNEY GENERAL EDWARD H. LEVI* (2013).

<sup>562</sup> In addition to the Department of Justice, numerous other agencies possess investigative authority for law enforcement activities, but the Attorney General, acting through the Department of Justice remains the principal interpreter of the law for the Executive Branch and also the principal representative of the government in litigation. In a nation pledged to governance under the rule of law, the Attorney General’s impact is government wide. He possesses an outsized potential to inflict harm on government structures.

supported by the Department of Defense and various subordinate support entities along with the military services. The president's foreign affairs power is directed by the secretary of state, supported by the Department of State and a cadre of ambassadors nominated by the president and confirmed by Congress.

These dual responsibilities designed to achieve external, or national, security extend along a continuum, from foreign policy concerns to military action. Their execution requires significant amounts of information about the intentions and activities of a broad collection of actors on the global stage. In World War II, such information, defined as "intelligence," was managed by the military services. Later, beginning with the National Security Act of 1947,<sup>563</sup> a group of executive branch agencies was gradually created, both by law and presidential directive. Together, these entities, collectively called the Intelligence Community ("IC"), manage the collection, analysis and dissemination of intelligence information, a process designed to anticipate and prepare the president and the executive branch about the global threat environment. Their work is thus quite distinct from that of law enforcement, which in contrast primarily responds to past events. The IC agencies, each responsible for its own distinct functional area, are defined in Executive Order 12,333.<sup>564</sup> Six of the IC agencies ('elements') are dedicated to full-time intelligence work according to their specific area of collection expertise (e.g., intelligence from human, electronic, overhead, and technical sources). An additional group of agencies have intelligence sub-components, but their activities are limited to the overarching functional missions of their parent agencies. Since 2004, the IC has been under the leadership and co-ordination of a newly created member of the president's cabinet, the Director of National Intelligence ("the DNI").<sup>565</sup>

Intelligence has historically been considered an *implied* presidential power. As such it has been jealously guarded and involvement by the other two branches of government has been limited. Accordingly, until recently, congressional involvement in IC operations has been restricted to funding authorizations and appropriations, oversight of intelligence activities, and prior review of certain of intelligence activities defined as covert action. Thus, the number of laws applicable to intelligence activities has been comparatively less than is the case for law enforcement. This has contributed to building a strong tradition of independence, protecting the IC and its activities from the political interaction between the executive and legislative branches of government and arguably also ensuring its mission of 'speaking truth to power.' Nonetheless, now by statute the

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<sup>563</sup> The National Security Act of 1947 was amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRPTA).

<sup>564</sup> Executive Order No. 12,333 sets forth a comprehensive regulatory framework for the Intelligence Community. Exec. Order No 12,333 (2020). Section 3.5 (g) defines the elements of the Intelligence Community as including the Office of the DNI, the CIA, the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office; along with components of the Department of Defense (e.g. counterintelligence elements of the Army, Navy, Air Force and Marine Corps), FBI, DEA, Departments of Energy, State, Homeland Security and Coast Guard.) *Id.*

<sup>565</sup> Previously the position of Director of National Intelligence (DNI) was the 'dual-hatted' responsibility of the Director of the CIA who also was designated as the overall Director of Central Intelligence. To avoid the conflict of interest which sometimes arose between the CIA and various other agencies in the IC and provide overall co-ordination and supervision of the sprawling IC, in 2004 the new DNI position was created. *See* Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), 50 U.S. C. §3024. The 'new' DNI position is a cabinet member who serves as head of the intelligence community and as principal advisor to the President, the National Security Council and Homeland Security. *See* ODNI, *Organization* (2020), <https://www.dni.gov/index.php/who-we-are/organizations>.

intelligence function is also explicitly ordered to be “timely, objective, independent of political considerations, and based upon all sources of available to the IC in the recent investigations into Russian disinformation activity focused on the 2016 U.S. domestic elections.

It is evident that these various internal and external security entities, law enforcement and the IC, have overlapping and complementary missions as they pursue the nation’s peace and security. Both share heavy reliance on information collection, a commitment to the rule of law, the importance of honesty and truth, and independence from political influence in their work. Nonetheless, the danger of conflating the differing means used to achieve parallel goals in these two functional areas has been clear since the inception of modern intelligence gathering after World War II. Aware of the potential for abuse of internal security’s law enforcement activities revealed in authoritarian regimes during World War II, the 1947 statute that created the CIA mandated a separation from domestic intelligence activities with the so-called ‘law enforcement proviso,’ which provides “the Director of the Central Intelligence Agency shall...have no police, subpoena, or law enforcement powers or internal security functions.”<sup>566</sup>

Over the years, this legal separation has been further reinforced by operational constraints that have combined to produce distinct legal, procedural, operational and, cultural differences between the law enforcement and intelligence communities that support the nation’s need for internal and external security. The resulting divide is not well understood and often confusing.<sup>567</sup> This is particularly true when domestic national security concerns arise, where the FBI’s National Security Branch is the lead actor.<sup>568</sup> The functional border between foreign intelligence and law enforcement activities can be especially challenging when matters of foreign intelligence significance arise within domestic borders or involve U.S. persons or interests. Such matters are the responsibility of the FBI, whether the focus is on either foreign intelligence collection or a criminal counterintelligence investigation. In such situations, considerations of national security frequently intersect with law enforcement interests.<sup>569</sup> This tension between overlapping law

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<sup>566</sup> 50 U.S.C. §3036(d)(1) (2020).

<sup>567</sup> A. Benjamin Mannes, *Law enforcement and intelligence agencies are not synonymous*, THE HILL (Apr. 28, 2017), <https://thehill.com/blogs/pundits-blog/homeland-security/330982-law-enforcement-and-intelligence-agencies-are-not>.

<sup>568</sup> This has been the case since the 1970s, when the FBI’s “domestic intelligence division was dismantled”. Zachary Laub, *The FBI’s Role in National Security*, BROOKINGS INST. (June 21, 2017), <https://www.cfr.org/background/fbis-role-national-security>. However, “during the 1990s, Director Louis Freeh increased the FBI’s presence in U.S. embassies diluting, to some degree, the traditional domestic-international divide”. *Id.*

<sup>569</sup> This distinction between the demands for, and authorities supporting, information collection in support of law enforcement purposes arising out of a counterintelligence investigation versus foreign intelligence needs is nowhere more pronounced than in the differing Fourth Amendment standards for surveillance collection under Title III of the Omnibus Crime Control and Safe Streets Act. *See* 18 U.S.C. §§2510-2520 (2020). (requiring probable cause to allow evidence of a crime to be collected). Compare that to the Foreign Intelligence Surveillance Act (FISA). *See* 50 U.S.C. §§1801-1862 (2020) (requiring probable cause that a target is a foreign power or an agent thereof). The tension produced by this overlap has been the focus of extensive judicial and legislative branch consideration since the decision in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972) which led to the original enactment of the Foreign Intelligence Surveillance Act (FISA) in 1978 and its subsequent amendment in response to the 2001 terrorist attacks. *See* James G. McAdams, III, *Foreign Intelligence Surveillance Act (FISA): An Overview* (2006), [https://www.fletc.gov/sites/default/files/imported\\_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf](https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf)

enforcement and intelligence equities is at the center of many issues discussed in this report. It is therefore important to keep in mind the differences between these two functional areas, although a comprehensive review is beyond the scope of this discussion.<sup>570</sup> The following summary highlights potential areas of concern and conflict that may already, or are likely to, result from the president's transfer of declassification authority to the attorney general as he oversees the Durham investigation as well as the 2019 Mueller Report, both of which straddle the divide between law enforcement and foreign intelligence responsibilities.

*ii. Operational Distinctions Between Law Enforcement and Intelligence*

The catalog of differences between the operation of law enforcement and national security activities is large and are result from the different roles that law enforcement and intelligence play. Law enforcement activities are designed to support a specific form of action: a criminal prosecution. They might be described as 'self-executing.' In contrast, intelligence informs policy makers but does not itself take any specific action.<sup>571</sup> This difference in function has produced different laws, regulations, and the rules for managing the collection, analysis, dissemination, and use of information, depending on its intended use, either in support of internal (law enforcement) or external security (foreign intelligence). There are several explanations for the resulting differences.

To begin, law enforcement and intelligence typically operate in distinct geographical arenas, one at home, the other abroad. This means that the likelihood of impacting constitutional rights due to their activities varies significantly. Focused externally, foreign intelligence is typically less likely to impact American citizens. On the other hand, law enforcement is focused internally; by purpose and design it will impact citizens and their rights. This distinguishes operational limitations imposed on intelligence and law enforcement activities, which is necessary to protect their respective impacts on the constitutional and legal rights of citizens.

Second, the different operational location of law enforcement and intelligence collection activities impacts how each is operated and managed. Law enforcement takes place principally within controlled domestic spaces; most foreign intelligence and counterintelligence collection occurs overseas, typically beyond the protection of the nation's security forces.<sup>572</sup> These differences

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("The Church Committee . . . characterized the state of the law in this area as 'riddled with gaps and exceptions', and echoed the call of the 'Keith' court for Congress to create appropriate guidelines for the exercise of foreign intelligence surveillances"). These efforts seek to balance the differing objectives of law enforcement with those of intelligence/counterintelligence collection and analysis, allowing them to coordinate essential security activities while satisfying Constitutional requirements and the need to protect Constitutional rights.

<sup>570</sup> For a comprehensive review of the distinctions between law enforcement and intelligence functions and their overlap in the context of counterintelligence investigations, see generally STEPHEN DYCUS, WILLIAM BANKS, PETER RAVEN-HANSEN, & STEPHEN VLADECK, NATIONAL SECURITY LAW (Wolters Kluwer, 7th Ed., 2020).

<sup>571</sup> Covert action is the one type of intelligence which falls outside of this characterization, since it constitutes a type of action. Even so, it operates only in response to the direction of the President and his national security advisors. See 50 U.S.C. § 3093(a) (2020) ("The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government unless the President determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States").

<sup>572</sup> See DIR. OF NAT'L INTELLIGENCE, *Facts on the Collection of Intelligence Pursuant to Section 702*

translate into different levels of operational risk and a corresponding difference in how the sources of information involved in their respective work can be protected.

Third, the uses intended for the information collected by law enforcement and intelligence differ markedly. Foreign intelligence is collected for external security purposes and those security concerns may dictate that its contents are not disseminated for public consumption. As a result, the sources and methods associated with the collection of foreign intelligence are designed for long-term protection. Beginning in the Truman administration, public release of such information has been carefully controlled pursuant to executive branch regulations currently set forth in Executive Order 13,526.<sup>573</sup> The reverse is true for law enforcement information, which, even when initially secret, is intended for eventual disclosure in a subsequent public legal proceeding.<sup>574</sup>

Fourth, the threats to which law enforcement and foreign intelligence are directed differ in size, severity, and difficulty of collection along a continuum that extends from domestic concerns about individual criminal activity to the existential harm potentially posed by armed external forces. Accordingly, the systems designed to inform about these threats differ in the size, approach, and technical capabilities employed.

Finally, and most importantly, the analytic approaches employed by law enforcement and foreign intelligence are significantly different. Law enforcement is primarily concerned about past events—crimes that have already occurred and can be proven. It employs a form of deductive logic, testing premises about a known criminal event against recognized rules, laws, and theories to meet a high standard of proof, i.e., “beyond a reasonable doubt.” In contrast, intelligence uses inductive logic to predict rather than prove what is most probable, given past experience, identifiable patterns, and expertise. It seeks to paint a picture of the likely future, not to establish past facts.<sup>575</sup> Intelligence uses past events to look forward and anticipate and predict threats that often cannot be known with precision and that can only be analyzed and interpreted over time by analysts with expertise assembled over years and with varying levels of confidence that frequently fall short of the level of prosecutorial certainty required of law enforcement—“beyond a reasonable doubt.” Such intelligence information, combined from different sources into a single

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*of the Foreign Intelligence Surveillance Act*, (June 8, 2013),

<https://www.dni.gov/files/documents/Facts%20on%20the%20Collection%20of%20Intelligence%20Pursuant%20to%20Section%20702.pdf> (“Section 702 cannot be used to intentionally target any U.S. citizen, or any other U.S. person, or to intentionally target any person known to be in the United States”).

<sup>573</sup> Exec. Order No. 13,256 §4.1(a) (2020) (setting forth declassification procedures).

<sup>574</sup> In fact, law enforcement surveillance under Title III must meet a statutory requirement that the target eventually be notified of the existence of the surveillance within a statutorily prescribed time. 28 U.S.C. §2518(8)(d) (2020). Conversely, because of the entirely different national interests served in foreign intelligence collection, to date Congress has resisted such an analogous ‘notice’ provision in FISA, although some have proposed such a provision as a reform in response to the recent disclosure of errors in the FBI’s FISA process revealed by DOJ Inspector General Michael Horowitz. See Ellen Nakashima, *Federal court orders government to assess whether FISA applications were so flawed they should not have been approved*, WASHINGTON POST (Apr. 3, 2020), <https://www.washingtonpost.com/national-security/2020/04/03/federal-court-orders-government-assess-whether-fisa-applications-were-so-flawed-they-should-not-have-been-approved/> (noting that the FBI responded by stating that “we will continue to work closely with the FISC and the Department of Justice to ensure that our FISA authorities are exercised responsibly”).

<sup>575</sup> OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS: THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION* (Jan. 6, 2017) (describing the analytic process used by the Intelligence Community in reaching its conclusions).

finished product, is used to inform analytic judgments expressed in varying degrees of confidence that in turn are provided to policymakers to inform their actions, sometimes even including decisions about the use of force when needed to deter external threats to the nation.

Historically, these fundamental differences, together with the fact that law enforcement and national security functions are managed by different parts of the executive branch under separate authorities, have resulted in limited interaction between both. In fact, for many years the only overlapping area of concern for law enforcement and intelligence occurred when foreign intelligence targets operated in the United States.<sup>576</sup> The resulting counterintelligence (e.g., spying) or foreign intelligence gathering activity occurred under the direction of the FBI because it occurred *inside* the United States, accompanied by a need to protect citizens' constitutional rights. Yet even here, both realms retained a cultural separation because the FBI relies on a law enforcement culture focused on arrest and prosecution rather than the long-term inductive analysis and prediction that characterizes the IC.

The nation's failure to anticipate the attacks of 9/11 and the lack of co-ordination between law enforcement and intelligence it revealed highlighted this long-standing relational separation.<sup>577</sup> It became clear that globalization and the asymmetric threat of international terrorism made existential threats, heretofore confined overseas, possible in the domestic arena as well. To encourage more effective collaboration in their complementary missions, several structural changes resulted.<sup>578</sup> Nonetheless, law enforcement and intelligence remain by design two distinct systems that exist in parallel universes, subject to different laws and procedures. This separation reflects distinct constitutional roles and operational considerations that in turn produced different operational cultures.

With this background in mind, several distinctions between the information relevant to law enforcement authorities and to the IC deserve special attention. They underscore the difference in impact that a public release of secret information can have on the operations of internal and external national security authorities.

First, law enforcement information is intended to become public. It is collected for the purpose of serving as evidence in an open court proceeding where its accuracy can be tested. Such information

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<sup>576</sup> See INTELLIGENCE RESOURCE PROGRAM, *The Need for a Coordinated Response to Global Crime* (Feb. 23, 1996), <https://fas.org/irp/offdocs/int008.html> ("The Department of Justice, the Federal Bureau of Investigation (FBI), and the Drug Enforcement Administration have historically been the lead agencies in U.S. efforts to protect our citizens against transnational wrongdoers, but the Departments of State and Defense, as well as the Intelligence Community, have been given increasingly larger roles since 1980").

<sup>577</sup> See generally, Amy B. Zegart, *September 11 and the Adaptation Failure of U.S. Intelligence Agencies*, 29 INT'L SECURITY 78-111 (Spring 2005), <https://www.jstor.org/stable/pdf/4137498.pdf?refreqid=excelsior%3Afb4a89097192fcdcbf8ecd2e312aa792>.

<sup>578</sup> U.S. intelligence continues to remain primarily focused abroad while law enforcement is focused domestically. Nonetheless, recent legislation has sought to overcome this divide to improve responses to national security threats in the domestic arena. It has created a new Department of Homeland Security and has also attempted to improve the co-ordination of information needed to anticipate and address national security threats at home. See, *Homeland Security Act of 2002*, Pub. L. No. 107-296 (2002); *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56 (2001); *USA Patriot Improvement and Reauthorization Act of 2006*, Pub. L. No. 109-178 (2006); *The Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring (USA FREEDOM ACT) Act of 2015*, Pub. L. No. 114-23 (2015).

is collected with this expectation. The sources and methods employed in its collection are intended for a single use and usually limited to a specific matter, and require only short-term protection.<sup>579</sup> In contrast, most intelligence is collected for long-term use over many years on a range of strategic targets, not simply for one transaction. The sources and methods developed for collecting intelligence information are sophisticated and costly. Loss of such ongoing sources of intelligence, whether human or technical, are not easily re-established.<sup>580</sup> For these reasons, protections afforded intelligence information are carefully managed to achieve protection from *all* disclosures, whether intended or not.

Second, the relative damage from an inadvertent release of information collected by law enforcement and intelligence are not comparable. The differing impact between the loss in law enforcement collection sources and methods and those of intelligence is more than a matter of degree, it is a difference in kind. Unlike law enforcement, intelligence information is designed to protect against often enduring existential threats, not a single criminal activity that can be effectively ended by prosecuting the perpetrator(s).<sup>581</sup> The IC must operate abroad in hostile environments. Consequently, it does not enjoy the protection afforded by the nation's boundaries and domestic law enforcement authorities which defend against threats within those boundaries. In such hostile environments, its collection sources and methods may take years to develop and require vast sums of money.<sup>582</sup> Their loss can be devastating—the death of an agent or destruction of costly collection methods, systems and relationships which often require years to develop and are not be easily replaced, if at all. Because the loss of IC sources and methods poses such significant personal and technical risks, special attention has consistently been given to their protection, and the DNI is explicitly assigned this protective responsibility by Executive Order 12,333, § 1.3(b)(8).<sup>583</sup> In particular, because public acknowledgement of such sources and methods can result in devastating and irreplaceable losses, particular care is given to the process of classification and declassification, again under the explicit direction of the DNI.<sup>584</sup> Further, a

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<sup>579</sup> See Fed. R. Evid. 41 (2020) (describing generally the limited scope of a warrant).

<sup>580</sup> See Josh Mayers, *Why Protecting Sources and Methods Really Matters*, THE CIPHER BRIEF (Jun. 1, 2018), [https://www.thecipherbrief.com/column\\_article/why-protecting-sources-and-methods-really-matters](https://www.thecipherbrief.com/column_article/why-protecting-sources-and-methods-really-matters) (“there is a sacred trust between the source, their handler and the agency the source is reporting to”). Indeed, this trust makes it difficult to replace the “invaluable insight and first-hand observations” that sources can provide. *Id.*

<sup>581</sup> DIR. OF NAT'L INTELLIGENCE, 2019 NAT'L INTELLIGENCE STRATEGY 7 (2019), [https://www.dni.gov/files/ODNI/documents/National\\_Intelligence\\_Strategy\\_2019.pdf](https://www.dni.gov/files/ODNI/documents/National_Intelligence_Strategy_2019.pdf) (describing the scope of the IC's goals, including counterproliferation, anticipatory intelligence, strategic intelligence, and counterterrorism).

<sup>582</sup> See U.S. CONGRESSIONAL RESEARCH SERVICE, UNITED STATES FOREIGN INTELLIGENCE RELATIONSHIPS: BACKGROUND, POLICY AND LEGAL AUTHORITIES, RISKS, BENEFITS, R45720, 21 (May 15, 2019), <https://fas.org/sgp/crs/intel/R45720.pdf> (describing some of the obstacles to intelligence gathering abroad through sources and methods). Cf. NAT'L RESEARCH COUNCIL, INTELLIGENCE ANALYSIS FOR TOMORROW (2011) (discussing the debate over whether to employ more open source intelligence or continue to rely on more difficult secretive sources).

<sup>583</sup> Section 1.3 of E.O. 12,333 describes the DNI's role and authorities, assigning the DNI specific responsibility for protecting intelligence:

(b) In addition to fulfilling the obligations and responsibilities prescribed by the Act, the Director: (8) Shall protect, and ensure that programs are developed to protect, intelligence sources, methods, and activities from unauthorized disclosure; (9) Shall, after consultation with the heads of affected departments and agencies, establish guidelines for Intelligence Community elements for: (A) Classification and declassification of all intelligence and intelligence related information classified under the authority of the Director...” Exec. Order 12333 § 1.3, 46 FR 59941 (Dec. 4, 1981).

<sup>584</sup> Exec. Order 12,333, § 1.3(b)(9)(A) 46 FR 59941 (Dec. 4, 1981).

uniform system for classifying and protecting information “reasonably...expected to cause identifiable or describable damage to the national security” is provided in detail by Executive Order 13,526.<sup>585</sup>

Finally, it bears emphasizing that intelligence sources and methods are exceptionally fragile; they easily fall victim to the efforts to uncover them by ever-persistent, observant, and sophisticated hostile intelligence services. Thus, clues not apparent to the casual observer or members of the law enforcement community may reveal invaluable means of intelligence gathering. Indeed, intimating the fact or contact of information can alone often damage its underlying source or method of collection.

### *iii. Intelligence Equities Must Be Balanced Against Law Enforcement Demands*

The distinctions described in the collection and use of law enforcement and intelligence information have long been acknowledged. For this reason, one of the most important responsibilities of the DNI, shared by the heads of the various subordinate IC agencies, is the protection of such intelligence sources and methods—a responsibility statutorily assigned to the DNI.<sup>586</sup> Thus, a process has been devised to protect the unique nature and importance of national security information when intelligence information becomes relevant to advancing the goals of another executive branch component. Under such circumstances, it is the DNI, *without exception*, that controls the use and release of the requested intelligence information, subject only to presidential review.<sup>587</sup> In this way, the concerns and interests of the IC, often not self-evident to those outside the IC, are subjected to an evaluation in order to balance competing executive branch policy interests. Only with such a process can a public release, unwittingly damaging important IC equities, be avoided.<sup>588</sup>

Notably this tension between the IC and other executive branch actors who seek public use of intelligence information is often present in government litigation, arising when criminal investigations and prosecutions seek to use IC information to support prosecutorial goals in public proceedings. Often, such use of intelligence risks compromising sources and methods in ways not obvious to those without a sophisticated understanding of intelligence collection systems, or perhaps who assign greater importance to executing their own responsibilities than to protecting intelligence sources and methods. To ensure that such disagreements between the various executive branch components are carefully managed, it is the DNI, the individual most acquainted with the risks of declassification to the nation’s security, who must control the release of such classified information for the use of other governmental components, subject only to the president’s review.<sup>589</sup> Only with such a structure, dividing the authority to release intelligence

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<sup>585</sup> Exec. Order 13526, 75 FR 705 (Dec. 29, 2009).

<sup>586</sup> Dir. Of Nat’l Intelligence, Intelligence Community Directive 700, 1-4 (June 7, 2012), [https://www.dni.gov/files/documents/ICD/ICD\\_700.pdf](https://www.dni.gov/files/documents/ICD/ICD_700.pdf) (“National intelligence and intelligence sources, methods, and activities shall be protected”). See, 50 U.S.C. § 3024(i)(1).

<sup>587</sup> See *Dep’t of the Navy v. Eagan*, 484 U.S. 518, 527 (1988), where the Supreme Court held in dictum that “authority to classify and control access to information bearing on national security...flows primarily from this constitutional investment of power in the President and exist quite apart from any explicit congressional grant.”

<sup>588</sup> *Id.* FN 3.

<sup>589</sup> Previous administrations have recognized this role for the DNI. See, e.g., Exec. Order 12333 1.3, 46 FR 59941 (Dec. 4, 1981); Letter from Dir. of Nat’l Intelligence James Clapper to the public concerning the Release of FISA

collected for foreign intelligence purposes in furtherance of domestic activities, can protection of sources and methods be evaluated against other policy objectives. Such a division of authority between the operational components of the federal government protects the competing interests of executive branch agencies and avoids a consolidation of power that might violate long-standing divisions between internal and external security considerations. Now, in stark contrast to this long-standing approach, the president has abdicated his own responsibility and delegated it to the attorney general in a review process all but devoid of standards. Section 2 of the 2019 Presidential Memorandum provides only a fig leaf of intra-branch co-ordination: "Before exercising this authority, the attorney general should, *to the extent he deems it practicable*, consult with the head of the originating IC element or department (emphasis supplied)." <sup>590</sup>

Thus, transferring declassification authority to the attorney general for use in his oversight of the Durham investigation raises unique risks. The inevitable concern is that a high-profile law enforcement activity, political in nature, will override appropriate concerns about the need to protect highly classified intelligence information critical to national security. Beyond this, shifting authority prudently reserved for the DNI, the nation's chief foreign intelligence official, to the attorney general, opens the door to abridging the protections provided by an executive branch structure where power is corralled by distributing it among separate operating entities.

#### *iv. The Special Threat Posed by A Criminal Investigation of Intelligence Activities*

As can be seen, developing information for use as evidence in the investigation of criminal activity differs greatly from using intelligence information to analyze a foreign threat to national security. The distinct analytic approaches used by law enforcement authorities and by the IC are shaped by the purposes for which each of their analyses will be used. This distinction renders it dangerous to subject the IC analytic process to review by law enforcement authorities. Lacking a background in intelligence analysis, prosecutors whose experience is in criminal investigation will almost inevitably employ the decidedly different law enforcement analytic approach. To be sure, Durham's investigation of the Mueller Report by criminal prosecutors avoids this problem for the obvious reasons that Mueller's work was limited to a criminal review. But the scope of Durham's role is much larger than that of Mueller. It not only includes review of the discontinued counterintelligence investigation, but also is charged with review of the IC's analytic processes used to assess Russian efforts to interfere with the 2016 election.<sup>591</sup> A criminal prosecutor without

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Section 702 documents (Aug. 21, 2013) (on file at <https://icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents>).

<sup>590</sup> See Memorandum on Agency Cooperation With Attorney General's Review of Intelligence Activities Relating to the 2016 Presidential Campaigns (May 23, 2019) (on file at <https://www.whitehouse.gov/presidential-actions/memorandum-agency-cooperation-attorney-generals-review-intelligence-activities-relating-2016-presidential-campaigns/>). Others have commented on this concern. The Federation of American Scientists has long followed declassification policy carefully and recently commented critically on the President's deliberate and cavalier disregard for managing national security policy. See Steven Aftergood, *Crisis of Credibility in Secrecy Policy*, *SECURITY NEWS* (June 22, 2020) ("An effective classification system depends on a presumption of good faith on the part of classifiers, checked by independent oversight, and some consensual understanding of the meaning of national security. All these factors are in doubt, absent, or undergoing swift transformation. Meanwhile, classification today is openly wielded as an instrument of political power"). As Aftergood correctly explains, it is the National Security Advisor, subject to the President, who is responsible for managing classification policy.

<sup>591</sup> Sadie Gurman, *Barr Taps Prosecutor to Investigate Origins of FBI Trump-Russia Probe*, *WALL ST. J.* (May 13, 2019), <https://www.wsj.com/articles/barr-taps-prosecutor-to-investigate-origins-of-fbi-trump-russia-probe-11557799239>.

apparent intelligence experience, Durham can be expected to employ the standards of a criminal investigation in examining foreign intelligence, both its approach to collection and analysis.<sup>592</sup> This creates a serious potential for both long- and short-term damage. The specter of a criminal investigation focused on the intelligence analysis process will have a chilling effect on the IC's analytic community.<sup>593</sup> Using criminal standards to evaluate the use of routine intelligence analytic processes, for example, the unmasking of one party to an appropriately intercepted conversation in order to understand its significance, places analysts in the untenable position of having their work evaluated and second-guessed against criminal standards.

Similarly, the opportunity for mischaracterizing the complex and nuanced approaches used by intelligence analysis is real when information is selectively revealed or declassified. A distortion of facts is highly likely, if not inevitable, when information on a given subject is only partially released, whether to protect classified sources or methods, or for political motivations designed to deliberately distort underlying facts.

Such concerns are further exacerbated by the inability of the IC to defend itself and its inability to thoroughly discuss its work publicly, lest sources and methods be revealed. This is now being compounded by an unsupportive president and a newly appointed DNI apparently selected for his political bias.<sup>594</sup> The impact on IC morale from such a situation, notwithstanding a talented workforce and committed leaders like CIA Director Gina Haspel, is predicably negative, as has recently been noted.<sup>595</sup> DNI Ratcliffe's recent decision to terminate in-person briefings of Congress accelerates this effort to muzzle the IC even further.<sup>596</sup> This move attacks the IC's obligation to be open and candid with the Congress. This represents another example of the president's goal of quashing criticism and demonstrates how one person in a senior leadership position, whether DNI or attorney general, can neuter important governmental institutions and eliminate the independent oversight essential to democracy. Ironically, DNI Ratcliffe

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<sup>592</sup> See George Croner, *What Durham Is Investigating and Why It Poses a Danger to US Intelligence Analysis*, JUST SECURITY (Jul. 25, 2020), <https://www.justsecurity.org/71647/what-durham-is-investigating-and-why-it-poses-a-danger-to-us-intelligence-analysis/> (“Durham . . . has no personal experience with intelligence evaluation or analysis. Other than the relatively cursory background investigation afforded those outside the IC as a precondition to gaining access to classified information, it is almost certain that Durham's clearance, even for access to so-called special access programs, consists of little more than the blessing of the attorney general”); see also Liam Stack, *Who Is John Durham, the Prosecutor Investigating the Russia Inquiry*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/us/politics/who-is-john-durham-attorney.html> (describing Durham's experience as a prosecutor).

<sup>593</sup> See George Croner, *What Durham Is Investigating and Why It Poses a Danger to US Intelligence Analysis*, JUST SECURITY (Jul. 25, 2020), <https://www.justsecurity.org/71647/what-durham-is-investigating-and-why-it-poses-a-danger-to-us-intelligence-analysis/> (“One can well imagine how other intelligence sources providing critical foreign intelligence information to the IC will react to this episode”).

<sup>594</sup> Brett Holmgren, *Trump's New Director of National Intelligence Doesn't Understand His Job*, FOREIGN POL'Y, (Jul. 16, 2020), <https://foreignpolicy.com/2020/07/16/john-ratcliffedirector-national-intelligence-trump/> (outlining Ratcliffe's Trump loyalist credentials, which caused his Senate vote to be the closest ever recorded for the post of DNI).

<sup>595</sup> The difficulties and their growing negative impact on the IC are described by Robert Draper in *Unwanted Truths: The Untold Story of President Trump's Battles With the Country's Intelligence Services*, N.Y. TIMES, (Aug. 16, 2020).

<sup>596</sup> See Nicholas Fandos & Julian Barnes, *No More In-Person Election Briefings for Congress, Intelligence Chief Says*, N.Y. TIMES (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/us/politics/election-security-intelligence-briefings-congress.html> (“Lawmakers in both parties worry the move will block their ability to question and test intelligence assessments”).

simultaneously promised to deliver unvarnished facts to the White House at his confirmation hearing.<sup>597</sup> His recent action demonstrates how vacuous such a confirmation hearing commitment can be.<sup>598</sup>

#### b. The Danger of Politicizing Systems for Protecting Classified Information

A second concern arises when the process itself of protecting classified information is compromised by political considerations. This concern is presented by efforts of the DOJ under Attorney General Barr's direction to restrain the June 2020 publication of John Bolton's memoir, *In the Room Where it Happened*, allegedly without completing a standard pre-publication review as required by E.O. 13,256, §4.1(a).<sup>599</sup> The process leading to the memoir's publication has been widely commented upon<sup>600</sup> and may now offer a second opportunity for evaluating Mr. Barr's unprecedented role in protecting intelligence information.<sup>601</sup> Now in litigation filed by the DOJ against Bolton in the U.S. District Court for the District of Columbia, the career staff member responsible for reviewing Bolton's book has provided troubling details. The detailed account of this September 22, 2020, letter describes a politically manipulated process compounded by a litigation strategy designed to mislead witnesses and the District Court itself. Taking advantage of the secrecy needed to protect intelligence information, these efforts have distorted the facts, misleading the judge and the public as well. The September letter now provides insight into the limited public facts leading to the Bolton litigation. Upon the assumption of his position as the president's third national security adviser in April 2018, John Bolton signed various standard non-disclosure agreements, a requirement for all government employees who will be exposed to information classified for reasons of national security. Review of Bolton's memoir pursuant to standard pre-publication review processes was thus a necessary requirement contained in these agreements.

On its face, the prepublication review of John Bolton's book appeared initially to be an unexceptional case of an eager author's failure to conclude prepublication review of a proposed publication as required by standard government non-disclosure agreements for all those who will gain access to classified information as part of their job responsibilities.

Nonetheless, the facts leading up to the DOJ litigation to prevent publication hinted at problems that had occurred in the review procedures used in the case of Bolton's book. Career staff cleared the book for publication only to have their final written conclusion delayed for over a month,

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<sup>597</sup> Julian Barnes & Nicholas Fandos, *Republican Senate Panel Signals Support for John Ratcliffe as Intelligence Chief* N.Y. TIMES (May 5, 2020).

<sup>598</sup> See *id.* ([Republicans] "were also warmer to Mr. Ratcliffe than they were last summer").

<sup>599</sup> Exec. Order No. 13,256 §4.1(a), 75 Fed. Reg. 705 (Dec. 29, 2009).

<sup>600</sup> See Jack Goldsmith & Marty Lederman, *Assessing the Government's Lawsuit Against John Bolton*, Lawfare (June 17, 2020) (explaining the weakness of the government's case against Bolton for a TRO).

<sup>601</sup> Bolton's sophisticated understanding of classification procedures presents a special irony, which may, nonetheless, be legally irrelevant to this litigation. The 2019 ISOO report to the President recounts as ISCAP decision about a dispute arising under Executive Order 13,526 in which then National Security Advisor Bolton successfully obtained ISCAP's approval of the declassification of 61 documents related to the United States' national security policy between 1977-1980, over the objections of both the Departments of State and Defense. INFORMATION SECURITY OVERSIGHT OFFICE, 2019 REPORT TO THE PRESIDENT, Report No. 20408-0001, 9 (2019) (On file at <https://www.archives.gov/files/isoo/reports/2019-isoo-annual-report.pdf>). As the ISOO Report noted, "the ISCAP's ability to evaluate these documents and make declassification decisions on them demonstrates the role the ISCAP can serve in resolving declassification disputes between agencies." *Id.*

apparently to allow a secondary review by a politically-appointed NSC staff member, Michael Ellis.<sup>602</sup> Ellis appeared to have been assigned the task without prior qualification or training.<sup>603</sup> And even before Ellis had received the requisite training for a classification review, he concluded that the manuscript continued to possess classified information.<sup>604</sup> Bolton's failure to wait for written confirmation of the staff's conclusion was said to be proof that the process had never been concluded before Bolton proceeded with publication, but this, too, was an issue not without doubt.

Nonetheless, relying on the apparent determination of career staff, Bolton proceeded unilaterally with plans to publish his book, evidently without communicating his intention directly to the NSC staff. By June 16, possibly responding to press reporting about the expected release date of the memoir, it became known that the NSC staff had not signed off on the clearance process.<sup>605</sup>

In response to press reports that Simon & Schuster planned to release Bolton's memoir on June 23, Mr. Barr took two actions. On June 15, 2020, he presented tacit support for President's Trump's objections to the publication at a press conference where questions about the book were raised. With neither objection or further clarification by Mr. Barr, President Trump offered an expansive assertion about the fact and nature of the highly classified information contained in Bolton's book.

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<sup>602</sup> Previously Ellis served first as General Counsel to the U.S. House of Representative Permanent Select Committee on Intelligence and then as Special Assistant to the President, Senior Associate Counsel to the President. In the second of these positions, he had twice demonstrated a willingness to bend controls for protecting classified information to serve political objectives. See Matt Naham, *Trump Installs Lawyer Who Worked for Rep. Nunes and Don McGahn in Key NSC Role*, LAW AND CRIME (Mar. 3, 2020) (describing the trajectory of Ellis' career). Michael Ellis' prior record for handling classified information showed a willingness to release classified information when politically expedient. Earlier, then as a lawyer in the Office of the White House Counsel, Ellis shared intelligence with Representative Devin Nunes (R-CA) about the national security investigation of Carter Page, with the suggestion that it supported allegations of surveillance of President Trump's campaign team. The information was then publicly released in flagrant disregard of normal IC declassification processes. See Matthew Rosenberg et al., *2 White House Officials Helped Give Nunes Intelligence Reports*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/devin-nunes-intelligence-reports.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&r=0> (noting Ellis' role in the Ukraine phone call scandal). Later, continuing to ignore intelligence requirements if politically useful, Ellis participated in the decision to use an IC document management system designed to protect highly classified information to protect the records of an unclassified conversation between President Trump and Ukraine President Volodymyr Zelensky seen as potentially damaging. See Natasha Bertrand & Daniel Lippman, *Trump loyalist installed in top intelligence post on National Security Council*, POLITICO (Mar. 3, 2020).

<sup>603</sup> Bolton's declaration filed in support of his defense to the requested Temporary Restraining Order (TRO) indicates that new proposed redactions were received on June 16. These were described as "extensive and sweeping" intended to "eliminat[e] passages describing or recounting a significant majority of the President's conversations with his advisors with foreign leaders," as well as "numerous passages portraying President Trump in an unflattering light." While unclear from the declaration, some have assumed that this information was a part of Michael Ellis' sealed classified declaration. See Jack Goldsmith & Marty Lederman, *Notes on John Bolton's Brief Opposing the Government's Motion to Enjoin Publication of His Book*, LAWFARE (June 19, 2020) (describing these assumptions).

<sup>604</sup> See Matt Naham, *DOJ Admits Trump Loyalist Reviewed Bolton Book for Classified Information Before Undergoing Required Training*, LAW & CRIME (June 19, 2020), <https://lawandcrime.com/high-profile/doj-admits-trump-loyalist-reviewed-bolton-book-for-classified-information-before-undergoing-required-training/> ("Ellis started as the National Security Council's Senior Director for Intelligence on March 1, reviewed Bolton's book on June 9, and received required annual training on June 10. After that training was done, Ellis investigated his own work and found no wrongdoing").

<sup>605</sup> See note 594.

In the president's words, "any conversation with me is classified."<sup>606</sup> He added that this would "be a very strong criminal problem," so that "they will soon be in court."<sup>607</sup> The attorney general's answers to additional questions suggested that he may not have been aware that publication was imminent, allowing the inference that the publication release date had caught him by surprise. In any event, his initial answers were somewhat more conciliatory than those of the president. He side-stepped questions about possible litigation and instead focused on his intention to persuade Bolton to complete the book's prepublication review process which both he and the president characterized as "incomplete."<sup>608</sup>

Even though Mr. Barr did not initially threaten litigation at the press conference, perhaps principally to support President Trump's comments, within days the DOJ seemed abruptly to change course when it sought a temporary restraining order ("TRO") to prevent publication of the book. This is a highly unusual step. Typically, even when classified information continues to be included in a proposed publication in violation of prepublication review requirements, legal action taken is not an effort to restrain publication but rather to recover an author's profits, an approach established by *Snepp v. United States*.

By this time Bolton's book had been reviewed by several commentators and was scheduled for discussion on several weekend talk shows designed to encourage sales when the book, already widely distributed, was formally released on June 23. Many wondered why the attorney general would seek a TRO that under the circumstances was so highly unlikely to be granted.<sup>609</sup> To many it appeared an action designed to respond to the president's comments, a legal strategy designed

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<sup>606</sup> POLITICO, Video, *Trump: 'I will consider every conversation with me as president highly classified'* (June 15, 2020), <https://www.politico.com/video/2020/06/15/trump-i-will-consider-every-conversation-with-me-as-president-highly-classified-078094>.

<sup>607</sup> *Id.*

<sup>608</sup> Concerns about the damage from unauthorized release of intelligence sources and methods are not new, but criminal prosecution is highly unlikely for actions such as Bolton's. The nation's communications intelligence and cryptographic activities have been protected for decades under 18 U.S.C. § 798, a statute which, uniquely among espionage laws, theoretically punishes publishing such information without further demonstration of intent to harm national security. *See* 18 U.S.C. § 798 (2020) (providing a potential punishment of 10 years in prison or forfeiture of any property or proceeds from the violation). More recently, Congress reiterated its concern for the protection of classified information when it passed The Intelligence Identities Protection Act of 1982, making it a federal crime for those with access to classified information to identify human sources. *See* 50 U.S.C. §§ 421–426 (2020) (describing the protection of certain national security information).

<sup>609</sup> Additional rationales may support such 'a last minute' TRO. Perhaps the book's release date suggested that the TRO was a bargaining chip to persuade Bolton to remove publication of politically embarrassing material in the memoir. Nonetheless, the litigation may have supported the Trump Administration's efforts to prevent publication of other 'tell all' books. Michael Cohen was retaken into federal custody for refusing to sign an abnormal release agreement preventing him from publishing a book. *See* Emily Jane Fox, *Michael Cohen is out of Jail and Manifesting a Book Deal*, VANITY FAIR (July 23, 2020), <https://www.vanityfair.com/news/2020/07/michael-cohen-is-out-of-jail-and-manifesting-a-book-deal> (discussing how Michael Cohen was perhaps re-jailed for working towards publishing his book). Even outside of the government itself, a member of the Trump family sued Mary Trump for the release of her book about the family's background. Dan Mangan, *Trump brother files new lawsuit seeking to block niece Mary Trump's tell-all book about family*, CNBC (June 27, 2020), <https://www.cnbc.com/2020/06/26/mary-trump-book-presidents-brother-files-suit-seeking-to-block-publication.html>. More recently, the DOJ tried to block the release of a tell-all book by one of Melania Trump's good friends. *See* Lachlan Cartwright & Asawin Suebsaeng, *Trump's Justice Department and Personal Lawyer Threatened Melania's BFF Over Tell-All, Documents Show*, THE DAILY BEAST (Sept. 23, 2020), <https://www.thedailybeast.com/trumps-justice-department-threatened-melania-former-senior-adviser-stephanie-winton-wolkoff-documents-show>

not for success but rather for publicity and as a way of satisfying the president's expressed desire for prosecution and punishment, if not revenge.

It came as no surprise that, in a brief opinion, Senior Judge Royce C. Lamberth denied the DOJ's request for a TRO. Nonetheless, the lawsuit's gamble paid off when surprisingly, in *dicta*, the judge noted the likelihood that the manuscript continued to contain classified information: "[T]he Court is persuaded that defendant Bolton likely jeopardized national security by disclosing classified information in violation of his nondisclosure agreement obligation."<sup>610</sup>

Judge Lamberth went further to suggest that Bolton might have exposed himself to civil and even criminal liability.<sup>611</sup> Although that underlying and fundamental issue had not been fully developed and would have seemed not yet ready for the court's review, Judge Lamberth's confidence in providing his view was apparently based on the four sealed submissions of three senior intelligence officials and that of the Mr. Ellis, NSC political staff member who had undertaken review of the manuscript after career staff had concluded that no sensitive information remained. In contrast, the process for review of the manuscript was not addressed. And, surprisingly the court did not receive a declaration from the career staff member who had initially cleared the manuscript for publication, noted by the court.

Almost immediately, facts leading up to *U.S. v. Bolton* and later brought to light in court filings raised suspicions that review of Bolton's book had been highly unusual, indicating that it was likely to have been politically motivated. Several events preceding the litigation and the law suit itself, seeking the improbable relief of a TRO to prevent publication, suggested an effort to prevent or punish the release of information which might be damaging to the president, possibly without regard to the underlying merits of the review.

In response, Bolton on July 16 moved to dismiss the underlying civil case against him, claiming an abuse of the prepublication review process. Meanwhile, the DOJ, encouraged by the District Court's comments, sought restitution of the book's profits in a motion for summary judgment.<sup>612</sup>

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<sup>610</sup> *United States v. John R. Bolton*, No. 1:20-cv-1580, 2020 U.S. Dist. LEXIS 108360 (D.D.C. June 20, 2020) at \*10. Judge Lamberth denied the motion for a TRO, not on the issue of prior restraint, but on grounds that the government could not prove that a TRO was needed to prevent irreparable harm, given that the manuscript had already been widely distributed. *See Id.* at \*12-\*13. Nonetheless, Judge Lamberth's comments, albeit in *dicta*, were a surprise bonus. Bolton may have won the TRO skirmish, but risks losing all profits when the underlying facts are litigated. *See* 18 U.S.C. 798 (D)(1)(a) (2020) (allowing the government to retain profits "as a result of such violation" of protecting classified information). For case precedent, *see Snapp v. United States*, 444 U.S. 507, 514-16 (1980) (*per curiam*) (holding that the government could force "him [Snapp] to disgorge the benefits of his faithlessness").

<sup>611</sup> *United States v. Bolton*, No. 1:20-cv-1580, 2020 U.S. Dist. LEXIS 108360, at \*2 (D.D.C. June 20, 2020).

<sup>612</sup> The Department of Justice's motion for summary judgment relies on *Snapp v. United States*, 444 U.S. 507 (1980), where in a *per curiam* opinion the Supreme Court upheld the Government's imposition of a constructive trust imposed on all royalties from a book published without the agreed-upon CIA prepublication review. Nonetheless, the facts in *Snapp* may be distinguishable from those in Bolton's case. In that case, Snapp totally failed to submit his book for pre-publication review and may have misled the Government about his intentions to honor the process. In contrast, Bolton did engage in the process, but will likely claim that it was manipulated to his disadvantage for inappropriate political purposes. Here the Supreme Court's language in the *Snapp* opinion may be helpful to him. "The Government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snapp should have given the CIA an opportunity to determine whether the material he proposed to

More ominously, on August 15, 2020, the DOJ opened a criminal investigation into Bolton's actions.<sup>613</sup> Undeterred, Bolton on August 21 asked the court to delay ruling on DOJ's motion for summary judgment to allow the opportunity to conduct discovery to show the Trump administration's abuse of the prepublication review system. The DOJ took the position that no discovery was warranted under so clear cut a case of violating the contractual obligation of Bolton's non-disclosure agreement.

Appearances notwithstanding, at this point the matter looked highly unfavorable for Bolton: he was risking significant financial and possibly even criminal penalties. A highly respected federal judge, Royce C. Lamberth, formerly the Chief Judge of the DC District Court and also the Presiding Judge for the Foreign Intelligence Surveillance Court (1995-2002), with a background as a military lawyer, had commented with concern about his release of classified information in his book. Moreover, Bolton's efforts to raise process concerns about the way in which his prepublication review had been handled as grounds to invalidate the action to recover his profits was being resisted by the DOJ as irrelevant. In fact, constitutional process concerns about the operation of prepublication reviews have been universally rejected.<sup>614</sup>

Then on September 22, 2020, the District Court for the District of Columbia received an unsolicited letter from the lawyer representing Ellen Knight, the NSC official in charge of prepublication review of the Bolton book who would standardly be responsible for prepublication decisions in such a matter.<sup>615</sup> It carefully documented the factual background of prepublication review of Bolton's book. That letter, attached as Appendix G, is a comprehensive review of the events leading up to the Bolton litigation, both the prepublication review process that Ms. Knight managed and for which she was the responsible official, and the efforts employed to persuade her to disavow the work of her staff in a decision on Bolton's book. A brief recitation of the most important facts in the letter is necessary for this discussion but cannot substitute for the eloquent and detailed description of the facts contained in the letter itself.

Ms. Knight, a career employee of the National Archives and Records Administration ("NARA"), is highly qualified in the handling of classification systems, both for classification and declassification. Since 2002, she has held the highest level of security clearances, with original classification authority and one of only six NSC officials also with declassification authority.<sup>616</sup> Her exemplary service of 16 years has resulted in numerous awards; the quality of her work during

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publish would comprise classified information or sources..." *Id.* at 511. In Bolton's case, it remains to be seen how *Snepp* may apply to the government's prepublication review process. Given the instant facts, in the view of a number of commentators, the political manipulation of the process for protecting classified intelligence is undeniable. Jack Goldsmith & Marty Lederman, *Assessing the Government's Lawsuit Against John Bolton*, LAWFARE (June 17, 2020), <https://www.lawfareblog.com/assessing-governments-lawsuit-against-john-bolton>. Goldsmith and Lederman note that "Snepp is not a categorical exception to the presumption against prior restraint. Instead, the facts of Snepp may be particular to a case in which the defendant did not submit his manuscript for prepublication review at all, while Bolton did submit his manuscript, even if he did not complete the process." *Id.*

<sup>613</sup> Katie Brenner, *Justice Dept. Opens Criminal Inquiry Into John Bolton's Book*, N.Y. TIMES (Sept. 15).

<sup>614</sup> See *Edgar v. Ratcliffe*, No. 8:19-cv-985-GJH (D. Md., Apr. 15, 2020) (on appeal).

<sup>615</sup> Letter from Att'ys Representing Ellen Knight to Jennifer B. Dickey, Dep. Assoc. Att'y Gen., et. al, *United States v. John Bolton* (Sept. 22, 2020) (on file at [https://context-cdn.washingtonpost.com/notes/prod/default/documents/75505544-153c-4c36-ac80-e02afded0c4d/note/d219aa7e-6a77-42a8-b68d-fdb96e01a3e8.#page=1](https://context.cdn.washingtonpost.com/notes/prod/default/documents/75505544-153c-4c36-ac80-e02afded0c4d/note/d219aa7e-6a77-42a8-b68d-fdb96e01a3e8.#page=1)) (hereinafter Knight Letter).

<sup>616</sup> *Id.* at 3-4.

almost two years of service as an NSC employee detailed from NARA led to her elevation to Senior Director for Records Access and Information Security Management, with the expectation reinforced as recently as May 22, 2020, that she would be advanced to a permanent NSC position at the conclusion of her two-year detail from NARA.<sup>617</sup>

Ms. Knight and her staff conducted a thorough review of the Bolton book, spending substantial time in person and in phone meetings over a four-month period from December 30, 2019, to April 28, 2020.<sup>618</sup> In the course of this work, Ms. Knight spent countless hours reviewing the manuscript on four separate occasions; she and a colleague actually read the 500 page manuscript four times, as they worked with Bolton and his attorneys to remove classified information and references.<sup>619</sup> In this process, her work, consistent with the prepublication review process, designed to facilitate Bolton's First Amendment rights to publish his book, was a process distinct from either original classification or declassification procedures. Importantly, prepublication reviews differ significantly from both original classification decisions and declassification decisions, the latter of which are explicitly governed by E.O. 13,256, while prepublication review is a matter under the guidance of each agency. In a prepublication review, the work, not of the government, but rather of private individuals with First Amendment rights must be considered.<sup>620</sup> To preserve an author's First Amendment rights, a prepublication review must look for ways to facilitate publication without damage to classified information, a process which relies upon searching the public record for sourcing material or revisions to avoid revealing sources and methods.<sup>621</sup> This is a sensitive and time-consuming process, quite different from decisions made either to classify or declassify sensitive information. The distinctions between these three activities was ignored by Mr. Ellis and his politically appointed superiors.

Satisfied by April 28 that Bolton had complied with her numerous requests and removed all references to sensitive sources and methods, Ms. Knight indicated to Bolton that she had concluded her work on the manuscript.<sup>622</sup> Unlike most prepublication review activities, the process employed in reviewing the Bolton book had been closely monitored by White House lawyers who had even instructed Ms. Knight to communicate only by phone, not in writing, and then later delayed her final decision when they instructed her to advise Bolton that the prepublication review process was "on-going".<sup>623</sup> She then notified the NSC Legal Advisor that the review was complete, and the NSC Legal Office asked Ms. Knight for a copy of the reviewed manuscript, which she provided. Thereafter, for nine days, Bolton made repeated calls to determine the status of his review, each of which Ms. Knight duly forwarded to NSC Legal along with the information that the manuscript was to be published on June 23; the only explanation for the delay in issuing a clearance letter was explained to Ms. Knight as due to other COVID-19 matters. Meanwhile, as instructed, Ms. Knight

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<sup>617</sup> *Id.*

<sup>618</sup> *Id.* at 6.

<sup>619</sup> *Id.*

<sup>620</sup> See Alex Abdo & Meenakshi Krishnan, *Explainer: Prepublication Review and How it Applies to Bolton*, KNIGHT FIRST AMEND. INST. (Jan. 30, 2020), <https://knightcolumbia.org/content/explainer-prepublication-review-and-how-it-applies-to-bolton> (discussing the background of prepublication review process).

<sup>621</sup> See generally Kevin Casey, *Till Death do us Part: Prepublication Review in the Intelligence Community*, 115 COLUMBIA L. REV. 417-460 (Mar. 2015), [https://www.jstor.org/stable/43294628?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/43294628?seq=1#metadata_info_tab_contents).

<sup>622</sup> Knight Letter at 8, *supra* note 610.

<sup>623</sup> *Id.*

followed instructions explaining to Bolton that the process was 'on-going.' Bolton's final call occurred on May 7.<sup>624</sup>

Ms. Knight first became aware that a second prepublication review was being conducted only on June 8, 2020, when she was asked by the NSC Legal Advisor to review a draft letter to Bolton's lawyers, which noted that press reports indicated imminent publication and including a finding that "the current draft manuscript still contains classified material."<sup>625</sup> Stunned at this request, Ms. Knight declined to sign the letter, explaining her objection to its finding. The next day, June 9, 2020, Ms. Knight was asked to arrange Original Classifying Authority ("OCA") training for Michael Ellis, who had recently moved from his position as NSC Deputy Legal Advisor to that of NSC Senior Director for Intelligence Programs, heretofore a position held only by career staff; the training occurred June 10.<sup>626</sup> The letter does not indicate whether Mr. Ellis was instructed on the difference between classification, declassification, and prepublication review responsibilities, but Mr. Ellis appears never to have consulted Ms. Knight on the difference of result he had reached.

Thereafter, between June 9 and 16, Ms. Knight was subjected to an unprecedented series of meetings with NSC lawyers, the Deputy White House Counsel, and lawyers from the DOJ.<sup>627</sup> These meetings extended over five days and twenty hours and included between three and six lawyers at a time questioning Ms. Knight.<sup>628</sup> Her request to have her NARA supervisor, an expert in classification matters, join her was denied, and she was instructed not to share the content of the meetings with him. The focus of this inquisition was a court declaration describing her role in the review process, which ultimately Ms. Knight refused to sign on June 16.<sup>629</sup> In that declaration, Ms. Knight would have claimed that (a) the difference in result of the two prepublication reviews (that of Ms. Knight and Mr. Ellis respectively) was simply a matter of a difference in opinion; (b) her team's review work had been subpar; (c) glossed over the details of a highly irregular review process; and (d) concluded that the manuscript was unpublishable due to the presence of classified information.<sup>630</sup>

In the meantime, Ms. Knight's request to know both how her proposed declaration would be handled and to see the declaration of Mr. Ellis was denied. She was also never advised that three senior intelligence officials had been asked to provide their own declarations about the presence of classified information in the Bolton book but without a full understanding of the context for the request.<sup>631</sup> Although Ms. Knight was suspicious that litigation was contemplated, the lawyers also refused to confirm this or what their strategy for the use of her declaration might involve. On June 16, Ms. Knight indicated that she would not sign the declaration. The next day, June 17, DOJ filed a motion for a TRO without Ms. Knight's declaration or any mention of her objections. The proceedings, conducted in part in closed session, did not make clear what the court may have been told about either the process or the allegations that the Bolton book continued to contain classified

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<sup>624</sup> *Id.*

<sup>625</sup> *Id.* at 9.

<sup>626</sup> *Id.* at 10-11.

<sup>627</sup> *Id.* at 11-15.

<sup>628</sup> Knight Letter at 11-15, *supra* note 610.

<sup>629</sup> *Id.* at 14-16.

<sup>630</sup> *Id.*

<sup>631</sup> *Id.*

information, but the facts in Ms. Knight's letter provide strong indication that the DOJ actively worked to mislead the other declarants as well as the court itself.

On June 22, an automatically generated e-mail advised Ms. Knight of the expiration of her detail to NSC.<sup>632</sup> In an about face and to the apparent regret of the NSC Executive Director, she was also told that there was no future for her at the NSC.<sup>633</sup> As a result, she returned to NARA on August 20.

The administration's lack of respect of the prepublication review process, supported by the DOJ, challenges yet again the integrity and value of all intelligence activities. It is a troubling corollary to the president's decision to transfer declassification authority in the review of the 2016 election from the IC to the attorney general.

Even more troubling is the pattern of manipulation of facts and disregard for legal processes revealed by Ms. Knight's letter. It is doubly concerning that the nation's premier law enforcement organization, the DOJ, would be a party to deceptions orchestrated by a politicized staff at the NSC, designed to mislead career administration officials, the court, the defendant, and the public itself. Far from being an outlier, the litigation over publication of the Bolton book reveals a 'play book' for a DOJ, newly recast, no longer the iconic independent law enforcement entity long revered for its adherence to the rule of law but rather the tool of a politicized administration, prepared to support every whim of a president inclined towards autocratic government. It threatens a move the nation from a government controlled by the rule of law to one that uses law to control, a government of the rule *by* law, a tool subservient to the whims of an increasingly autocratic leader. Such a rule by law system is the hallmark of regimes that are democracies in name but not in fact.

This results-oriented approach thus endangers *both* classified information and the systems designed for its protection. Even more, it is eroding the integrity of the DOJ when asked to defend these actions. All these actions threaten to confuse and undermine long-standing administrative structures established to protect important legal values and vital bureaucratic systems, as well as protected information. By consolidating intra-branch authorities into the hands of the attorney general, important safeguards have been eroded. The resulting concentration of power expands the attorney general's capacity to politicize and abuse processes, not to mention the work of a dedicated and committed IC workforce.

The delegation of intelligence responsibilities to Attorney General Barr threatens to blur the lines between law enforcement and intelligence, a crucial distinction. Additionally, the abuse of the prepublication review process seen in the handling of John Bolton's book suggests widespread politicization of the DOJ to serve a notion of executive power unencumbered by the customary guardrails on intelligence and classification issues.

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<sup>632</sup> *Id.* at 17.

<sup>633</sup> *Id.*

## 8. Other Failures to Prevent DOJ Politicization

### a. Politicization in the Antitrust Division

Our principal focus in this section of this report is DOJ favoritism—and hostility—to private enterprises based on the perceived loyalty of those enterprises or their owners to the president. Some of these cases suggest that official government action is being taken or threatened because someone associated with a business exercised a First Amendment right to criticize the president. Other cases involve the administration, often at the president’s request, taking sides in private business matters to favor companies whose owners who are loyal to the president.

An opening salvo came with the DOJ’s litigation against the Time-Warner/ATT merger under Attorney General Jeff Sessions. This was a weak antitrust suit and one very unlikely to be brought by the DOJ in ordinary circumstances, particularly under a pro-business Republican administration.<sup>634</sup> Time-Warner owned CNN, and President Trump has shown antipathy towards CNN, publicly attacking Time-Warner and opposing the merger.<sup>635</sup> The DOJ litigated the case in court and lost at both the District Court and Appeals Court levels, choosing not to appeal to the U.S. Supreme Court.<sup>636</sup> Attorney General Barr had a prior history with Time-Warner as a member of its Board of Directors, but we are not aware of concrete evidence of how that affected the litigation over the Time-Warner merger.<sup>637</sup>

Mr. Barr’s tenure brought the cannabis antitrust cases that were the subject of House Judiciary Committee testimony on June 24. On June 24, DOJ Antitrust Division official John Elias alleged in whistleblower testimony before the House Judiciary Committee that the DOJ was using antitrust

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<sup>634</sup> However, we recognize that some Republicans are beginning to support more robust antitrust enforcement. See Gilad Edelman, *No, Really—These Republicans Are Serious About Big Tech Antitrust*, WIRED (Aug. 7, 2020), <https://www.wired.com/story/republicans-serious-big-tech-antitrust-armstrong-buck/> (suggesting that Republicans like Kelly Armstrong of North Dakota hint at “a rare glimmer of hope that Congress can, occasionally, work across the aisle”). However, this has faced strong pushback from more traditional business-friendly GOP conservatives. Ashley Gold, *Conservatives aim to cool GOP’s newfound antitrust fervor*, AXIOS (Jul. 29, 2020), <https://www.axios.com/conservatives-aim-to-cool-gops-newfound-antitrust-fervor-32aa023a-6601-4201-8002-a7cce6d84444.html>. See also, Emily Birnbaum, *Cracks are appearing in the bipartisan pushback against big tech*, Protocol (May 13, 2020), <https://www.protocol.com/congress-antitrust-big-tech-bipartisan> (noting that even conservatives who talk about antitrust against big tech failed to support a Democratic merger moratorium plan for the duration of the pandemic). For more information about this emerging faultline on antitrust on the right, see Sagar Enjeti & Marshall Kosloff, *The Realignment* (podcast) (2020), <https://the-realignment.simplecast.com/>; Emily Stewart, *This Republican senator’s radical new plan for the FTC kind of makes sense*, VOX (Feb. 10, 2020), <https://www.vox.com/recode/2020/2/10/21131558/josh-hawley-ftc-doj-google-facebook-proposal>.

<sup>635</sup> A 2016 Trump campaign release suggested that Trump would not allow AT&T to purchase the “wildly anti-Trump CNN”. Hadas Gold, *AT&T Brings Trump Back into Justice Department’s Antitrust Case*, CNN (Sept. 20, 2018). Additionally, President Trump purportedly told Economic Advisor Gary Cohn to block the merger, stating: “I’ve been telling Cohn to get this lawsuit filed and nothing’s happened! I’ve mentioned it fifty times. And nothing’s happened. I want to make sure it’s filed. I want that deal blocked.” See Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 11, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house>.

<sup>636</sup> See Marguerite Reardon & Mike Sorrentino, *Justice Department Won’t Appeal ATT-Time Warner decision*, CNET (Feb. 26, 2019) (noting that the Government decided to accept the court’s claim that there was a lack of evidence showing consumer harm from the merger).

<sup>637</sup> See Ted Johnson, *Trump’s Attorney General Pick Questioned DOJ’s ‘Motivation’ in Opposing AT&T-Time Warner Merger*, VARIETY (Dec. 7, 2018).

investigations as a political weapon against the cannabis industry, which the attorney general dislikes.<sup>638</sup> Elias alleged that Mr. Barr directed the Antitrust Division to launch 10 investigations of proposed cannabis industry merger transactions, despite low levels of market concentration.<sup>639</sup> Elias stated that the motivation for the investigations was not competitiveness but political concern—to intimidate and impose legal costs on an industry because of Mr. Barr’s “personal dislike.”<sup>640</sup>

Perhaps not coincidentally, the cannabis industry is an emerging political force, and its political contributions heavily favor Democrats.<sup>641</sup> Although the marijuana industry is nowhere near as influential as the country’s largest industries, it is expanding quickly and could be a formidable political force in the future.<sup>642</sup> The DOJ’s Office of Professional Responsibility denied any untoward motives, pointing to the cannabis industry as “a unique challenge” that made it “reasonable for ATR to seek additional information from the industry through its Second Request process”.<sup>643</sup> However this could be a smokescreen, as it appears that the DOJ’s Antitrust Division

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<sup>638</sup> *Hearing Before the U.S. House Comm. on the Judiciary*, 116<sup>th</sup> Cong. (2020) (Testimony of John W. Elias). Elias has served under six Attorneys General and three Presidents and decided to become a whistleblower because in his words, “I recognize the imperative for law enforcers to operate even-handedly and in good faith”. *Id.*

<sup>639</sup> *Id.* In fact according to Elias, “staff calculated market shares far smaller than the double-digit shares that ordinarily trigger a full antitrust review”. *See Id.* Nonetheless, despite the lack of potentially concerning consolidation, these investigations made up 1/3 of the Antitrust Division’s cases in 2019. *See* Kyle Jaeger, *Attorney General Wasted DOJ Resources To Investigate Marijuana Mergers Due To Personal Bias, Official Alleges*, MARIJUANA MOMENT (June 23, 2020), <https://www.marijuanamoment.net/attorney-general-wasted-doj-resources-to-investigate-marijuana-mergers-due-to-personal-bias-official-alleges/>.

<sup>640</sup> *See* Chris Sprigman, *What’s Missing in Current and Former Official’s Responses to DOJ Antitrust Whistleblower*, JUST SECURITY, July 16, 2020. <https://www.justsecurity.org/71450/whats-missing-in-current-and-former-officials-responses-to-doj-antitrust-whistleblower/>. *See also* *Hearing Before the House Committee on the Judiciary* (John W. Elias). However, Barr’s approach to marijuana is less stringent than Former AG Jeff Sessions’ hardline stance. *See* Claire Hansen, *Attorney General Barr Calls Current Marijuana Situation ‘Intolerable,’ Indicates Support for Reform Bill*, U.S. NEWS (Apr. 10, 2019) (describing how Barr’s policy ideas differ from Sessions’); *see also* Kurtis Lee, *With Jeff Sessions out at the Justice Dept., the Marijuana Movement Exhales*, L.A. TIMES (Nov. 25, 2018) (noting how Jeff Sessions described marijuana as “a very real danger” and calling him “hardly shy about sharing his anti-marijuana stance”).

<sup>641</sup> *See* OpenSecrets, *National Cannabis Industry Association Summary*, CENTER FOR RESPONSIVE POLITICS (2020), <https://www.opensecrets.org/pacs/lookup2.php?cycle=2018&strID=C00528026>. In 2019, political contributions from the marijuana industry surged. *See* Alex Gangitano, *Marijuana Industry Donations to Lawmakers Surge in 2019: Analysis*, THE HILL (Sept. 12, 2019), <https://thehill.com/business-a-lobbying/461099-marijuana-industry-donations-to-lawmakers-surge-in-2019-analysis>. However, some Republicans have begun to stake out different positions on the marijuana industry. Dana Rohrabacher, long-time Republican Congressman from Orange County, serves on the Board of BudTrader.com. Dana Rohrabacher (@DanaRohrabacher), TWITTER (May 28, 2019, 8:13 PM), <https://twitter.com/DanaRohrabacher/status/1133526843162865664>. Republican Florida Congressman Matt Gaetz supports ending the federal prohibition on marijuana. *See* Veronica Stracqualursi, *‘OK boomer’: Millennial Republican responds to Kellyanne Conway’s concerns about marijuana*, CNN (Nov. 24, 2019), <https://www.cnn.com/2019/11/23/politics/matt-gaetz-kellyanne-conway-marijuana-boomer-cnntv/index.html>.

<sup>642</sup> *See generally* GRANDVIEW RESEARCH, *Legal Marijuana Market Size, Share & Trends Analysis Report By Marijuana Type (Medical, Adult Use), By Product Type, By Medical Application (Cancer, Mental Disorders), And Segment Forecasts, 2020 – 2027* (Feb. 2020), <https://www.grandviewresearch.com/industry-analysis/legal-marijuana-market> (chronicling the high rate of growth).

<sup>643</sup> Memorandum from Jeffrey R. Ragsdale, Dir. and Chief Counsel, DOJ Office of Prof’l Responsibility, to Bradley Weinsheimer, Assoc. Dep. Att’y Gen. (June 11, 2020) (on file with Politico), <https://www.politico.com/f/?id=00000172-e82d-d7d3-afff-f8bdb2ba0000>.

is slowing this high-growth sector down with burdensome investigations.<sup>644</sup> Cannabis industry experts and antitrust attorneys warn that the DOJ could be pursuing “an unofficial policy that pressures the industry through indirect means, such as burdensome antitrust reviews”.<sup>645</sup>

We acknowledge that our campaign finance system is rife with issues and that the problem of political parties catering to certain industries and special interests precedes the Trump administration. But the response should be urging campaign finance reform, not encouraging use of the DOJ Antitrust Division to favor growth of politically supportive industries and stymie those who support the “other side.” Such practices at the DOJ may blunt economic growth and equitable administration of the rule of law.

Also, even if Attorney General Barr’s objection to cannabis is moral, not political, the DOJ Antitrust Division is not the appropriate vehicle for retaliatory political arguments about the morality of marijuana.<sup>646</sup> Protecting consumers and markets should come before any political imperative at the DOJ.

On June 24, 2020, the House Judiciary Committee received testimony from John W. Elias, a career prosecutor in the DOJ’s Antitrust Division.<sup>647</sup> Mr. Elias described two troubling political interventions into law enforcement investigations within the Antitrust Division. One was an unjustified investigation at the direction of Mr. Barr into the conduct of companies operating in the cannabis industry. The second was an improperly initiated investigation into the conduct of a group of automakers who negotiated with the state of California with respect to that state’s emissions regulations at the direction of political appointees a day after President Trump tweeted disapprovingly about the automakers’ actions.<sup>648</sup>

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<sup>644</sup> There is tangible evidence that these investigations depress marijuana industry growth. DOJ second requests “kill a heavy percentage of these deals” according to Akerman partner Larry Silverman. See Craig Behnke & Jeff Smith, *Antitrust issues weigh on US cannabis stocks, but is it enough to unravel deals?*, MARIJUANA BUSINESS DAILY (July 31, 2019), <https://mjbizdaily.com/antitrust-issues-weigh-on-us-cannabis-stocks-but-is-it-enough-to-unravel-deals/> (noting how the DOJ’s reviews are “triggering concerns whether some of the purchases could unravel”). See also Alex Veiga, *MedMen’s Ends Blockbuster Deal Adding to Cannabis Stock Woes*, ASSOCIATED PRESS (Oct. 8, 2019), <https://apnews.com/adffca7180ca41f6bb6faae9ca8b7c88> (“There’s been a delay in M&A activity and that’s prompted investors to step away from the sector until they know M&A activity is going to pick up again” said Bobby Burleson, an analyst with Canaccord Genuity”).

<sup>645</sup> See Barak Cohen & Jon Jacobs, *DOJ Attorney’s House Testimony: Industry “Unpopular” With Attorney General Barr*, PERKINS COIE (June 26, 2020), <https://www.perkinscoie.com/en/news-insights/cannabis-industry-should-expect-continued-federal-antitrust-oversight.html>.

<sup>646</sup> While taking the position that states should have latitude to legislate marijuana, Barr stated that “it’s a mistake to back off on marijuana” and legalize it. Brandi Kellam, *Trump’s attorney general nominee may shift policy on marijuana enforcement*, CBS NEWS (Jan. 18, 2019), <https://www.cbsnews.com/news/william-barr-on-marijuana-legalization-attorney-general-nominee/>. He also stated that he “would still favor one uniform federal rule against marijuana, but if there is not sufficient consensus to obtain that, then I think the way to go is to permit a more federal approach, that states can make their own decisions within the framework of the federal law”. Justin Wingerter, *New Trump attorney general endorses Gardner’s marijuana legalization bill*, DENVER POST (Apr. 10, 2019), <https://www.denverpost.com/2019/04/10/william-barr-cory-gardner-marijuana-legalization/>.

<sup>647</sup> *Hearing Before the U.S. House Committee on the Judiciary*, 116<sup>th</sup> Cong. (2020) (Testimony of John W. Elias), <https://docs.house.gov/meetings/JU/JU00/20200624/110836/HHRG-116-JU00-Wstate-EliasJ-20200624-U8.pdf>. [hereinafter *Elias Antitrust Testimony*].

<sup>648</sup> *Id.*

The mission of the Antitrust Division is to “promote economic competition through enforcing and providing guidance on antitrust laws and principles.”<sup>649</sup> One of the ways in which it achieves these goals is to pre-approve certain “horizontal” mergers (that is, mergers of two or more peer companies within the same industry) in order to prevent such mergers from harming economic competition.<sup>650</sup> Another way is to investigate conduct by companies working together within the same industry to ensure that their joint conduct does not harm economic competition.<sup>651</sup> When the Antitrust Division exercises its powers to take actions to protect competition in each of these ways, it operates within the limits of relevant statutes and with guidelines designed to ensure its actions have a proper basis.<sup>652</sup>

*i. Improper investigations of mergers in the cannabis industry*

Regarding proposed mergers in the cannabis industry, Mr. Elias testified that the Antitrust Division’s “Horizontal Merger Guidelines treat market shares as a key indicator” of whether a proposed merger deserves additional scrutiny.<sup>653</sup> Because that additional scrutiny can require the companies involved to produce many documents and because the companies “have essentially no recourse to challenge” the DOJ’s requests and “cannot complete their proposed mergers until they have complied,” Elias testified, such investigations are “infrequent.”<sup>654</sup> Elias noted that there were 19 such investigations fiscal year 2018 and 31 in fiscal year 2019 out of more than 2,000 proposed mergers submitted for scrutiny in each of those years.<sup>655</sup> In general, Mr. Elias said, “double-digit market shares” are “usually” required to trigger this review.<sup>656</sup>

When career staff of the Antitrust Division applied these standards to a proposed merger at issue in the cannabis industry, they concluded that the cannabis industry itself was “fragmented with many market participants in the states that had legalized the product” and therefore concluded that the proposed merger “was unlikely to raise any significant competitive concerns.”<sup>657</sup> Notwithstanding this, Elias testified, Attorney General Barr ordered the Antitrust Division to conduct additional investigation into the merger based “not on an antitrust analysis, but because he did not like the nature of [the companies’] underlying business.”<sup>658</sup> In a subsequent staff memo, career staff reiterated the view that the merger at issue did not raise antitrust concerns but stated that the investigation was undertaken because the Antitrust Division “had ‘not closely evaluated

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<sup>649</sup> ANTITRUST DIVISION, *About the Division*, UNITED STATES DEP’T OF JUSTICE (Feb. 21, 2020), <https://www.justice.gov/atr/about-division>.

<sup>650</sup> U.S. DEP’T OF JUSTICE, ANTITRUST DIV., HORIZONTAL MERGER GUIDELINES (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>. In a merger situation, if the “effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”, the merger is not allowed. 15 U.S.C.S. § 18.

<sup>651</sup> U.S. DEP’T OF JUSTICE, ANTITRUST DIV., MANUAL 5<sup>TH</sup> ED. (2012), <https://www.justice.gov/atr/file/761166/download>. Such actions are barred by the Sherman Antitrust Act, which prohibits “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”. 15 U.S.C.S. § 1.

<sup>652</sup> *See id* (guiding the enforcement of antitrust law).

<sup>653</sup> *Elias Antitrust Testimony*, *supra* note 642 at 2.

<sup>654</sup> *Id.* at 3.

<sup>655</sup> *Id.* at 2.

<sup>656</sup> *Id.*

<sup>657</sup> *Id.* at 3

<sup>658</sup> *Id.*

this industry before.”<sup>659</sup> Mr. Elias noted that “[t]his rationale – standing alone, without reference to a competition problem—is not described in the Merger Guidelines as a basis for investigating a transaction.”<sup>660</sup> The investigation confirmed the career staff’s assessment of the fragmented nature of the industry and the lack of antitrust concerns with the merger; however, in the intervening time the merger was called off with one of the companies “citing unexpected delays in obtaining regulatory approval.”<sup>661</sup>

Even after this experience, political appointees in the Antitrust Division continued to require staff to investigate mergers in the cannabis industry, leading to nine more such investigations.<sup>662</sup> Ultimately, the cannabis investigations represented nearly a third of all the merger investigations across the entire economy in fiscal year 2019 and required diverting staff from work on other sectors of the economy, such as the telecommunications, technology, and media industries.<sup>663</sup> The extent of the chilling effect of these investigations on development of the cannabis industry is not fully apparent yet, but there is little question about their impropriety. Mr. Elias testified that when career staff raised concerns at an all-staff meeting, the head of the Antitrust Division acknowledged that “the investigations were motivated by the fact that the cannabis industry is unpopular “on the fifth floor,” a reference to Mr. Barr’s offices in the DOJ headquarters building.”<sup>664</sup> As Mr. Elias notes, “[p]ersonal dislike of the industry is not a proper basis upon which to ground an antitrust investigation.”<sup>665</sup>

#### *ii. Improper scrutiny of major automakers*

Mr. Elias also described a similar pattern of improperly predicated antitrust investigations into another set of “unpopular” targets: four major automakers that negotiated with the state of California on a set of emissions regulations in that state.<sup>666</sup> Under well-established legal principles, Mr. Elias testified, “states have wide latitude to regulate” and “companies are free to collectively lobby the government for regulation.”<sup>667</sup>

The deal, announced on July 25, 2019, would undermine the Trump administration’s attempt to entirely undo the Obama administration’s stricter emissions regulations, because the automakers would build all their U.S. cars to meet California’s higher standard.<sup>668</sup> For several weeks afterward, the White House reportedly held a number of meetings pressuring other automakers not to join the four already announced.<sup>669</sup> At one such meeting, President Trump reportedly “went so far as to propose scrapping his own rollback plan and keeping the Obama regulations, while still revoking

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<sup>659</sup> *Id.* at 4

<sup>660</sup> *Id.*

<sup>661</sup> *Id.*

<sup>662</sup> *Elias Antitrust Testimony, supra* note 642 at 5.

<sup>663</sup> *Id.* at 5-6.

<sup>664</sup> *Id.*

<sup>665</sup> *Id.*

<sup>666</sup> *Id.* at 6.

<sup>667</sup> *Id.*

<sup>668</sup> Coral Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal With California*, N.Y. TIMES (Jul. 25, 2019), <https://www.nytimes.com/2019/07/25/climate/automakers-rejecting-trump-pollution-rule-strike-a-deal-with-california.html>.

<sup>669</sup> Coral Davenport & Hiroko Tabuchi, *Trump’s Rollback of Auto Pollution Rules Shows Signs of Disarray*, N.Y. TIMES (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/climate/trump-auto-emissions-rollback-disarray.html>.

California’s legal authority to set its own standards.... The president framed it as a way to retaliate against both California and the four automakers in California’s camp....”<sup>670</sup> Indeed, President Trump’s administration revoked California’s authority to revoke the waiver provided to California under the 1970 Clean Air Act that allowed it to set tougher regulations than those promulgated by the federal government.<sup>671</sup>

On August 21, 2019, President Trump tweeted that “Henry Ford would be very disappointed if he saw his modern-day descendants wanting to build a much more expensive car, that is far less safe and doesn’t work as well, because execs don’t want to fight California regulators.”<sup>672</sup> The next day, August 22, 2019, Mr. Elias testified, “Antitrust Division political leadership instructed staff to initiate an investigation that day.”<sup>673</sup> Mr. Elias further explained that “[o]rordinarily, decisions of import—here, an investigation of a \$630 billion automobile market—take time and care to evaluate.” Additionally, he noted that career enforcement staff requested “time to perform their own analysis and requested a delay in going overt with the investigation.”<sup>674</sup> Instead, on August 28, the head of the Division personally wrote to the four automakers to notify them of the DOJ investigation.<sup>675</sup> The investigation was publicly reported on September 6, and it appeared to have an immediate chilling effect: “after the German government learned of the federal investigation into the other companies that had signed on, it warned Mercedes[-Benz] not to join.”<sup>676</sup>

Mr. Elias testified that “[w]hen news of the investigation became public and spread within the Antitrust Division, many [Antitrust Division staff] ... questioned why the Division was investigating conduct that appeared to be prompted by a state regulator.”<sup>677</sup> The head of the division responded with an all-staff e-mail stating that “he ‘strongly believe[s] that the division has a basis to investigate and that the standards for opening a preliminary investigation were more than satisfied based on the available facts.’”<sup>678</sup> The next day, he published an op-ed in *USA Today* that, while not mentioning the automaker investigation specifically, appears to seek to defend the investigation, stating that “media personalities and politicians recently have levied the charge of ‘politicization’ of antitrust in light of enforcement scrutiny that may not align with their political objectives.”<sup>679</sup> The op-ed implicitly characterizes the criticism of the division’s investigation as stemming from a view of the automakers’ conduct as serving a “laudable goal,” which the op-ed

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<sup>670</sup> *Id.*

<sup>671</sup> Coral Davenport, *Trump to Revoke California’s Authority to Set Stricter Auto Emissions Rules*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/17/climate/trump-california-emissions-waiver.html>.

<sup>672</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 21, 2019, 7:01 PM), <https://twitter.com/realdonaldtrump/status/1164311594081247233?lang=en>.

<sup>673</sup> *Elias Antitrust Testimony*, *supra* note 642 at 7.

<sup>674</sup> *Id.*

<sup>675</sup> David Shepardson, *U.S. launches antitrust probe into California automaker agreement*, REUTERS (Sept. 6, 2019), <https://www.reuters.com/article/us-autos-emissions/u-s-launches-antitrust-probe-into-california-automaker-agreement-idUSKCN1VR1WG>.

<sup>676</sup> Hiroki Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html>.

<sup>677</sup> *Elias Antitrust Testimony*, *supra* note 642 at 7.

<sup>678</sup> *Id.*

<sup>679</sup> Makan Delrahim, *DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion*, USA TODAY (Sept. 12, 2019), <https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/>.

says is not a proper reason for the Antitrust Division not to take “ a good, hard look.”<sup>680</sup> However, the op-ed does not address the well-established legal principles of state regulation and the right to collective lobbying raised by career staff and other commentators.

By November, one of the main critical facts needed to sustain the antitrust investigation as initially described was found lacking: each of the four automakers affirmed in response to a subpoena that they “had independently entered into an agreement with California; there was no group agreement.”<sup>681</sup> Rather than drop the investigation, however, “political leadership instructed staff to examine an announcement by California that it would purchase state vehicles only from automakers that comply with the stricter fuel efficiency standards.”<sup>682</sup> Mr. Elias noted that “[w]hen operating as a market participant, states have wide latitude to determine their own purchases” and that California’s annual purchase of fewer than 2,700 vehicles in a state of nearly 40 million people did not confer it with the market power that could lead to antitrust liability.”<sup>683</sup> In February 2020, the Antitrust Division notified the four automakers that it was ending its investigation, “deciding that the companies had violated no laws.”<sup>684</sup>

In August 2020, five automakers—the original four, plus one more—finalized an agreement on emissions standards with the state of California.<sup>685</sup> California is challenging the revocation of its authority to regulate in court.<sup>686</sup>

### *iii. Potentially premature complaint against Alphabet, Google’s parent company*

In May 2019, it was reported that the DOJ was considering opening an antitrust case against Google.<sup>687</sup> In August 2019, Google disclosed that it had received a formal request for information from the DOJ relating to a prior investigation.<sup>688</sup> Around the same time, Attorney General Barr hired a member of the Antitrust Division’s political staff to work in his office as liaison to the cases.<sup>689</sup> In February 2020, it was reported that the head of the Antitrust Division, Makan Delrahim, had recused himself from the ongoing investigation of “allegations of anticompetitive

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<sup>680</sup> *Id.*

<sup>681</sup> *Elias Antitrust Testimony*, *supra* note 642 at 8.

<sup>682</sup> *Id.*

<sup>683</sup> *Id.*

<sup>684</sup> Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions*, N.Y. TIMES <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>.

<sup>685</sup> <https://www.nytimes.com/2020/08/17/climate/california-automakers-pollution.html>. Mercedes-Benz was not among these automakers. See Stanley Young, *Framework Agreements on Clean Cars*, CALIF. AIR RESOURCES BOARD (Aug. 17, 2020), <https://ww2.arb.ca.gov/news/framework-agreements-clean-cars> (listing automakers covered under the framework arrangement).

<sup>686</sup> See *id.* (“California is engaging in litigation to restore its authority to protect the public health of its residents”).

<sup>687</sup> Cecilia Kang, Katie Benner, & Jack Nicas, *Justice Dept. Explores Google Antitrust Case*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/business/google-antitrust-justice-department.html>. Google controls 92.05% of the search engine market share. STATCOUNTER, Search Engine Market Share Worldwide Aug 2019-Aug 2020 (Sept. 2020), <https://gs.statcounter.com/search-engine-market-share>.

<sup>688</sup> Alphabet Inc., Current Report (Form 8-K) (Aug. 30, 2019), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1652044/000165204419000025/form8-kdojcid.htm>.

<sup>689</sup> David McCabe & Cecilia Kang, *Barr’s Interest in Google Antitrust Case Keeps It Moving Swiftly*, N.Y. TIMES (Jun. 25, 2020), <https://www.nytimes.com/2020/06/25/technology/barr-google-investigation.html>; UNITED STATES DEP’T OF JUSTICE, *Division Update Spring 2019 New Members of the Front Office* (Apr. 2019), <https://www.justice.gov/atr/division-operations/division-update-spring-2019/new-members-front-office>.

practices at Google.”<sup>690</sup> Oversight of the investigation was initially said to be shifted to a deputy in the Antitrust Division and an attorney in the Office of the Deputy Attorney General.<sup>691</sup>

In June 2020, it was reported that, among other internal shifts, “staff members appear to have begun drafting a case memo to test [the Justice Department’s] legal argument.”<sup>692</sup> Around the same time, Mr. Barr shifted his public statements about the general issue. In his confirmation hearing in January 2019, Mr. Barr said “I don’t think big is necessarily bad, but I think a lot of people wonder how such huge behemoths that now exist in Silicon Valley have taken shape under the nose of the antitrust enforcers.”<sup>693</sup> On June 21, 2020, he offered antitrust enforcement as a solution to the perceived problem of tech companies suppressing conservative viewpoints. In an interview, he claimed: “These companies held themselves out as open to all-comers. That’s what led people to join and to get the strong market position they have.”<sup>694</sup> But, he stated, the companies engaged in a “bait and switch.”<sup>695</sup> “They are only presenting one viewpoint and they can push the public in a particular direction very quickly. One way this can be addressed is through the antitrust laws and challenging companies that engage in monopolistic practices.”<sup>696</sup>

On September 3, 2020, it was reported that Mr. Barr “overruled career lawyers who said they needed more time to build a strong case” against Google, and that the case would be filed within weeks.<sup>697</sup> Specifically, it was reported, “most of the 40-odd lawyers who had been working on the investigation opposed the deadline,” “[s]ome said they would not sign the complaint, and several of them left the case this summer.”<sup>698</sup> In addition to “disagreements about tactics, career lawyers also expressed concerns that Mr. Barr wanted to announce the case in September to take credit for action against a powerful tech company under the Trump administration.”<sup>699</sup> According to reports, “[s]ome lawyers in the department worry that Mr. Barr’s determination to bring a complaint this month could weaken their case and ultimately strengthen Google’s hand,” and indeed “Google’s lawyers hope to seize on Mr. Trump’s politicization of the matter should the Justice Department sue the company.”<sup>700</sup>

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<sup>690</sup> Cecilia Kang, *Top Antitrust Official Is Said to Recuse Himself From Google Inquiry*, N.Y. TIMES (Feb. 3, 2020), <https://www.nytimes.com/2020/02/03/technology/makan-delrahim-antitrust-google-tech.html>. Mr. Delrahim had lobbied for Google while it was seeking to acquire the advertising company DoubleClick, which could have posed a potential conflict of interest. *Id.*

<sup>691</sup> *Id.*

<sup>692</sup> *Id.*

<sup>693</sup> Dan Primack, *Barr confirmation hearing highlights Big Tech antitrust fears*, AXIOS (Jan. 17, 2019), <https://www.axios.com/bill-barr-confirmation-hearing-big-tech-antitrust-fe535feb-8980-4d47-94fa-15bb564e84de.html>.

<sup>694</sup> Interview by Maria Bartiromo with William Barr, Att’y Gen. (Jun. 21, 2020), <https://video.foxbusiness.com/v/6166149301001/#sp=show-clips>; Leah Nysten, *Facebook ad boycott gains steam*, POLITICO MORNING TECH (Jun. 22, 2020), <https://www.politico.com/newsletters/morning-tech/2020/06/22/facebook-ad-boycott-gains-steam-788699>.

<sup>695</sup> *Id.*

<sup>696</sup> *Id.*

<sup>697</sup> Katie Benner & Cecilia Kang, *Justice Dept. Plans to File Antitrust Charges Against Google in Coming Weeks*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/09/03/us/politics/google-antitrust-justice-department.html>.

<sup>698</sup> *Id.*

<sup>699</sup> *Id.*

<sup>700</sup> Benner & Kang, *supra* note 692.

While it may be too soon to judge whether the case against Google represents an appropriate exercise of the attorney general's authority to direct the priorities and resources of the DOJ, the pattern of politicized antitrust enforcement seen in the cannabis and California automaker matters dictates that future steps by the DOJ be carefully scrutinized.

b. Hatch Act violations

In this section of the report, the Working Group addresses whether Attorney General Barr's actions in the Ukraine scandal and in the June 1, 2020, Lafayette Square photo-op violate the Hatch Act.<sup>701</sup>

The Hatch Act, 5 U.S.C. § 7323, prohibits federal employees from using their official positions to influence a partisan election. The Standards of Ethical Conduct for Employees of the Executive Branch prohibit federal employees from using their public office for the private gain of another or to endorse a nongovernmental enterprise.<sup>702</sup>

In June 2020, one of the chairs of the Working Group, Richard W. Painter, submitted to the Office of Special Counsel ("OSC") and to the Office of Government Ethics ("OGE") a complaint about violations of the Hatch Act and federal ethics rules by Attorney General William Barr and other senior officials in the administration. At issue were violations by Mr. Barr of the Hatch Act as well as misuse of official position, 5 CFR 2635.702, by the attorney general and other DOJ officials in connection with President Trump's presidential campaign photo opportunity that took place outside St. John's Church adjacent to Lafayette Square from approximately 7:01 PM to 7:06 PM on June 1, 2020. There appear to have been violations of the Hatch Act as well as misuse of official position by White House officials who were involved in preparation for this campaign event. Furthermore, Mr. Barr and other DOJ employees apparently violated the Hatch Act and misused their official positions in violation of 5 CFR 2635.702 in the Ukraine matter. The complaint refers to President Trump's request in his telephone call with the president of Ukraine that Ukrainian officials contact both Mr. Barr and Rudy Giuliani, Trump's campaign lawyer, about investigating Joe Biden and his son Hunter, as well as origins of the truthful accusation that Russia interfered in the 2016 election. These are matters principally of interest to Trump's 2020 re-election campaign.

Finally, even after these events and Professor Painter's complaint, Attorney General Barr continued to use his official position to assist with President Trump's re-election campaign. As discussed in Section 6b of this report, the U.S. Attorney for the Southern District of New York, Geoffrey Berman, was removed in June 2020 in the middle of several investigations that were sensitive to the Trump campaign, including the Jeffrey Epstein investigation. Mr. Barr may have had a role in the Roger Stone sentence commutation discussed in Section 4b of this report, although he said that he protested. The Durham counter-investigation appears to be designed to generate an "October surprise," perhaps even in an indictment, to discredit the Mueller investigation and the origins of the Russia investigation. In multiple ways, Mr. Barr has devoted a substantial portion of this term as attorney general beginning January 2019 to the re-election of Donald Trump.

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<sup>701</sup> See Letter from Richard Painter, Professor, to Henry J. Kerner, Special Counsel & Emory A. Rounds III, Director, Office of Gov. Ethics, *Hatch Act Complaint* (June 15, 2020) (on file at <https://www.law.upenn.edu/live/files/10561-painter-complaint-hatch-act>).

<sup>702</sup> 5 C.F.R. § 2635.702 (2020).

Violations of the Hatch Act and of OGE ethics rules are not permissible, including by an executive branch official acting under orders from elected officials such as the president who are exempt from parts of the Hatch Act and OGE ethics rules. Hatch Act violations and ethics violations are of particular concern in the DOJ, which is responsible for upholding and enforcing federal law. An aggravating factor in the Lafayette Square incident is that the Hatch Act and ethics violations included, among other things, giving orders for use of force by federal officers to remove peaceful unarmed civilians exercising their First Amendment right to political speech in space adjacent to a hastily planned political event. An aggravating factor in the Ukraine incident is that the Hatch Act and ethics violations included not only collaboration between Attorney General Barr and Giuliani but also proposed collaboration with a foreign government.

These are not typical Hatch Act violations. Still, these violations are more egregious than more routine cases Trump’s campaign lawyer e.g., Kellyanne Conway promoting Ivanka Trump’s clothing in official capacity television interviews or attacking Democratic candidates before T.V. cameras while standing on the White House lawn. The Lafayette Square incident is a situation where violent and probably illegal official government actions were used to support a political campaign and accomplish no legitimate federal purpose. The Ukraine matter resulted in use of the foreign policy of the United States to attempt to coerce a foreign power into aiding a political campaign. In cases such as this, Hatch Act violations can have a great impact on public confidence in our federal government.

c. Recusal at the Department of Justice

Rules of professional responsibility that apply generally to all attorneys, particularly rules dictating when lawyers should recuse from certain cases, can help mitigate some issues with politicization. However, history suggests that many DOJ attorneys who are political appointees are on at least some occasions confronted with an insurmountable conflict between representation of their client—the United States—and political and personal loyalties in the political party through which they likely obtained their DOJ position, and in some cases their political and personal loyalties to the president. Some of these DOJ attorneys also have conflicts with their own personal interests. And yet recusal in such cases is not widespread.

Rules of professional conduct are binding on DOJ attorneys by statute.<sup>703</sup> This statute also directs the attorney general to “make and amend rules of the DOJ to assure compliance with” this provision.<sup>704</sup> While different states have different rules of professional responsibility, many look to ABA Model Rule 1.7:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

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<sup>703</sup> See 28 U.S.C. §530B (2020) (providing that “[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where the attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in the State”).

<sup>704</sup> *Id.*

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>705</sup>

A DOJ lawyer appointed by the president and a subordinate DOJ lawyer having a political appointment run the risk of a concurrent conflict of interest under Rule 1.7 for two reasons. First, there are the lawyer's actual or perceived responsibilities to the political party of the president and to the president himself in his personal and partisan political capacity as distinct from his official capacity as head of the executive branch. Second, there are the personal interests of the lawyer. Both can be sources of conflict of interest.

It is one thing for a DOJ attorney to support the official policies of the president, which may be drawn from the platform of a political party or from campaign promises. It is quite another for a DOJ attorney to support an official action at the DOJ that is directly intended at benefiting a political party, influencing an election, or benefiting the president in his personal capacity, such as the president's business interests.

Furthermore, even official policies promoted by the president—for example arresting people without probable cause or using torture on detainees—may in some instances be illegal.<sup>706</sup> In that case, the DOJ lawyer must put loyalty to the Constitution and laws of the United States before loyalty to the president, even in his official capacity.

Time and again, DOJ lawyers who are political appointees have found themselves pressured to act to further the personal and political interests of the president, or illegal official policies of the president, rather than the interests of the United States, their client. Long before Mr. Barr's second stint as attorney general, some DOJ lawyers have succumbed to this pressure. Robert Bork's firing of special prosecutor Archibald Cox in 1974 might be one example, the infamous torture memos written by OLC lawyer John Yoo another, and Eric Holder's questioning of OLC opinions regarding gun control in D.C. can be seen as yet another.<sup>707</sup> One attorney general—John Mitchell—went to jail for putting the personal and political interests of the president above his duty to uphold the laws of the United States.<sup>708</sup> In this report we discuss instances in which Mr. Barr and other political appointees at DOJ are pressured by President Trump to advance his personal and

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<sup>705</sup> MODEL CODE OF PROF'L CONDUCT 1.7 (AM. BAR ASS'N 2020), available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_7\\_conflict\\_of\\_interest\\_current\\_clients/#:~:text=\(2\)%20there%20is%20a%20significant,personal%20interest%20of%20the%20lawyer](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/#:~:text=(2)%20there%20is%20a%20significant,personal%20interest%20of%20the%20lawyer) (emphasis supplied).

<sup>706</sup> See e.g., *United States v. Nixon*, 418 U.S. 683, 707 (1974) (“The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III”). For a more modern look, see e.g. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that Bush administration attempts to use tribunals at Guantanamo Bay violated the Uniform Code of Military Justice).

<sup>707</sup> Benjamin Wittes, *John Yoo Interrogation Memo*, Op-ed, BROOKINGS INST. (Apr. 5, 2008), <https://www.brookings.edu/opinions/john-yoo-interrogation-memo/>; Kenneth Noble, *Bork Irked by Emphasis on His Role in Watergate*, N.Y. TIMES (Jul. 2, 1987), <https://www.nytimes.com/1987/07/02/us/bork-irked-by-emphasis-on-his-role-in-watergate.html>; WALL ST. J., *Alberto Holder* (Apr. 2, 2009), <https://www.wsj.com/articles/SB1238863025435480649>.

<sup>708</sup> See Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASHINGTON POST (Nov. 10, 1988), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/stories/mitchobit.htm> (noting that Mitchell was “the only United States attorney general to serve a prison sentence”).

political interests or official policies that are illegal. And based on what we observe, some of these DOJ lawyers are doing just that.

This brings us to the second conflict—the personal interests of the lawyer. DOJ lawyers who are political appointees—whether appointees of the president or subordinates—do not have job protection. They can be removed at will by the president or a senior DOJ official who is appointed by the president. These DOJ lawyers obtained their job through close personal ties to other lawyers who are politically aligned with the president, and these ties are valuable going forward either when they return to the private sector or in obtaining future government jobs, up to and including lifetime judicial appointments.

Our concern is that far too often, DOJ lawyers do not recuse even in situations where it is virtually impossible to loyally represent the United States, including the president in his official capacity, because of these conflicts of interest. We have seen this problem in several parts of the DOJ including OLC, where politically slanted opinions tell the White House what it wants to hear rather than what the law is. The 2002 torture memos were the most blatant example, although we believe that OLC is advising the Trump administration on many of the very questionable actions described in this report.<sup>709</sup> Problematically, much, if not all of this advice is never made public because many OLC opinions are not publicly disclosed.<sup>710</sup>

Similar conflicts of interest enter into criminal prosecutions. Here, in addition to the general conflict of interest principle in Model Rule 1.7, specific ethics rules and DOJ guidelines apply. More specifically, we address here the failure of Mr. Barr himself to recuse from the Russia investigation and the Ukraine investigation. Members of our Working Group were nearly unanimous in thinking Mr. Barr should have recused himself from the Russia investigation. Our group was of mixed views with respect to whether Mr. Barr also should have recused himself from the Ukraine investigation.

#### *i. Russia Investigation*

Attorney General Barr faced insurmountable conflicts of interest that should have caused him to follow the lead of his predecessor, Attorney General Jeff Sessions, and recuse himself from supervising Robert Mueller’s work or any other aspect of the Russia investigation. Mr. Barr testified in his Senate confirmation hearing that “under the regulations, I make the decision as the

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<sup>709</sup> As we note, this erosion of OLC is not entirely new but is worsening under Trump. See Shalev Roisman, *The Real Decline of OLC*, JUST SECURITY (Oct. 8, 2019), <https://www.justsecurity.org/66495/the-real-decline-of-olc/> (arguing that OLC’s expanded involvement weakens its longer term legitimacy). The Trump administration, for instance, seems to be heavily reliant on OLC material to defend its questionable actions. See Charlotte Butash & Hilary Hurd, *OLC on Presidential Power, According to Trump’s Impeachment Defense*, Lawfare Blog (Feb. 11, 2020) (“as the executive’s branch top legal shop, OLC has an institutional incentive across administrations to interpret the law in ways that enhance executive power ... the frequency with which the trial memorandum relies on OLC opinions is striking”).

<sup>710</sup> Daniel Van Schooten & Nick Schwellenbach, *Justice Department's "Secret Law" Still Prevalent, Documents Show*, POGO.ORG (Mar. 22, 2017), <https://www.pogo.org/investigation/2017/03/justice-departments-secret-law-still-prevalent-documents-show/>.

head of the agency as to my own recusal.”<sup>711</sup> He made it clear that he would not follow the ethics officials' recommendation should he disagree with their advice. Federal employees have some discretion as to whether to recuse from specific matters that give rise to the appearance of a loss of impartiality. But the employee choosing not to recuse must not believe it would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter. Once a federal employee consults with career ethics officials on whether to recuse from a matter, he is bound by the judgment of those ethics officials. Federal law requires that the “employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee.”<sup>712</sup> Such an authorization can be premised on a determination that the agency’s interest outweighs the appearance of a loss of impartiality and authorize the employee’s participation. But agency ethics officials, not the employee with the apparent conflict of interest, are to determine whether the authorization is appropriate.

Although Attorney General Barr consulted with DOJ ethics officials on the Russia matter as he told the Senate committee he would do,<sup>713</sup> no written ethics advice from DOJ career ethics officials has been made publicly available. Rather than publicizing the agency ethics official’s advice, which would normally include a detailed analysis providing the basis for the determination, the DOJ merely issued a brief statement that “senior career ethics officials advised that [Attorney] General Barr should not recuse himself from the Special Counsel's investigation.”<sup>714</sup>

Some have suggested that Mr. Barr’s prior work for clients with ties to Russia or financial interests in companies with such ties should have led to his recusal.<sup>715</sup> According to Barr’s ethics agreement, prior to assuming the role of attorney general he divested from at least one of these financial interests.<sup>716</sup> We have reviewed the factual background concerning these clients and financial interests and do not conclude that Mr. Barr’s or Kirkland and Ellis’s work for these clients or these past financial interests alone would require recusal of Mr. Barr from the Russia investigation.

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<sup>711</sup> Matthew Choi, *Key moments from William Barr's confirmation hearing*, POLITICO (Jan. 15, 2019), <https://www.politico.com/story/2019/01/15/key-moments-barr-promises-to-protect-mueller-special-counsel-1101410>.

<sup>712</sup> 5 CFR § 2635.502 (2020)

<sup>713</sup> Meg Wagner, Veronica Rocha, & Amanda Wills, *Trump's attorney general pick faces Senate hearing*, CNN (Jan. 16, 2019), [https://www.cnn.com/politics/live-news/william-barr-confirmation-hearing/h\\_7e6bce8f8e66868590a0ee2ffe6b86ce](https://www.cnn.com/politics/live-news/william-barr-confirmation-hearing/h_7e6bce8f8e66868590a0ee2ffe6b86ce). See 5 C.F.R. § 2635.102(b) (“Any provision that requires a determination, approval or other action by the agency designee shall, where the conduct in issue is that of the agency head, be deemed to require that such determination, approval or action be made or taken by the agency head in consultation with the designated agency ethics official.”)

<sup>714</sup> Laura Jarrett, *Attorney General Bill Barr won't recuse from oversight of Russia investigation*, CNN (Mar. 4, 2019), <https://www.cnn.com/2019/03/04/politics/bill-barr-attorney-general-recuse-russia-investigation-mueller-oversight/index.html>.

<sup>715</sup> Cristina Maza, *Should William Barr Recuse Himself From Mueller Report? Legal Experts Say Attorney General's Ties to Russia Are Troubling*, NEWSWEEK (Apr. 15, 2019), <https://www.newsweek.com/so-many-conflicts-so-little-time-1396435?fbclid=IwAR0D->.

<sup>716</sup> Lee J. Lofthus, Letter to Emory A. Rounds, III regarding the financial disclosure report of William P. Barr (Jan. 11, 2019), <https://www.documentcloud.org/documents/6446467-Attorney-General-William-Barr-Ethics-Agreement.html>.

On the other hand, Mr. Barr should have recused himself from the Russia investigation because he already had been personally and substantially involved in the Russia investigation itself.<sup>717</sup> This substantial involvement included a 19-page memo that Mr. Barr prepared concerning the Russia investigation, a meeting he had with President Trump concerning Mr. Barr's potential employment as Trump's private counsel in the Russia investigation, and public statements made by Mr. Barr about the Russia investigation.

As a private sector lawyer Mr. Barr submitted to Deputy Attorney General Rod Rosenstein a supposedly unsolicited 19-page memorandum dated June 8, 2018, titled "Mueller's 'obstruction' theory."<sup>718</sup> In it, Mr. Barr argued that what he viewed as Mueller's interpretation of the obstruction of justice statute was unconstitutional. Mr. Barr then sent copies of the memo to members of Trump's White House legal team and other DOJ officials such as Solicitor General Noel Francisco. Mr. Barr also apparently provided or discussed the memo with Jared Kushner's personal attorney and several members of President Trump's personal legal team.<sup>719</sup>

Mr. Barr then met with President Trump sometime in June 2017 to discuss the possibility of joining his legal team.<sup>720</sup> This meeting was at the behest of David Friedman, the U.S. ambassador to Israel and a former Trump campaign staffer.<sup>721</sup> During his oral testimony, Mr. Barr responded to Senator Lindsey Graham's questions regarding the meeting that: "[Barr's] understanding was [that Friedman] was interested in finding lawyers that could augment the defense team, and failing that, he wanted to identify Washington lawyers who had experience, you know, broad experience whose perspective might be useful to the President[.]"<sup>722</sup> In his Senate testimony, Mr. Barr stated that he told Friedman [that he declined] the position of Trump's legal team because he had a large workload due to a new corporate client and was looking forward to some "respite" instead of sticking his head into "that meat grinder."<sup>723</sup> Friedman asked Mr. Barr "if [he] would nonetheless meet—briefly go over the next day to meet with the President. And I said, 'Sure, I will go and meet with the President.'"<sup>724</sup>

Mr. Barr testified that the parties involved in the meeting were himself, President Trump, and Ambassador Friedman, and that Friedman stayed throughout the duration of the meeting.<sup>725</sup> Mr. Barr testified further that President Trump asked him several questions during the meeting. First,

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<sup>717</sup> Letter from Noah Bookbinder, Exec. Dir. CREW, to Assistant Att'y Gen. Lee J. Lofthus (May 20, 2019) (on file at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/20193529/Barr-Letter-5-20-19-updated-Final-.pdf>).

<sup>718</sup> Memorandum from William Barr to Rod Rosenstein & Steve Engel on Mueller's "Obstruction" Theory (Jun. 8, 2018) (On file with author at <https://www.justsecurity.org/wp-content/uploads/2018/12/June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction-Theory-1.2.pdf>).

<sup>719</sup> Michael Balsamo, AG nominee sent memo on Mueller probe to Trump's lawyers, AP (Jan. 14, 2019), <https://apnews.com/bfeed77bee18406aa1d651873d77c63d>.

<sup>720</sup> Jeff Mordock, *William Barr publicly details his talks about joining Donald Trump's legal team*, THE WASHINGTON TIMES, Jan. 15, 2019, available at <https://apnews.com/da7a26e86b9d9973ccea3f147789689f>.

<sup>721</sup> *Id.*

<sup>722</sup> Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Attorney General of the United States, Sen. Comm. on the Judiciary, 116<sup>th</sup> Cong., (Jan. 15, 16, 2019), available at <https://www.congress.gov/116/chrg/CHRG-116shrg36846/CHRG-116shrg36846.htm>.

<sup>723</sup> *Id.*

<sup>724</sup> *Id.*

<sup>725</sup> *Id.*

according to Barr’s oral testimony, Trump asked “How well do you know Bob Mueller?”<sup>726</sup> Mr. Barr responded that his family and the Mueller family were good friends and that they “would be good friends when this is all over...”<sup>727</sup> In his written testimony, Barr characterized this exchange slightly differently, stating that the president asked his “opinion” of the special counsel.<sup>728</sup> Mr. Barr wrote that he responded that Mueller “was a person of significant experience and integrity.”<sup>729</sup> Second, Trump asked, “So are you envisioning some role here?”<sup>730</sup> Mr. Barr responded that he could not “do it,” and that his personal and professional obligations “are such that I am unable to do it.”<sup>731</sup> In his written testimony, Mr. Barr also recounted that President Trump “reiterated his public statements denying collusion and describing the allegations as politically motivated.”<sup>732</sup> Mr. Barr claims that he did not respond to the president’s statements.<sup>733</sup> He also stated that the president did not comment on the content of his memo.<sup>734</sup> Mr. Barr further stated orally that he did not hear from the president until he was tapped for the position of attorney general.<sup>735</sup>

Finally, we address Mr. Barr’s public statements about the Russia investigation before he became attorney general. These were primarily in the form of op-ed pieces in *The Washington Post*.

In October 2016, Mr. Barr wrote an op-ed stating that “Comey did the right thing” in announcing the Clinton investigation.<sup>736</sup> In a 2017 op-ed in *The Post*, he praised the president’s firing of Sally Yates.<sup>737</sup> In another 2017 op-ed in *The Post*, Barr criticized Comey’s handling of the DOJ’s long-running investigation into Hillary Clinton’s e-mails: “Comey’s basic misjudgment boxed him in, compelling him to take increasingly controversial actions giving the impression that the FBI was enmeshed in politics.”<sup>738</sup> Mr. Barr also criticized the composition of the group of DOJ officials involved in the Mueller investigation. He told *The Washington Post* in July 2017: “In my view,

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<sup>726</sup> *Id.*

<sup>727</sup> *Id.*

<sup>728</sup> Responses to Questions for the Record from Senator Patrick Leahy, 116<sup>th</sup> Cong. (Jan. 27, 2019), *available at* <https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20QFRs.pdf>.

<sup>729</sup> *Id.*

<sup>730</sup> Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Attorney General of the United States, Sen. Comm. on the Judiciary, 116<sup>th</sup> Cong., (Jan. 15, 16, 2019), *available at* <https://www.congress.gov/116/chr/CHRG-116shrg36846/CHRG-116shrg36846.htm>.

<sup>731</sup> *Id.*

<sup>732</sup> Questions for the Record from Senator Patrick Leahy, 116<sup>th</sup> Cong., Jan. 27, 2019, *available at* <https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20QFRs.pdf>.

<sup>733</sup> *Id.*

<sup>734</sup> Questions for the Record from Senator Cory Booker, 116<sup>th</sup> Cong. (Jan. 27, 2019), *available at* <https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Booker%20QFRs1.pdf>.

<sup>735</sup> Questions for the Record from Senator Patrick Leahy, 116<sup>th</sup> Cong. (Jan. 27, 2019), *available at* <https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20QFRs.pdf>.

<sup>736</sup> William Barr, *James Comey Did the Right Thing*, THE WASHINGTON POST (Oct. 31, 2016), [https://www.washingtonpost.com/opinions/james-comey-did-the-right-thing/2016/10/31/7fcf0018-9f84-11e6-a44d-cc2898cfab06\\_story.html](https://www.washingtonpost.com/opinions/james-comey-did-the-right-thing/2016/10/31/7fcf0018-9f84-11e6-a44d-cc2898cfab06_story.html).

<sup>737</sup> William Barr, *Trump Was Right to Fire Sally Yates*, THE WASHINGTON POST, (Feb. 1, 2017), [https://www.washingtonpost.com/opinions/former-attorney-general-trump-was-right-to-fire-sally-yates/2017/02/01/5981d890-e809-11e6-80c2-30e57e57e05d\\_story.html](https://www.washingtonpost.com/opinions/former-attorney-general-trump-was-right-to-fire-sally-yates/2017/02/01/5981d890-e809-11e6-80c2-30e57e57e05d_story.html).

<sup>738</sup> Aaron Gregg, *Who is Attorney General Barr, the man deciding what parts of the Mueller report to release?*, WASHINGTON POST (Mar. 24, 2019), <https://www.washingtonpost.com/politics/2019/03/24/who-is-attorney-general-barr-man-deciding-what-parts-mueller-report-release/>.

prosecutors who make political contributions are identifying fairly strongly with a political party ... I would have liked [Mueller] to have more balance on this group.”<sup>739</sup>

Putting these facts together, Attorney General Barr was already too involved in the Russia investigation before becoming attorney general for him to be able to participate in it at the DOJ without a serious conflict of interest. Applicable rules of professional responsibility for lawyers as well as government ethics rules support this conclusion.

State bar ethics rules modeled on the American Bar Association Model Rules of Professional Conduct (Rule 1.11 and Rule 1.7) govern these types of conflicts of interest for lawyers moving in and out of government. These rules provide that a government lawyer shall not participate in a particular matter such as an investigation if the lawyer personally and substantially participated in the same matter in private practice or nongovernmental employment. Rule 1.11 (d) thus provides that government lawyers “shall not ... participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing...”<sup>740</sup>

The Russia investigation was a matter in which Mr. Barr “participated personally and substantially while in private practice or nongovernmental employment.” The rule’s language does not require the lawyer to have a client in a matter to create a conflict of interest for the lawyer. “Personal and substantial participation” in the matter creates the conflict. A 19-page memo, a meeting with the president about the same matter, and extensive public comments about the matter constitute “substantial participation.” Attorney General Barr should have recused himself from that matter at the DOJ. His direct supervisor President Trump was in no position to give the consent referred to in this rule because he also was a subject of the Russia investigation, and indeed the second part of the Mueller Report is about acts by President Trump that likely were obstruction of justice.

Based on their interview, President Trump in his personal capacity also was Mr. Barr’s prospective client in the same matter. This prospective client relationship implicated conflict of interest, confidentiality, and other obligations that arise from prospective clients under the ABA rules.<sup>741</sup> Whether or not he represented President Trump as a client, Mr. Barr owed fiduciary duties to the president as a prospective client in the Russia investigation, including the duty of confidentiality. How could Attorney General Barr simultaneously represent the United States, supervising Robert Mueller on the opposite side of this same investigation? He couldn’t. The notion that the president could give consent on both sides of this conflict—for himself personally and as president on behalf of the United States government—for purposes of Rule 1.18(d)(1) is absurd.

Under the ABA rules (Rules 1.7, 1.11 and 1.18), Attorney General Barr thus could only be involved in the Mueller inquiry only if the appropriate government agency gave informed

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<sup>739</sup> Shawn Boburg & Anu Narayanswamy, *Trump has blasted Mueller’s team for political donations. But attorney general nominee William P. Barr has given more than \$500,000*, WASHINGTON POST (Dec. 11, 2018), [https://www.washingtonpost.com/investigations/trump-has-blasted-muellers-team-for-political-donations-but-attorney-general-nominee-william-barr-has-given-more-than-500000/2018/12/11/dce5974a-fcb0-11e8-862a-b6a6f3ce8199\\_story.html](https://www.washingtonpost.com/investigations/trump-has-blasted-muellers-team-for-political-donations-but-attorney-general-nominee-william-barr-has-given-more-than-500000/2018/12/11/dce5974a-fcb0-11e8-862a-b6a6f3ce8199_story.html).

<sup>740</sup> MODEL RULES OF PROF’L CONDUCT 1.11(D) (AM. BAR ASS’N 2020).

<sup>741</sup> MODEL RULES OF PROF’L CONDUCT 1.18 (AM. BAR ASS’N 2020).

consent.<sup>742</sup> President Trump is unable to give meaningful consent to the conflict of interest because he is himself a subject of the investigation.

Further, 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, if it would cause a reasonable person to question his impartiality.<sup>743</sup> By formulating a legal defense against possible obstruction of justice charges against President Trump in his 19-page memorandum and engaging with members of President Trump’s legal team, Mr. Barr formed a consulting relationship with President Trump, his lawyers, and lawyers representing other individuals that would cause a reasonable person to question his impartiality under applicable ethics rules.<sup>744</sup> These rules should have barred Mr. Barr from any involvement in the Russia investigation under 5 CFR 2635.502.<sup>745</sup>

As the head of our nation’s law enforcement agency, Attorney General Barr is not only bound by the same ethical standards that apply to regular government employees but also DOJ policies applying to federal prosecutors. While all executive branch employees must act impartially and are expected to consult with their ethics officials when they are aware of circumstances that would cause a reasonable person to question their impartiality,<sup>746</sup> federal prosecutors have a special responsibility to promote confidence “that important prosecutorial decisions will be made rationally and objectively on the merits of each case.”<sup>747</sup>

#### *ii. Ukraine Whistleblower*

With respect to the Ukraine investigation, members of the Working Group were divided on the question of whether Attorney General Barr was also required to recuse himself (with a majority but not all of the members believing that he should have recused).

President Trump suggested in his phone call with Ukrainian 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.<sup>748</sup> Additional witnesses

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<sup>742</sup> See generally MODEL RULES OF PRO’FL CONDUCT 1.11 (AM. BAR ASS’N 2020); MODEL RULES OF PRO’FL CONDUCT 1.18 (AM. BAR ASS’N 2020); MODEL RULES OF PRO’FL CONDUCT 1.7 (AM. BAR ASS’N 2020).

<sup>743</sup> 5 CFR § 2635.502 (2020).

<sup>744</sup> Letter from Noah Bookbinder, Exec. Dir., CREW, to William P. Barr, Att’y Gen. of the United States (Apr. 11, 2019) (on file with author at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/04/11154733/Barr-Letter-4-11-19.pdf>); Letter from Noah Bookbinder, Exec. Dir., CREW, to William P. Barr, Att’y Gen. of the United States (May 20, 2019) (on file with author at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/20193529/Barr-Letter-5-20-19-updated-Final-.pdf>).

<sup>745</sup> *Id.*

<sup>746</sup> 5 CFR § 2635.502 (2020) (dealing with personal and business relationships) and 5 CFR § 2635.101 (2020) (outlining the basic obligation of public service).

<sup>747</sup> 9 PRINCIPLES OF FEDERAL PROSECUTION 9-27.001 (2020), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.001>.

<sup>748</sup> Ryan Lucas, *How Attorney General Barr Ended Up At The Center Of The Ukraine Controversy*, NPR (Oct. 3, 2019), <https://www.npr.org/2019/10/03/766927045/how-attorney-general-barr-ended-up-at-the-center-of-the-ukraine-controversy>.

subsequently implicated Mr. Barr in the Ukraine pressure campaign. An associate of Giuliani, Lev Parnas, revealed that Mr. Barr was “on the team” of those involved with the Ukraine pressure campaign<sup>749</sup> and former National Security Advisor John Bolton reported that he shared concerns about Giuliani’s involvement in the Ukraine pressure campaign with Mr. Barr.<sup>750</sup>

It is not clear whether Attorney General Barr was in fact involved in either of the investigations mentioned by President Trump in the phone call. It is entirely possible that Mr. Barr was not involved in investigating anything having to do with Vice President Biden or his son Hunter. Some members of the Working Group believed that calls for Mr. Barr’s recusal from the Ukraine investigation would be premature without knowing the actual extent of his prior involvement. Others in the Working Group believed that the mere fact that the president of the United States said this about Mr. Barr in a call with a foreign leader was sufficient to require Mr. Barr to recuse from any DOJ matter connected to whether what the president said on the phone call was true or what other federal officials, including whistleblowers and inspectors general, should do about it. Concerns over Mr. Barr’s failure to recuse on the Ukraine matter led the New York City Bar Association to call publicly for him to recuse or resign, advice that he ignored.<sup>751</sup>

Rule 1.7 of the ABA Model Rules requires recusal if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”<sup>752</sup> The Ukraine matter arguably fits within this rule because “there is a significant risk that the representation of [the United States] will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer.” This third person would be President Trump, who appointed Mr. Barr as attorney general, and who ultimately was impeached over that phone call. Separately, it may be that Mr. Barr himself had a personal interest in the Ukraine investigation because Trump mentioned him on the phone call and suggested to the president of Ukraine that Mr. Barr was working with private Trump campaign lawyer Rudy Giuliani on the relevant investigations.

Mr. Barr could argue that he received consent from the client, the United States, to participate in the Ukraine investigation, because he received consent from his superior President Trump. This argument, however, fails for the same reason it fails with respect to the Russia investigation. President Trump was in no position to give such consent under Rule 1.7 because he too was in the middle of the Ukraine investigation just as he was in the middle of the Russia investigation. Whatever version of the “unitary executive theory” might be used to justify the president giving such consent to Mr. Barr as an exercise of presidential power under Article II, that does not make Mr. Barr’s representation of the United States in the Ukraine matter ethically right. For purposes

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<sup>749</sup> Interview by Rachel Maddow with Lev Parnas & Joseph Bondy, MSNBC (Jan. 15, 2020) (on file at <https://www.msnbc.com/transcripts/rachel-maddow-show/2020-01-15-msna1322756>).

<sup>750</sup> Maggie Haberman & Michael Schmidt, *Trump Tied Ukraine Aid to Inquiries He Sought, Bolton Book Says* N.Y. TIMES (Jan. 26, 2020), <https://www.nytimes.com/2020/01/26/us/politics/trump-bolton-book-ukraine.html> (“Mr. Bolton also said that after the president’s July phone call with the president of Ukraine, he raised with Attorney General William P. Barr his concerns about Mr. Giuliani”).

<sup>751</sup> Eric Friedman & Eli Cohen, *NYC Bar Association Calls on Trump's AG William Barr to Recuse Himself—or Resign* (City Watch), N.Y. CITY BAR (Oct. 24, 2019), <https://www.nycbar.org/media-listing/media/detail/nyc-bar-association-calls-on-trumps-ag-william-barr-to-recuse-himself-for-resign-city-watch>.

<sup>752</sup> MODEL RULES OF PROF’L CONDUCT 1.7 (AM. BAR ASS’N 2020).

of professional ethics rules at least, consent was not properly obtained from the client—the United States—and several members of the Working Group believes that Mr. Barr still needed to recuse.

But Mr. Barr did not recuse.<sup>753</sup> He appears to have been at least “minimally involved” in key decisions related to the DOJ’s handling of the whistleblower complaint, potentially including OLC’s opinion regarding its handling and the decision not to pursue criminal investigations of the facts it disclosed.<sup>754</sup> Attorney General Barr’s failure to recuse from the Ukraine investigations potentially compromised the integrity of the DOJ’s investigations involving these matters. His actions violate the public trust, which requires our public servants to “place loyalty to the Constitution, the laws, and ethical principles above private gain” and to “avoid any actions creating the appearance that they are violating ethical standards.”<sup>755</sup> As pointed out above, a minority of the Working Group members disagreed with this conclusion with respect to recusal from the Ukraine investigation. Working Group members were more unanimous in their agreement about Attorney General Barr’s need to recuse from the Russia investigation.

#### d. Judicial Selection

A shared priority of Attorney General Barr’s DOJ and the Republican U.S. Senate majority is nominating and confirming additional judges to the federal courts who share the conservative political ideology of Senate Republicans. President Trump-appointed judges have ruled on many cases in which the president and his administration are parties, including cases discussed in this report. Often but not always, Trump-appointed judges have come down favorably towards the president. This is not abnormal. However, the two Trump-appointed Supreme Court justices, Neil Gorsuch and Brett Kavanaugh, are among the judges who have decided these cases, not always on the side of the president but showing more deference to presidential power than some of their colleagues.<sup>756</sup>

The judicial selection process involves coordination between the DOJ and the Senate that can, and we believe does, spill over into lack of Senate oversight of the DOJ with respect to the abuses described in this report. To accomplish this objective, the Senate may be willing to give the attorney general and others at the DOJ a pass on conduct that undermines the independence of the DOJ and the rule of law. The current vacancy on the Supreme Court with the death of Justice Ginsburg adds to the politicization of the atmosphere both at the DOJ and at the Senate with respect to oversight of the DOJ. We describe here aspects of the DOJ’s role in the judicial nomination and confirmation process as well as some of our concerns about that role.

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<sup>753</sup> See Josh Gerstein, *Barr is thrust back in harsh glare as Ukraine scandal grows*, POLITICO (Sept. 25, 2019), <https://www.politico.com/story/2019/09/25/william-barr-ukraine-memo-1512255> (noting that the Justice Department stated that “Barr’s denial of involvement extended beyond the Ukraine scandal”).

<sup>754</sup> Evan Perez and Katelyn Polantz, *Trump’s attorney general has “minimal involvement” as Justice department whistleblower complaint referral*, CNN (Sept. 25, 2019) [https://www.cnn.com/politics/live-news/trump-impeachment-inquiry-09-25-2019/h\\_afffcc9f090e17c445c22d7a1a634592](https://www.cnn.com/politics/live-news/trump-impeachment-inquiry-09-25-2019/h_afffcc9f090e17c445c22d7a1a634592).

<sup>755</sup> 5 C.F.R. § 2635.101(a), (b) (2020).

<sup>756</sup> See generally *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. Mazars USA, LLP*, 591 U.S. \_\_\_ (2020).

The DOJ's Office of Legal Policy ("OLP") works with the attorney general to advise the president on nominations for judgeships. Then, OLP works with the White House and Senate Judiciary Committee to secure the nominee's confirmation.<sup>757</sup>

In recent administrations, the task of evaluating the background of judicial candidates has been apportioned between the White House Counsel's Office and the OLP. Finalists are subject to a detailed probe by the FBI. During President Obama's administration, the OLP within the DOJ did the most detailed vetting.<sup>758</sup>

OLP is now led by Beth Ann Williams (Assistant Attorney General). She was appointed to head the office in 2017.<sup>759</sup> Interestingly, Beth Ann Williams is also a contributor to the Federalist Society.<sup>760</sup>

Wikipedia lists each judge that has been nominated and confirmed through the DOJ in Trump's tenure. According to this website, there have been 216 Article III judges confirmed, including two to the Supreme Court, 53 to the U.S. Courts of Appeals, 159 to the U.S. District Courts, and two to the Court of International Trade.<sup>761</sup>

President Obama in his eight years in office appointed 329 Article III judges: two to the Supreme Court, 55 to the U.S. Courts of Appeals, 268 to the US District Courts, and four to the Court of International Trade.<sup>762</sup>

President Trump has been nearly twice as fast at putting people on federal appeals courts than most other presidents. This is likely attributed to Senate Republicans choosing to slow-roll Obama's nominees in 2015-16 while accelerating the president's nominees after 2017.<sup>763</sup>

According to Mark Carl Rom, a Georgetown University government and public policy professor: "To use a baseball analogy, you can't just look at how many players did a team sign, right? There's such a big difference between signing a player to the big leagues and signing someone to a Single A contract."<sup>764</sup>

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<sup>757</sup> For further information, see U.S. DEP'T OF JUST., *Judicial Nominations* (June 26, 2020), <https://www.justice.gov/olp/judicial-nominations>.

<sup>758</sup> See DENIS STEVEN RUTKUS, THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS, CONG. RESEARCH SERV. (2016), <https://fas.org/sgp/crs/misc/R43762.pdf> (outlining how nominations occur).

<sup>759</sup> U.S. DEP'T OF JUST., *Meet the Assistant Attorney General* (June 14, 2018), <https://www.justice.gov/olp/staff-profile/meet-assistant-attorney-general>.

<sup>760</sup> FEDERALIST SOC'Y, *Hon. Beth Williams* (2020), <https://fedsoc.org/contributors/beth-williams>.

<sup>761</sup> WIKIPEDIA, *List of federal judges appointed by Donald Trump* (2020), [https://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_Donald\\_Trump](https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump).

<sup>762</sup> WIKIPEDIA, *List of federal judges appointed by Barack Obama* (2020), [https://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_Barack\\_Obama](https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Barack_Obama).

<sup>763</sup> See John T. Bennett, *Trump's Federal Judge Pace Matches Recent Presidents but with a big Twist: Incumbent has stressed putting conservatives in legal realm's "big leagues" expert says*, ROLL CALL (May 8, 2019), <https://www.rollcall.com/2019/05/08/trumps-federal-judge-pace-matches-recent-presidents-but-with-a-big-twist/> ("One likely factor in Trump's judicial success in his first two years was the number of vacancies that existed when he took office").

<sup>764</sup> *Id.*

Rom continued, “The big leagues in the judicial system means the Supreme Court and the appellate courts. There’s no question that President Trump has been incredibly effective at putting people on the appellate courts—in fact, he’s gotten more than twice as many appeals court judges than most of the other presidents.”<sup>765</sup>

Concerns about the Trump judicial nominations include lack of ethnic and gender diversity.<sup>766</sup> As of January, Trump’s nominees to appellate and district courts were 76% men and 85% white (Obamas numbers were 58% male and 64% white).<sup>767</sup> There is a value in having a diverse judicial branch, value that is currently going unrecognized.<sup>768</sup>

Another concern is the involvement of outside organizations in the judicial selection process.

The American Bar Association (ABA), a very large organization with approximately 194,000 dues paying members nationwide, has traditionally had a role in evaluating and rating candidates for judicial nominations.<sup>769</sup> Although the ABA is nonpartisan, many of its leaders and committees have leaned liberal on social issues with a tilt toward business interests but also (predictably) promoting the interests of both plaintiffs and defense lawyers in economic and litigation related issues.<sup>770</sup> There is substantial turnover in leadership at the ABA; the ABA president serves a term of only one year. The ABA, given its size, probably reflects the political perspectives of the legal profession, which are complex and vary according to age, geography, and practice area.<sup>771</sup>

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<sup>765</sup> *Id.*

<sup>766</sup> See Andrew Cohen, *Trump and McConnell’s Overwhelmingly White and Male Judicial Appointments*, BRENNAN CENTER FOR JUSTICE (July 1, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/trump-and-mcconnells-overwhelmingly-white-male-judicial-appointments> (“Not a single one of Trump’s 53 confirmed appeals court nominees is Black. Only a single confirmed appeals court nominee is Latino”).

<sup>767</sup> Blake Dodge, *Trump Judicial Nominees Are 85 Percent White and 76 Percent Men, Report Shows*, NEWSWEEK (Jan. 16, 2020), <https://www.newsweek.com/trump-judicial-nominees-mostly-white-men-1482638>.

<sup>768</sup> See Theresa Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. OF GENDER & L. 113, 150 (1996) (“The best judge, however, should be able to see and assess the differing perspectives of the many parties and persons involved in the litigation. This is where diversity becomes important”). This allows impartial judges to “represent the values and perspectives of minority communities”. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASHINGTON & LEE L. REV. 405 (2000). Justice Samuel Alito recognized this in his confirmation hearing, stating “When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account”. Blake Dodge, *Trump Judicial Nominees Are 85 Percent White and 76 Percent Men, Report Shows*, NEWSWEEK (Jan. 16, 2020), <https://www.newsweek.com/trump-judicial-nominees-mostly-white-men-1482638>

<sup>769</sup> See AM. BAR. ASSOC., *Ratings* (2020), [https://www.americanbar.org/groups/committees/federal\\_judiciary/ratings/](https://www.americanbar.org/groups/committees/federal_judiciary/ratings/) (“The Standing Committee rates each nominee ‘Well Qualified,’ ‘Qualified’ or ‘Not Qualified’”).

<sup>770</sup> See Susan Navarro Smelcer, Amy Steigerwalt, & Richard Vining, Jr., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POLITICAL RESEARCH QUARTERLY 827-840 (Dec. 2012) (arguing that matching methods show evidence of bias against Republican nominees in ABA ratings over time). This has led conservative outlets to lambaste the American Bar Association as a “left-wing advocacy group”. Carrie Campbell Severino, *Yes, the ABA Is Still a Left-Wing Advocacy Group*, NAT’L REV. (Sept. 27, 2019), <https://www.nationalreview.com/bench-memos/yes-the-aba-is-still-a-left-wing-advocacy-group/>.

<sup>771</sup> See generally Adam Bonica, Adam S. Chilton, Maya Sen, *The Political Ideologies of American Lawyers*, 8 J. OF LEGAL ANALYSIS 277-335 (Winter 2016) <https://doi.org/10.1093/jla/lav011>.

Republican administrations, however, have often sought to minimize the role of the ABA in judicial nomination and confirmation.<sup>772</sup> Particularly in the Trump administration, key roles in judicial selection have been outsourced to a single outside organization of conservative and libertarian lawyers called the Federalist Society. It appears from news reports that the socially conservative wing of the Federalist Society, led by its Co-Chairman Leonard Leo, has an outsized influence in the judicial selection process compared with the more libertarian wing led by Gene Meyer, President and CEO. Senate Democrats have tried to call out the Federalist Society's role in vetting and promoting the judicial nominees.<sup>773</sup>

The Federalist Society's impact in judicial nominees has been profound, including in Supreme Court nominations: "Indeed, when Neil Gorsuch was asked in a questionnaire by the Senate Judiciary Committee how he came to President Trump's attention as a potential Supreme Court nominee, he answered, 'I was contacted by Leonard Leo.'"<sup>774</sup>

Unlike the ABA, which rotates its leadership every few years, and its presidency yearly, the Federalist Society leadership is static. Leonard Leo has been one of the top two officers of the Federalist Society for close to 30 years and is the principal person at the Federalist Society for the selection of federal judges.<sup>775</sup>

One problem is that much of the deliberation between the Federalist Society and the DOJ and White House over judicial selection is not transparent. The influence of the Federalist Society has induced lawsuits under the Freedom of Information Act (FOIA) by groups such as American Oversight seeking information on interactions between the Federalist Society and the DOJ.<sup>776</sup> Indeed, the influence of the Federalist Society's Leonard Leo and the Heritage Foundation's John Malcolm is paramount to these allegations; Leo, a scion of the right, has "reared a generation of originalist elites".<sup>777</sup>

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<sup>772</sup> Matthew Renda, Report: Republicans Stacking Courts With Unqualified Conservatives, COURTHOUSE NEWS SERVICE (May 11, 2018), <https://www.courthousenews.com/report-republicans-stacking-courts-with-unqualified-conservatives/>; Seung Min Kim & Josh Bresnahan, *Republicans step up defense of 'not qualified' judicial nominees*, POLITICO (Dec. 10, 2017), <https://www.politico.com/story/2017/12/10/trump-judicial-nominees-republicans-287911>.

<sup>773</sup> See Ben Protess & Rebecca R. Ruiz, *Democrats Accuse Conservatives of a "Dark Money" Bid to Influence Judges*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/federalist-society-judges.html>.

<sup>774</sup> See Caroline Frederickson & Eric Segall, *Opinion: Trump Judges or Federalist Society Judges? Try Both*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html>.

<sup>775</sup> FEDERALIST SOC'Y, *Leonard A. Leo* (2020), <https://fedsoc.org/contributors/leonard-leo>.

<sup>776</sup> For an example of such a complaint, see AM. OVERSIGHT, *New LawsUIT Seeks Evidence of Outside Influence on Judicial Nominations* (Apr. 1, 2019), <https://www.americanoversight.org/new-lawsuit-seeks-evidence-of-outside-influence-on-judicial-nominations>.

<sup>777</sup> See Complaint, *Am. Oversight v. Dep't of Just.*, Case No. 19-cv-914 at 3, 4 (D.D.C. Apr. 1, 2019), <https://www.americanoversight.org/document/complaint-american-oversight-v-doj-judicial-nominations-influence> (Naming Leonard Leo in the case). For information about Leo's influence, see Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, THE NEW YORKER (Apr. 17, 2017), <http://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>. See also Brian Schwartz, *Schumer, Democrats claim outside Trump advisor helps rig the judicial nomination process*, CNBC (May 27, 2020), <https://www.cnbc.com/2020/05/27/schumer-democrats-say-outside-trump-advisor-leo-rigs-judicial-nomination-process.html> (laying out Democratic allegations that the Federalist Society is "directly aligned with Trump").

There are accompanying legal concerns about any federal function being delegated to an outside organization without a formal federal contract vetted through the procurement process. The fact that work is volunteer and uncompensated does not change the fact that federal government work should be done by federal employees subject to the federal ethics rules not by outsiders employed by an organization that is receiving large donations from undisclosed individuals and businesses.<sup>778</sup> The Antideficiency Act (“ADA”) bars federal employees from spending in excess of amounts approved by Congress or for a particular purpose.<sup>779</sup> Unless there is specific authorization, federal employees are not allowed to accept voluntary services for the United States except in cases of emergency involving the safety of human life or the protection of property.<sup>780</sup> On the other hand, many outside organizations such as the ABA devote considerable resources to advising federal government agencies on specific issues, including the selection of judges, without crossing the line into performing federal functions. This avoids violating the ADA and presumably falls within the many exceptions to the Lobbying Disclosure Act of 1996 (“LDA”) that otherwise would require them to register as lobbyists.<sup>781</sup>

It is not clear whether the services performed by the Federalist Society for the DOJ in judicial selection are specific enough and extensive enough to cross the line into being volunteer services for the government under the ADA. This may turn on how much the Federalist Society takes over specific tasks—such as screening potential nominees and narrowing larger pools of candidates down to shorter lists of “front runners” —that in previous administrations were performed within DOJ.<sup>782</sup> When confronted, Leonard Leo claims to be acting separately in his advisory role from the Federalist Society itself.<sup>783</sup> It is also not clear whether the Federalist Society has operated outside the exceptions provided for in the LDA. Without access to the documentation of interactions between DOJ and the Federalist Society, this is hard to determine, but the documents sought in the FOIA litigation may help. Regardless of whether the ADA and LDA are complied

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<sup>778</sup> 18 U.S.C. § 208 (2020) (providing the criminal financial conflict of interest statute for federal employees).

<sup>779</sup> 31 U.S.C. § 1341 (2020) (placing limitations on expending and obligating amounts). For more explanation about this law, see Gordon Gray, *The Antideficiency Act: A Primer*, AMERICAN ACTION FORUM (Aug. 3, 2016), <https://www.americanactionforum.org/research/antideficiency-act-primer/> (outlining the contours of the Antideficiency Act).

<sup>780</sup> 31 U.S.C. § 1342 (2020) (limiting voluntary services for the government).

<sup>781</sup> 2 U.S.C. § 1603 (2020) (governing the registration of lobbyists).

<sup>782</sup> See Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html> (“The Republican nominee promised that, if he were elected president, his judicial nominees would ‘all [be] picked by the Federalist Society.’”). This has led members of the Federalist Society to deny official-capacity action with the government.

<sup>783</sup> See Mark Joseph Stern, *The Federalist Society Just Proved It’s All in for Trump*, SLATE (“Whenever Leo advises Trump or sets up a dark money front group, he takes a leave of absence from the Federalist Society . . . This fiction is beyond comical. Through his work with the Federalist Society, Leo screens potential nominees and woos likely donors. Then, as a putative freelancer, he suggests nominees to Trump and uses donor cash to push them through the Senate. Leo could not be a Washington power broker if he were not simultaneously the liege of the Federalist Society”). For more information on the Federalist Society’s response to allegations of influence, see Lydia Wheeler, *Meet the powerful group behind Trump’s judicial nominations*, THE HILL (Nov. 16, 2017), <https://thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations> (“Steven Calabresi, who co-founded the society in 1980 and serves as chairman of its 12-member board of directors, said Leo offers recommendations to the White House on his own time and in his private capacity as an individual citizen — not as the society’s executive vice president”).

with, the influence of the Federalist Society on judicial selection in this administration is substantial and raises legal questions worth considering.

e. Resistance to Congressional Oversight

This is not the first administration in which the DOJ has ignored subpoenas from Congress. Republicans repeatedly discuss Attorney General Eric Holder and his refusal to comply with subpoenas concerning “Operation Fast and Furious” subpoenas, his citation for contempt of Congress, and the lengthy litigation that followed.<sup>784</sup> That represented one instance of bad judgment on the part of the last administration. There have been isolated instances in others as well.<sup>785</sup> But never have there been so many subpoenas from Congress that go intentionally unanswered.<sup>786</sup>

Attorney General Barr has directed DOJ attorneys to defy congressional subpoenas regarding the 2020 Census and many other matters.<sup>787</sup> A discussion of those subpoenas follows. In this section we provide some legal analysis of this issue, focusing on the following questions: Can the DOJ ignore some subpoenas under the executive privilege doctrine? Even if there is no good reason to ignore a subpoena such as no recognizable executive privilege, will the courts bother to enforce it? This report also will point out the implications for the rule of law if Congressional subpoenas of the DOJ and other agencies and departments, including the White House, can be ignored.

Since Attorney General William Barr’s Senate confirmation on February 14, 2019, DOJ policy has outlined and vehemently defended the position that executive branch officials have little to no legal obligation to comply with congressional subpoenas.<sup>788</sup> The executive branch’s systematic undermining of congressional subpoenas as a mechanism of legislative oversight is elucidated by OLC opinions, correspondences between White House Counsel Pat Cipollone and several House Committees, AG Barr’s personal statements, and DOJ letters from Assistant Attorney General Steven Engel. In sum, the White House and the DOJ have cited executive privilege, absolute immunity, the unconstitutionality and illegitimacy of congressional inquiries, and the prohibition of agency counsel during congressional testimony as grounds to invalidate congressional

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<sup>784</sup> See Alan Silverleib, *House holds Holder in contempt*, CNN (Jun. 29, 2012), <https://www.cnn.com/2012/06/28/politics/holder-contempt/index.html> (describing the reasoning behind the contempt vote); Judson Phillips, *Eric Holder Is Defying the Law by Resisting Subpoena*, U.S. NEWS (Jul. 3, 2012), <https://www.usnews.com/debate-club/was-the-house-right-to-hold-eric-holder-in-contempt/eric-holder-is-defying-the-law-by-resisting-subpoena>. (noting, with a dose of indignation, “Eric Holder went off to Disney World the day the House voted on holding him in contempt”).

<sup>785</sup> See THE ECONOMIST, *Donald Trump is not the first president to fight subpoenas* (May 2, 2019), <https://www.economist.com/united-states/2019/05/02/donald-trump-is-not-the-first-president-to-fight-subpoenas> (mentioning a 1935 attempt by a Hoover administration figure to evade a subpoena that ended in arrest at the Willard Hotel).

<sup>786</sup> See Griffin Connolly, *Democrats learning their subpoenas are only as powerful as Trump allows*, ROLL CALL (May 2, 2019), <https://www.rollcall.com/2019/05/02/democrats-learning-their-subpoenas-are-only-as-powerful-as-trump-allows/> (“another former senior GOP oversight aide argued that Trump has already jettied past Obama to set a new bar for stonewalling congressional inquiries”).

<sup>787</sup> Ramsey Touchberry, *William Barr Directs DOJ Official to Defy Congressional Subpoena to Testify About 2020 Census*, NEWSWEEK (Apr. 24, 2019), <https://www.newsweek.com/william-barr-doj-congressional-subpoena-1404879>

<sup>788</sup> Harper Neidig, *DOJ Tells Court that Congress can’t sue to enforce subpoenas*, THE HILL (Jan. 30, 2020), <https://thehill.com/regulation/court-battles/480730-doj-tells-court-that-congress-cant-sue-to-enforce-subpoenas>.

subpoenas. These justifications for noncompliance have provided other federal agencies and offices, namely the Department of State, Department of Education, Department of Homeland Security, Department of Commerce, and Office of Budget and Management with a legal framework to disregard congressional subpoenas.<sup>789</sup> Thus, the pervasiveness of the DOJ's noncompliance is evident both explicitly through Attorney General Barr's actions and implicitly through the parallelism between the DOJ's arguments and those of other federal agencies.

An analysis of relevant OLC opinions and court cases, specifically *House Committee on the Judiciary v. Miers*, Operation Fast and Furious under Attorney General Eric Holder, *House Committee on the Judiciary v. McGahn*, Mr. Barr's refusal to release the complete and unredacted Mueller Report, and the July 9, 2020, Supreme Court decision in the *Mazars* case, reveals the tenuous legal arguments and long-term consequences of the DOJ's position. We include such an analysis in Appendix C to this report while only summarizing our view of current law here in the body of this report. We also emphasize the broader rule of law concerns that arise if congressional subpoenas lose their legitimacy and authority.

In *Department of Justice v. House Committee on the Judiciary*, the House sued for the release of grand jury material from the Mueller Report.<sup>790</sup> They argued that it was necessary to the impeachment process.<sup>791</sup> The DC Circuit ruled in favor of the Judiciary Committee, ruling that the court controlled the requested materials, not the executive branch.<sup>792</sup> The Supreme Court, however, granted a stay in May 2020, and certiorari was granted in July 2020.<sup>793</sup> Although litigation over the House subpoena of the unredacted Mueller Report is not yet concluded, the Supreme Court has in 2020 clarified much of the relevant law in this area.

There is no stated immunity of presidents from investigation by Congress. No president has unequivocally asserted that he is immune from an investigation by Congress. The Supreme Court has three times held that a president does not have absolute immunity from a subpoena whether from a federal prosecutor, *United States v. Nixon* (1974), a state grand jury, *Trump v. Vance* (2020),

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<sup>789</sup> See Matthew Callahan & Reuben Fischer-Baum, *Where the Trump administration is thwarting House oversight*, WASHINGTON POST (Oct. 11, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-blocking-congress/> (listing the various areas in which this administration has ignored Congressional subpoenas). Congressional oversight authority is crucial to our system of checks and balances. See BRIANNE GOROD, BRIAN FRAZELLE, & ASHWIN PHATAK, THE HISTORICAL AND LEGAL BASIS FOR THE EXERCISE OF CONGRESSIONAL OVERSIGHT AUTHORITY, REPORT FROM THE CONSTITUTIONAL ACCOUNTABILITY CENTER at 3, 4 (Jan. 2019), <https://www.theconstitution.org/wp-content/uploads/2019/01/Congressional-Oversight-Issue-Brief.pdf> (arguing that Congressional oversight power has significant precedent in British practice and throughout American history from the country's earliest days); see also *Watkins v. United States*, 354 U.S. 178, 205 (1957) (holding that the court will not interfere with Congress opening up investigations because this is "a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected").

<sup>790</sup> Jeremy Herb and Manu Raju, *House Democrats escalate impeachment fight with suit to obtain Mueller grand jury information*, CNN POLITICS (Jul. 26, 2019), <https://www.cnn.com/2019/07/26/politics/nadler-democrats-grand-jury/index.html>

<sup>791</sup> *Id.*

<sup>792</sup> Robert Legare and Melissa Quinn, *Appeals court orders DOJ to turn over secret Mueller grand jury docs to Congress*, CBS NEWS (Mar. 10, 2020), <https://www.cbsnews.com/news/appeals-court-doj-secret-mueller-grand-jury-materials-house-judiciary-committee/>

<sup>793</sup> *Docket for 19-1328*, SUPREMECOURT.GOV, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-1328.html>

or Congress, *Trump v. Mazars* (2020). The *Trump v. Vance* case is particularly notable in its sweeping language rejecting notions of absolute presidential immunity from subpoenas and its reiteration of the basic premise that no man is above the law.

We recognize simultaneously that there are legitimate questions about how broad a congressional subpoena of the president can be. Congress cannot simply subpoena the president for anything it wants. Similar considerations apply when there is a subpoena of official records from the DOJ, although considerably less protection should be given to DOJ documents that do not involve legal advice given to the president.

The seminal case involves a House subpoena of the president’s personal accountants at a Trump Organization accounting firm called Mazars. Although the House lost its bid to enforce that particular subpoena, the Court provided a clear roadmap for when such subpoenas are enforceable.<sup>794</sup> On February 27, 2019, President Trump’s former attorney Michael Cohen testified before the House Oversight Committee that President Trump had changed the estimated value of his assets and liabilities on financial statements prepared by his accounting firm, Mazars USA, LLP. The committee subpoenaed Mazars for documents related to President Trump’s and his businesses’ finances from 2011 until the present, which led them to sue Mazars, asking the U.S. District Court for the District of Columbia to declare the subpoena invalid and unenforceable. The Oversight Committee intervened to defend its subpoena. A hearing on the preliminary injunction was consolidated with resolution of the merits. The court granted summary judgment in favor of committee; the president appealed; and the Supreme Court released its decision on July 9, 2020.

The DOJ filed an amicus brief urging a federal appeals court to block the House Oversight Committee’s subpoena of the president’s financial records. The DOJ cited separation of powers concerns and constitutional-avoidance principles, arguing that the committee did not clearly authorize the request for the information nor could it identify a legitimate legislative purpose to justify the inquiry. The initial court ruling rejected these claims, holding that the committee was engaged in legitimate legislative investigation, not an unconstitutional oversight inquiry when issuing the subpoena; the requested documents were relevant to the congressional investigation; and the committee was properly authorized to issue the subpoena. The July 9, 2020, Supreme Court decision affirmed Congress’ broad investigatory powers, which allow it to investigate both the executive branch and the president himself; rejected the president’s and Solicitor General’s proposed heightened standard for presidential subpoenas, reserving it for official communications subject to executive privilege.<sup>795</sup>

In July 2020, the Supreme Court in *Trump v. Mazars* affirmed Congress’ broad investigatory powers, which allow it to investigate both the executive branch and the president himself. The Court rejected the president and Solicitor General’s proposed heightened standard for presidential subpoenas, reserving the higher standard in *United States v. Nixon* for subpoenas of official communications subject to executive privilege (that heightened standard might apply to subpoenas of official papers from the DOJ that involved advice given to the president). But the Court also

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<sup>794</sup> *Trump v. Mazars* USA, LLP, 940 F.3d 710 (D.C. Cir.), cert. granted, 140 S. Ct. 660, 205 L. Ed. 2d 418 (2019) 591 U.S. \_\_\_\_ (2020), ([https://www.supremecourt.gov/opinions/19pdf/19-715\\_febh.pdf](https://www.supremecourt.gov/opinions/19pdf/19-715_febh.pdf)).

<sup>795</sup> *Trump v. Mazars*, 591 U.S. \_\_\_\_ (2020), [https://www.supremecourt.gov/opinions/19pdf/19-715\\_febh.pdf](https://www.supremecourt.gov/opinions/19pdf/19-715_febh.pdf).

held that the court below had not adequately taken into account the separation of powers concerns that arise when Congress subpoenas a president. Chief Justice Roberts wrote,

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. “[O]ccasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible.” *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 389–390 (2004) (quoting *Nixon*, 418 U. S., at 692). Congress may not rely on the President’s information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President’s unique constitutional position means that Congress may not look to him as a “case study” for general legislation. Cf. 943 F. 3d, at 662–663, n. 67.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective. The specificity of the subpoena’s request “serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.” *Cheney*, 542 U. S., at 387.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress’s legislative purpose, the better. See *Watkins*, 354 U. S., at 201, 205 (preferring such evidence over “vague” and “loosely worded” evidence of Congress’s purpose). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is “impossible” to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President’s information will advance its consideration of the possible legislation. *Id.*, at 205–206, 214–215.

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President’s time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance, ante*, at 12–14; *Clinton*, 520 U. S., at 704–705. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.<sup>796</sup>

The Court held that the House Committees had not met these showings to enforce their subpoenas at issue in *Mazars* and remanded the case to the district court for further proceedings.<sup>797</sup>

The point in *Mazars* is clear: Congress can subpoena the president and get, among other documents, his tax returns, but Congress needs to have a clearly articulated reason for doing so. An open impeachment inquiry backed up by other credible evidence of wrongdoing is one good reason, perhaps the best reason, for Congress to get a president’s personal records. Official records

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<sup>796</sup> *Trump v. Mazars*, 591 U.S. \_\_\_\_ (2020) at 19.

<sup>797</sup> *Id.* at 20.

also can be obtained, although such subpoenas may be subject to the higher standard in *United States v. Nixon*.<sup>798</sup>

A clear message from *Mazars* is that a formal impeachment inquiry backed by credible evidence of wrongdoing is a way Congress can meet its burden of showing need for the subpoenaed documents, whether personal papers of the president or official papers of an executive branch agency such as the DOJ.

In January 2020, one of the reporters for this report recommended in an op-ed in *The New York Times* that both the House and the Senate should use the impeachment process, combined with the subpoena power and litigation in the courts to enforce subpoenas, to gather as much evidence as possible before voting on articles of impeachment or on the president's guilt or innocence.<sup>799</sup> Getting that evidence was much more important than whether the Senate ultimately convicted or acquitted the president. Unfortunately, that opportunity was lost because the House, instead of keeping an impeachment inquiry open for a considerable period of time and going to court to enforce its subpoenas, delayed opening a formal impeachment inquiry until after the Ukraine scandal broke and then rushed the process to introduce articles of impeachment only months thereafter.<sup>800</sup>

The alternative scenario—and the scenario now backed up by the Court's *Mazars* opinion—would have been a formal impeachment inquiry being opened by the House immediately after Robert Mueller filed his report in April 2019. That impeachment inquiry would have stayed open until the House obtained all the relevant documents and evidence by seeking court enforcement of its subpoenas. President Trump's financial conflicts of interest and violations of the emoluments clause would have been one area of inquiry. Tax returns and other documents in *Mazars*'s possession would have been subpoenaed. Under the test laid out in the Court's *Mazars* opinion, the subpoena would be enforceable because it was related to an open impeachment inquiry backed up by other credible evidence. The logic in the *Mazars* case would have been the same, but the result different. Congress would have won the case and would likely have had the tax returns by Summer 2020.<sup>801</sup>

Congress now faces a similar situation with Attorney General Barr. House subpoenas of the DOJ are simply ignored. So much so that the attorney general thinks it is funny. As Attorney General

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<sup>798</sup> *Id.* at 2, 13.

<sup>799</sup> Claire Finkelstein, *This Question is More Important than Removing Trump*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/opinion/trump-obstruction-impeachment.html>.

<sup>800</sup> See James Risen, House Democrats Rushed Donald Trump's Impeachment, Handing Him an Election Year Gift, THE INTERCEPT (Feb. 5, 2020), <https://theintercept.com/2020/02/05/house-democrats-donald-trump-impeachment/> (suggesting alternatives to the undertaken process that might have allowed for the uncovering of more pertinent information).

<sup>801</sup> See Richard Lempert, *Trump's tax returns: The legal issues and possible outcomes*, BROOKINGS INST. (May 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/05/28/trumps-tax-returns-the-legal-issues-and-possible-outcomes/> (“the test of whether a congressional inquiry might inform legislation is an easy one to apply”); David M. Driesen, *Stealth Executive Privilege: Trump v. Mazars*, JURIST (July 28, 2020), <https://www.jurist.org/commentary/2020/07/david-driesen-trump-mazars/> (“[T]he *Mazars* Court held that Congress need not demonstrate that the information Congress seeks is “demonstrably critical” to the legislative purpose justifying the subpoena”).

Barr once quipped to House Speaker Nancy Pelosi when she complained that he was ignoring House subpoenas: “did you bring your handcuffs?”<sup>802</sup>

It is difficult, for example for anyone to claim credibly that there is an executive privilege with respect to the redacted portions of the Mueller Report. It was not prepared to provide the president with advice and does not contain confidential communications by the president (Trump refused to even interview with Mueller). But if Attorney General Barr refuses to give the full unredacted Mueller Report to Congress, who will make him? In a nation of laws, will Article III courts intervene to enforce a congressional subpoena when it is appropriate to do so?

The answer the District of Columbia Circuit initially gave in a separate case involving subpoena of a former White House counsel, *McGahn*, is “no.” The federal courts do not have a role in enforcing subpoenas from Congress. These subpoenas are the product of conflict between the Article I branch of government (Congress) and the Article 2 branch (the president), and Article 3 courts are not to get involved. An impasse over a subpoena was a political problem and had to find a political resolution—impeachment of a president or of another officer, or Congress withholding money from an agency that refuses to comply with a subpoena are among the options. Federal courts—the three-judge panel decided by a 2-1 vote—need not and should not get involved. The House committee had no standing to sue in federal court to enforce its subpoena.<sup>803</sup>

The full District of Columbia Circuit heard the *McGahn* case *en banc* and reversed 7-2 on August 7, 2020. The House of Representatives, the court found, did have standing to proceed to enforce its subpoena of Mr. McGahn. In *McGahn*, the en banc panel, in an opinion written by Judge Rogers, observed:

The power of each House of Congress to compel witnesses to appear before it to testify and to produce documentary evidence has a pedigree predating the Founding and has long been employed in Congress’s discharge of its primary constitutional responsibilities: legislating, conducting oversight of the federal government, and, when necessary, checking the president through the power of impeachment. Congressional subpoenas have their historical basis in the “emergence of [the English] Parliament.” *Watkins*, 354 U.S. at 188. Congress began using its investigative powers from the earliest days of the Republic to investigate national problems and probe for possible federal solutions.<sup>804</sup>

The power to impeach the president or another officer, rests with the House and that power is impotent if a president can simply refuse to comply with a congressional subpoena. As the *McGahn* court went on to observe:

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<sup>802</sup> Laurie Kellman, *Barr asks Pelosi at event: ‘Did you bring your handcuffs?’*, AP (May 15, 2019), <https://apnews.com/article/3f769e19bf034c139e8973c653582969>.

<sup>803</sup> *Comm. on the Judiciary of the U.S. House of Representatives v. Donald McGahn*, No. 1:19-cv-02379, (D.D.C. Feb. 28, 2020) (*rev’d en banc*, renumbered No. 19-5331) (slip op.) [https://www.cadc.uscourts.gov/internet/opinions.nsf/29F7900862BA6CD68525851C00784758/\\$file/19-5331-1831001.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/29F7900862BA6CD68525851C00784758/$file/19-5331-1831001.pdf).

<sup>804</sup> *Comm. on the Judiciary of the U.S. House of Representatives v. Donald McGahn*, No. 19-5331, 11 (D.C. App. Aug. 7, 2020) (*en banc*) <https://law.justia.com/cases/federal/appellate-courts/cadc/19-5331/19-5331-2020-08-07.html>.

As far back as 1796, George Washington, the Nation’s first President, acknowledged that the House may compel the President to turn over some Executive Branch information if sought as part of an impeachment investigation. See Pres. George Washington, Message to the House Regarding Documents Relative to the Jay Treaty (Mar. 30, 1796); see *Mazars*, 140 S. Ct. at 2029–30. Decades later, Congress also issued subpoenas to President Nixon during its impeachment investigation of him. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726–27 (D.C. Cir. 1974).<sup>805</sup>

The *McGahn* court, while affirming the standing of the House to sue in federal court to enforce its subpoenas, made it clear that the court was not deciding the scope of the executive privilege. In other words McGahn could by court order be compelled to testify before the House but what questions he had to answer was a separate question to be decided under the law—including the very scant case law—of executive privilege. The court thus observed in its earlier opinion:

What the Committee seeks through its subpoena enforcement lawsuit is resolution of a discrete and limited legal issue: whether McGahn must appear before it to testify, absent invocation of a valid privilege that would excuse his refusal to answer specific questions. Given McGahn’s previous role as a close presidential advisor, it is plausible that Executive privilege could be properly asserted in response to at least some of the Committee’s questions, depending on their substance. See generally *United States v. Nixon*, 418 U.S. 683, 705 (1974). Such a potentially available privilege is a powerful protection of the President’s interest in Executive Branch confidentiality, and it remains unaffected by an order compelling McGahn to appear and testify before the Committee.<sup>806</sup>

The legal doctrine of executive privilege is not well defined by the courts and is supposed to cover only some communications that are made to or by the president and possibly his staff in an *official* capacity. It is not supposed to cover communications made to or by the president in his *personal* capacity or communications to or by businesses owned by the president. But this does not stop presidents from claiming the broadest possible application of the executive privilege. President Clinton tried to use the executive privilege to shield evidence of his personal behavior. Brett Kavanaugh, staff attorney for Independent Counsel Kenneth Starr, wrote in an August 15, 1998, memorandum to Starr that “[Clinton] ‘has required the urgent attention of the courts and the Supreme Court for frivolous privilege claims—all to cover up his oral sex from an intern.’” Kavanaugh went on to advise Starr that “He [Clinton] should be forced to account for all of that and to defend his actions.”<sup>807</sup>

Fast forward 20 years from that sordid episode to Attorney General Barr’s jest that the speaker of the House should bring her “handcuffs.” The message from the District of Columbia Circuit in *McGahn* and from the Supreme Court in *Mazars* is that the federal courts, in appropriate circumstances, can provide the court order and if necessary the handcuffs to enforce it. The speaker of the House and the other members of Congress are entitled to use the power vested in them by

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<sup>805</sup> *Id. slip op.* at 13.

<sup>806</sup> *Id. slip op.* at 27.

<sup>807</sup> CNN, *Read Kavanaugh’s memo on Lewinsky*, <https://www.cnn.com/2018/08/20/politics/kavanaugh-lewinsky-email/index.html>.

Article 1 of the Constitution, which can include subpoenas of the DOJ and other parts of the executive branch. Nothing in Article II of the Constitution abrogates that.

We do believe, however, that Congress should learn from its loss in the *Mazars* case to be more strategic in use of its subpoena power. With Attorney General Barr, a different strategy from the Trump impeachment process should be followed. A formal impeachment inquiry should be opened as soon as possible and then left open until all or at least most House subpoenas have been enforced by the courts. Impeaching too soon was a mistake in the case of President Trump because it closed the House inquiry and the advantage in enforcing subpoenas that an open impeachment process provides. Considering the holding in *Mazars*, a Barr impeachment inquiry may have to remain open for considerably longer to enforce the House subpoenas of the DOJ.

The DOJ has consistently resisted Congressional oversight principally by refusing to comply with House of Representatives subpoenas. These subpoenas include, among other things, the unredacted Mueller Report on the Russia investigation. The Supreme Court this summer in *Trump v. Mazars* and *Trump v. Vance* ruled that subpoenas directed at the president are enforceable if there is a demonstrable need for the information, whether the subpoena is issued by Congress or by a grand jury. Most if not all the House subpoenas directed at the DOJ are supported by a demonstrable need for the information. Nonetheless the legal case for prompt enforcement of subpoenas by federal courts would be even stronger if there were an open impeachment inquiry into the conduct of the attorney general. The conduct describes in this report is more than enough to justify opening such an impeachment inquiry, and the Working Group recommends that the House do so. We also recommend that the impeachment inquiry stay open until all or at least most relevant House subpoenas have been complied with.

## **VI. Findings**

The concerns the Working Group has raised in this report 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 and at a minimum, created the perception that the law is being applied as a political tool to support the re-election of the current president. In some cases, he has gone so far as to violate rules of professional conduct and government ethics rules. The group is also concerned about lack of congressional oversight of the DOJ and refusal of the attorney general to cooperate with Congress. Our findings are listed below as first general and then specific.

### **General Findings:**

1. Mr. Barr appears to embrace an autocratic view of the power of the executive branch, specifically presidential power, and he views his own extensive authority as flowing from this nearly unbounded view of presidential power. This authoritarian worldview limits the degree to which Mr. Barr regards himself as bound by the rule of law and makes him see himself as entitled to ignore the laws, ethics and historical practices that have helped to ensure that the work of the Department is in line with the values of a democratic nation.

2. The Working Group reached the dismaying conclusion that Mr. Barr regards the DOJ as limited in its operations by nothing other than contrary political power. There is no evidence that Mr. Barr seeks to constrain the operations of the DOJ in accordance with a view of law as a limiting principle on its authority. Law serves at best as a rhetorical tool for enhancing power rather than as a source of constraint on that power.
3. The Working Group came to the reluctant conclusion that Mr. Barr is using the powers of the DOJ as a vehicle for supporting the political objectives of President Donald Trump. There are two senses in which this appears to be the case. First, the attorney general is willing to take measures to please the president or because the president has requested or pressed him to do so. Second, the attorney general appears to be willing to use the powers of his office to attempt to help with the president's bid for re-election. These are distinct phenomena and should be analyzed separately. They raise separate and distinct concerns about the conduct of the attorney general, though both create an ethos of politicization at the DOJ.
4. The Working Group identified recent developments at the Department of Justice as an extreme departure from the reform agenda implemented by Attorneys General Ed Levi and Griffin Bell in the 1970's, a reform that was sparked by concerns about the Department following the Watergate scandal. The Working Group found that because the DOJ plays a vital role in securing and protecting the rule of law, its continued politicization is dangerous to our system of democratic governance. The DOJ appears to have transitioned from a department that regarded itself as bound by the law to a department that treats adherence to law as optional, and moreover as one that uses law for political ends. Using law as a weapon against political enemies poses a lasting threat not only to the integrity of the Department of Justice, but also a threat to the rule of law itself.
5. A consistent theme of the Working Group's findings was that Mr. Barr could not be trusted to represent the work of the department accurately, and that there are consistent problems of veracity in Mr. Barr's public statements and representations. In numerous different areas, the Working Group found that he distorted both law and facts, placing a spin on his own actions, the actions of the DOJ, or the actions of the president's political rivals in a way that was not faithful to reality and seemingly motivated by political considerations.
6. The Working Group found that in several different areas, the actions of the DOJ under Mr. Barr compromised U.S. national security and increased risks to U.S. national interests relative to foreign and domestic enemies. As with the Working Group's other findings, the clear picture emerged that Mr. Barr was more interested in supporting the president's re-election bid and supporting his general wishes than in protecting the interests of U.S. national security. Examples can be found in the specific findings.

### **Specific Findings:**

1. The attorney general seriously and intentionally mischaracterized the Mueller Report when he presented its findings to Congress and to the American people. The intentional nature of the mischaracterization is made clear by the fact Mr. Barr had received a series of

summaries from the Mueller team and yet he substituted his own summary of the report for the summaries the Mueller team had prepared, along with other facts surrounding Mr. Barr's representations, such as objections from Mr. Mueller himself that Mr. Barr disregarded. The purpose of this mischaracterization was indisputably political, namely, to benefit Donald Trump by obscuring the Mueller Report's findings regarding the Russia probe. One individual interviewed by the Working Group, a senior member of the Mueller team, made clear that no one in the Special Counsel's office expected the announcement and the letter produced by the attorney general. Moreover, the attorney general had provided every reason to believe that the public release of the Mueller Report would, in the first instance, consist of a release of summaries that the Mueller team had prepared and which the attorney general knew had been prepared for that purpose. This suggests that the attorney general not only misled the American people with regard to the content of the Mueller Report, but that he also intentionally misled the Mueller team into believing they would have more control over the public roll out of the report than ultimately they did.

2. Attorney General Barr should have recused from the Russia investigation under ethics rules promulgated by the United States Office of Government Ethics pursuant to the Ethics in Government Act of 1978, as well as under state bar ethics rules based on the ABA Model Rules of Professional Conduct that apply to all DOJ attorneys by federal statute. This recusal was required because as a private sector lawyer, Mr. Barr had previously written a 19-page memo about the Mueller investigation for lawyers representing targets of the investigation. Having interviewed personally with President Trump about the possibility of representing him privately in the Mueller investigation, along with Mr. Barr's public statements about the Mueller investigation. The Working Group also discussed whether Attorney General Barr had a conflict of interest that required him to recuse from the Ukraine matter at DOJ, as evidenced by President Trump's having asked the President of Ukraine to contact Mr. Barr in the phone call they had that was the subject of Mr. Trump's impeachment. This refusal to recuse went against a strongly worded opinion of the City Bar in New York where Barr is licensed to practice law. Given the current state of knowledge regarding the basis for Mr. Trump's remarks, the Working Group could not reach agreement about whether Mr. Barr should not have recused with regard to the Ukraine matter. The question for the Working Group ended up being whether Mr. Barr had engaged in communications with Ukraine about the subject matter described in the phone call or other conduct that was the underlying subject matter of the Ukraine investigation.
3. The Working Group disagreed strongly with the Attorney General's refusal to release an unredacted version of the Mueller Report to Congress, an action that obstructed Congressional inquiry and signaled a concerning lack of respect for Congressional oversight. Moreover, the failure to release the unredacted report deepened political rancor and spawned litigation in the courts relating to House subpoenas and public requests under the Freedom of Information Act. A Republican appointed federal judge strongly criticized DOJ's handling of the Mueller Report, including DOJ withholding of redacted portions of the Report from Congress and the public. While litigation over the report was pending, the Attorney General launched a series of counter-investigations designed to discredit the Russia investigation as well as the Mueller Report, a move the Working Group saw as highly problematic.

4. The Attorney General has also continued to make misleading public statements about the Russia investigations as well as counter-investigations, seemingly in order to provide political cover for President Trump. This conduct fits in with a consistent pattern demonstrated elsewhere in this Report: An Attorney General who is determined to use the DOJ in every possible way to provide political cover and political support for President Trump, regardless of what the rule of law requires.
5. President Trump in his phone call with the President of Ukraine described Attorney General Barr as having a role that is entirely inappropriate for any lawyer at DOJ, including the Attorney General: investigating the president's political opponents and possibly coordinating with Rudy Giuliani, a private lawyer representing the president's political campaign. To the extent the conduct for which President Trump was criminal it is important to know whether the Attorney General was involved. Congress should investigate.
6. Attorney General Barr apparently encouraged the Office of Legal Counsel (OLC) to issue an opinion to justify concealment of the Ukraine whistleblower's report from Congress. The Attorney General also has supported President Trump's firing of Inspector Generals in the middle of the Ukraine scandal and other investigations.
7. The Working Group is concerned about the impropriety and the intentions behind the Durham investigation, as well as other US Attorney investigations that are currently taking place relating to the origins of the probe into the Trump campaign to discredit the Russia investigation. Even though Justice Department policy forbids public comments on pending investigations, Attorney General Barr has repeatedly given interviews on Fox News and elsewhere about the counter-investigations, especially the Durham investigation. One of the clearest and most overriding concern of the Working Group to come out of the present study is concern about the intended use of the counter-investigations against political enemies of the president, especially in the immediate run up to the election. The Working Group expressed grave concerns that Mr. Barr is attempting to use these investigations for the purpose of announcing high level indictments in the immediate run up to the November elections. The Working Group also noted that the House and Senate do not seem fully prepared for politically motivated indictments or other politicized uses of these investigations in the run up to the November election. Congress must be prepared to confront such maneuvering should it in fact occur.
8. The Working Group also concluded that there has been extensive political and politically-motivated interference in individual prosecutions by the White House and Attorney General – particularly in the cases of Michael Flynn and Roger Stone. This interference goes well beyond what has occurred in previous administrations and is a violation of Justice Department practices and procedures. In the case of Roger Stone, the Working Group particularly noted the likelihood that Mr. Stone's sentence was commuted, rather than Mr. Stone receiving a pardon, in order to assist with the effort to immunize Mr. Stone from having to testify in any future proceeding involving Mr. Trump. With commutation of Mr. Stone's sentence, but no pardon for his underlying actions, Mr. Stone could still claim he

could not respond to a subpoena on the grounds that it would violate his Fifth Amendment privilege against self-incrimination. This conclusion reinforced the impression that the actions of the president in the area of pardons and commutations, is politically motivated. DOJ, which has its own pardon office to advise the president, thus has apparently played a role that facilitated and implicitly condoned the President's abuse of the pardon and commutation power, probably to silence witnesses in ongoing investigations. This is yet another obstruction of justice problem.

9. The DOJ has played a crucial role in the Trump Administration's response to various national "emergencies" of differing orders of magnitude, as well as some perceived, but not actual, emergencies. The Department has supported the Trump Administration in using "emergency" arguments to abrogate the right of Congress to determine appropriation of federal funds for a proposed border wall. The federal response to both the COVID19 emergency and to civil unrest after the police killing of George Floyd in Minneapolis has been highly politicized. DOJ has supported the Trump Administration in applying inconsistent legal standards to critically important questions such as First Amendment freedom of speech and assembly and federalism issues surrounding states' prerogative to protect public health and maintain order under the Tenth Amendment. The DOJ supported private lawsuits against states responding to the COVID19 pandemic with temporary stay at home orders. On the other hand, in at least one instance the Attorney General gave orders to federal officers to use tear gas and pepper spray as well as other physical force on peaceful protesters so the President could have a political photo op of himself outside a church in Washington, DC.
10. DOJ manipulates loopholes in the law to justify use of federal officers for violent crackdowns on dissent, including in Portland, Oregon and in Lafayette Park in the District of Columbia where federal troops were used against peaceful protesters. DOJ's actions raise troubling questions under the First Amendment and under applicable statutes, regulations and procedures for deployment of federal forces including the National Guard. DOJ is also supporting the President's use of federal armed forces to encroach upon the legitimate law enforcement prerogative of the states guaranteed under the Tenth Amendment, the Posse Comitatus Act and other statutes.
11. DOJ has a troubling approach to civil liberties and surveillance, particularly rights under the First Amendment. There has been ramped up FBI/DOJ surveillance and other law enforcement activities aimed at the political left after the President's declaration – without any basis in applicable law -- of "antifa" as a terrorist organization. There have also been reports of federal agents tapping the cell phones of protesters in Portland, presumably without a warrant and if so in violation of the Fourth Amendment.
12. Several recent DOJ actions likely violate the Hatch Act, which prohibits federal officials from using their official position to influence the results of a partisan election. These actions include the possibility that the Attorney General had a role in the Ukraine scandal as described in the President's phone call with the President of Ukraine, the Attorney General's actions in clearing Lafayette Park of peaceful protesters to facilitate a political photo op for the President holding a Bible upside down outside a church, and developments

in DOJ's Russia counter investigations that are intended to influence the November 2020 election. One member of the Working Group had previously filed a Hatch Act complaint against Mr. Barr following his conduct in the Lafayette Square incident.

13. Many members of the Working Group are concerned that DOJ's procedures for selecting federal judges have been excessively politicized -- with a lot of input coming from a few outside organizations such as the Federalist Society -- although we note that this has occurred in past administrations as well. Legitimate questions arise as to whether these outside organizations are inappropriately outsourced functions that should be performed in DOJ and whether lobbying of DOJ with respect to judicial nominations meets the bare minimum standards of the Lobbying Disclosure Act of 1995 as amended.
14. DOJ has consistently resisted Congressional oversight, principally by refusing to comply with House of Representatives subpoenas. With respect to enforcement of House subpoenas the Attorney General is so flagrant as to ask the Speaker of the House "did you bring your handcuffs." DOJ also advises other federal agencies against subpoena compliance and litigates in support of other federal agencies -- and even the Trump Organization -- in ignoring subpoenas. In two recent cases, *Trump v. Mazars* and *Trump v. Vance*, the Supreme Court ruled that subpoenas directed at the President are enforceable if there is a demonstrable need for the information, and that the president must comply with a valid subpoena whether it is issued by Congress or by a grand jury. Most if not all of the House of Representatives subpoenas directed at DOJ are supported by a demonstrable need for the information. DOJ nonetheless refuses to comply with these subpoenas.
15. The Attorney General has an active role in firing United States Attorneys engaged in investigations that get too close to the President and his associates, most notably in the Southern District of New York (SDNY). There has also been a reshuffling of US Attorneys in the Eastern District of New York (EDNY) where the Ukraine investigations are pending. These actions if motivated by a desire to stymie investigations are probably a repeat violation of the obstruction of justice statute, 18 U.S.C. §1512(c)(2) (prohibiting criminal penalties for anyone who "corruptly ... obstructs, influences, or impedes any official proceeding, or attempts to do so"). This statute appears to have been violated with President Trump's 2017 firing of FBI Director James Comey, as described in Part II of the Mueller Report. This obstruction of justice statute continues to be ignored and DOJ adheres to the position taken in a 19-page memo written for Trump's personal lawyers by Mr. Barr in private practice arguing that the president by removing a prosecutor or investigator cannot obstruct justice because he has the power to remove federal officers under Article II of the Constitution. The Supreme Court, however, has made it clear, most recently in *Trump v. Vance*, that the criminal laws do apply to the president. Presumably this would include this and other obstruction of justice statutes.
16. The Working Group concluded that there is a grave danger to the Intelligence Community from politicized DOJ investigations, intimidation and potential prosecutions, and that this danger poses in turn a grave risk of harm to U.S. national security, which depends heavily upon effective intelligence operations and a collaborative relationship between the president and the IC.

17. The use of a criminal investigation is ill-suited to examining the process of foreign intelligence analysis, that it poses unnecessary risks to intelligence sources and methods, that it intimidates and alienates foreign intelligence analysts, and that it chills the analytic process in a way likely to undermine the candor essential to producing the best intelligence information for national policymakers. The cumulative effects are likely to increase the attrition of talented intelligence personnel and neutralize the concept of “speaking truth to power” that is essential to the effective use of intelligence in national policy decisions. All of this weakens prospective U.S. intelligence capabilities to the advantage of Russia and other adversaries in competition with the interests and goals of the United States. Careless investigations also risk compromising intelligence sources and methods. This will likely bring high attrition in intelligence agencies and a climate of fear among intelligence personnel. This also creates a disincentive to share information, particularly information that risks exposing/embarrassing political appointees. This in turn will bring a substantial weakening of US intelligence gathering going forward, greatly advantaging Russia and other adversaries.
18. The Attorney General inappropriately has mixed religious views with the official business of the DOJ by, among other things, attacking “militant secularists” in an October 2019 speech given at Notre Dame Law School that was posted on the DOJ website. This was both an endorsement of one set of religious views and a denunciation of another set of religious views in an official speech. The Attorney General also may have conducted other official DOJ business during his visit to Notre Dame, such as discussion of DOJ amicus briefs in religious freedom cases, including one case involving the archdiocese of Indianapolis, and possibly may have discussed nominations to the Supreme Court and other federal courts. Mixing these official DOJ functions with an official capacity endorsement/denunciation of particular religious views raises very troubling questions under the First Amendment establishment clause and, because of Barr’s attack on “militant secularists” in his official speech, the First Amendment free exercise clause. The Attorney General also may have violated federal ethics rules prohibiting official capacity endorsement of private organizations.
19. The Department of Justice has aggressively targeted individuals who have chosen to write books or articles that are unflattering to President Trump. Particular cases in point are the efforts on the part of the DOJ to interfere with the publication of former National Security Advisor John Bolton’s book, as well as another book written by former Trump attorney Michael Cohen. In both of these instances, we believe that the actions of the DOJ infringe on the First Amendment rights of the authors and publishers, and subvert the criminal process for political purposes.

A common theme for the above points is the use of the DOJ to further President Trump’s 2020 re-election campaign. The Working Group had been particularly concerned that Mr. Barr was determined to use the Durham investigation to justify President Trump’s conduct in the 2016 campaign and to discredit the Russia investigation of Robert Mueller. Until quite recently, all signs pointed towards a politically orchestrated “October surprise,” in which John Durham or one of the other U.S. Attorneys assigned to investigate the origins of the Russia probe would announce his

findings prior to the election, which Mr. Barr would then use to hand down some high level indictments from the Obama Administration, including possibly Vice-President, now presidential candidate, Joe Biden, as well as large number of individuals from the Obama Intelligence Community. These concerns were heightened last week, when the president said in a phone call on October 8, 2020 on Fox News and Fox Business that Mr. Barr has “all the information he needs” in order to bring indictments of top Democrats like Joe Biden and Barak Obama.<sup>808</sup> In between the release of the embargoed copy of this report and the final release, several news outlets have reported, however, that Mr. Barr has said that the Durham report will not be ready until after the election.<sup>809</sup> Reporting suggests that Mr. Trump is disappointed in Mr. Barr on this point, saying, “Unless Bill Barr indicts these people for crimes, the greatest political crime in the history of our country, then we’re going to get little satisfaction unless I win and we’ll just have to go, because I won’t forget it,” a thinly veiled threat to Mr. Barr. The following day, on October 9, President Trump ratcheted up his pressure on the Department of Justice in a radio interview with Rush Limbaugh, calling the delayed Durham report “a disgrace,” and said that Hillary Clinton should be “jailed.”<sup>810</sup>

In light of the severity of the abuses set forth in this Report, the Working Group recommends that the House of Representatives open a formal impeachment inquiry into the conduct of Attorney General Barr. The House should leave that inquiry open until most of the relevant information has been obtained from DOJ, by subpoena or otherwise. We note that under the recent *Mazars* holding the legal case for prompt enforcement of subpoenas by federal courts would be even stronger if there were an open impeachment inquiry into the conduct of the Attorney General, and most likely had an impeachment inquiry been underway when the subpoena to Mazars for Donald Trump’s financial records. The conduct described in this Report is more than enough to justify opening such an impeachment inquiry and we recommend that the House Judiciary Committee do so at once. Potential charges include abuse of power, obstruction of Congress and obstruction of justice. If there is sufficient evidence of high crimes and misdemeanors by the Attorney General, the House should then vote out articles of impeachment against the Attorney General.

## VII. Recommendations

In light of the severity of the abuses set forth in this Report, the Working Group recommends that the House of Representatives open a formal impeachment inquiry into the conduct of Attorney General Barr. The House should leave that inquiry open until most of the relevant information has been obtained from DOJ, by subpoena or otherwise. We note that under the recent *Mazars* holding the legal case for prompt enforcement of subpoenas by federal courts would be even stronger if there were an open impeachment inquiry into the conduct of the Attorney General, and most likely

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<sup>808</sup> Peter Baker and Maggie Haberman, *Trump Lashes Out at His Cabinet With Calls to Indict Political Rivals*, The New York Times, Oct. 8, 2020. <https://www.nytimes.com/2020/10/08/us/politics/trump-calls-to-indict-political-rivals.html>

<sup>809</sup> Alayna Treene, *Barr Tells Republicans Durham Report Won’t Be Ready by Election*, Oct. 9, 2020. <https://www.axios.com/barr-durham-report-election-3c02ec6a-7613-4083-b35c-4844de6da16b.html>.

<sup>810</sup> Anne Gearan, et. al., *Trump, Lagging in Polls, Pressure Justice Department to Target Democrats and Criticizes Barr*. Oct. 9, 2020. [https://www.washingtonpost.com/politics/trump-barr-durham-russia/2020/10/09/05ed9842-0a40-11eb-a166-dc429b380d10\\_story.html](https://www.washingtonpost.com/politics/trump-barr-durham-russia/2020/10/09/05ed9842-0a40-11eb-a166-dc429b380d10_story.html)

had an impeachment inquiry been underway when the subpoena to Mazars for Donald Trump’s financial records. The conduct described in this Report is more than enough to justify opening such an impeachment inquiry and we recommend that the House Judiciary Committee do so at once. Potential charges include abuse of power, obstruction of Congress and obstruction of justice. If there is sufficient evidence of high crimes and misdemeanors by the Attorney General, the House should then vote out articles of impeachment against the Attorney General.

### **Other Recommendations:**

1. Strengthen the independence of the special counsel

Congress should take steps, by statute, to strengthen the independence of the special counsel, particularly when investigating the president, vice president, their campaigns, and close family. Different members of the working group have different views on how best to achieve this and what the constitutional limitations on such a statute might be. The Supreme Court upheld the former independent counsel statute, so there are good arguments that a similar mechanism would also be upheld, but there were also good reasons that Congress ultimately chose not to renew that particular statute, including concerns that a future Supreme Court might overturn its earlier opinion.

2. Staggered ten-year terms for U.S. attorneys

Appointment of U.S. attorneys for fixed terms would avoid some of the problems discussed in this report that occur when U.S. attorneys are removed for political reasons that may or may not amount to demonstrable obstruction of justice. Arguably these U.S. attorneys would be protected from removal by the statute which would not be overturned for the reasons articulated in *Morrison v. Olson*. The problem is that U.S. attorneys do not have the narrow and case specific role that the special prosecutor has and that was emphasized in *Morrison v. Olson*. Recent cases affirming a robust version of the “unitary executive theory” in the context of presidential removal power make such an arrangement even more problematic.<sup>811</sup> See *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, \_\_\_ U.S. \_\_\_, No. 19-7 (2020).

3. Staggered ten-year terms for IGs

Inspectors general are not infrequently the bearers of bad news and negative information as the officer tasked to verify compliance with law, regulation, and policy within their respective governmental agency. They need to be protected from reprisal for being the bearer of bad news lest the agency and the government writ large lose the primary benefit of their position. Appointment of inspectors general for fixed terms would avoid some of the problems discussed in this report that occur when inspectors general are removed in the middle of investigations. This type of arrangement might be constitutional under the reasoning in *Morrison v. Olson*, but there is a significant risk that the current Supreme Court could overturn the arrangement as an infringement of the president’s removal power.

4. Strengthen the independence of career DOJ attorneys in all departments.

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<sup>811</sup> *Free Enterprise Fund v. PCAOB*, 561 U. S. 477 (2010); *Seila Law v. CFPB*, 591 U.S. \_\_\_ (2020).

The DOJ should enhance the role of its career attorneys in policy decisions as well as decisions in individual investigations, civil cases, and criminal prosecutions. Career attorneys should also have a greater impact on the work of OLC. Although different administrations may interpret some laws differently and have different law enforcement priorities, consistency in federal law enforcement is important. Regardless of who is in the White House, investigations and prosecutions should not be influenced by partisan politics. Increasing the role of career DOJ attorneys will make incidents like some of those described in this report less likely to occur. Disagreements between career DOJ attorneys and political appointees also should be documented, preferably in writing, and the DOJ should share information about such disagreements with congressional oversight committees upon request.

5. Require recusal of presidential appointees in the DOJ from particular party matters involving the president's personal financial interests, the president's family or his campaign.

Recusal rules for such matters could be embodied in an executive order on ethics, and/or an amendment to the Office of Government Ethics "impartiality rule" at 5 C.F.R. 2635.502.<sup>812</sup> Even better would be to accomplish this recusal rule with a federal statute so it cannot be undone by another executive order. Such rules could apply to other agencies as well—for example, Treasury Department employees handling matters pertaining to a president's tax returns. Senior executive branch officers appointed by the president are generally removable by the president at will.<sup>813</sup> These officers should not be the persons making decisions anywhere in the U.S. government on particular party matters involving the president in his personal capacity, and they certainly should not be so in the DOJ whose mission it is to assure equal justice under the law.

6. Strengthen the legal protections for inspectors general and expand their purview.

Inspectors general are part of the executive branch, with the president at its head, but they also have a critically important independent role in investigating alleged waste, fraud, and abuse in their agencies. Sometimes the investigative work of inspectors general will displease political superiors and even the president, but it is important that that this work continue anyway. Inspectors general should also report information to Congress not only at the conclusion of investigations but in appropriate circumstances at the outset of an investigation or during an investigation, and inspectors general should not be removed by the president for fulfilling this duty. Congress should consider strengthening reporting requirements for inspectors to provide them with additional protection in carrying out this role.

7. Strengthen the independence of members of the Intelligence Community, specifically ODNI.

This report discusses ways in which DOJ investigations undermine the independence of the Intelligence Community, particularly if those investigations are politically motivated. Although violations of law in the IC should be investigated and prosecuted, it is important that DOJ lawyers not intimidate IC employees who have done nothing wrong and who are simply trying to do their

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<sup>812</sup> 5 CFR § 2635.502 (2020).

<sup>813</sup> *Free Enterprise Fund v. PCAOB*, 561 U. S. 477 (2010); *Seila Law v. CFPB*, 591 U.S. \_\_\_ (2020).

jobs. There is also a risk that carelessly handled DOJ investigations in the IC could compromise sources and methods of obtaining intelligence. The ODNI Inspector General's office should have an opportunity to guide DOJ investigations within ODNI, and the DOJ should coordinate with the ODNI Inspector General's office to make sure investigations do not compromise the quality of our intelligence or unfairly intimidate intelligence employees.

8. Ensure vigorous use of the congressional budgetary process to engage in oversight. Require regular testimony from the attorney general.

Congress should use its power of the purse to assure greater accountability from the DOJ. This includes requiring regular testimony from the attorney general before House and Senate committees that oversee the DOJ as well as compliance with congressional subpoenas. Congress will sometimes have to go to court to enforce its subpoenas, but congressional control over the budgetary process also is an effective, appropriate, and sometimes faster, method. The DOJ requests and receives funding from Congress, and the DOJ should respond to congressional requests for relevant information. The elected representatives of the people who decide disbursement of public funds are entitled to information on how that money is being spent by executive branch agencies including the DOJ and, as part of the budgetary process, Congress should make sure that information is provided.

9. Move some of the oversight responsibility from the Office of Professional Responsibility (OPR) to the inspectors general. The Inspector General Access Act of 2019 (S. 685 / H.R. 202) is currently pending in Congress, having been co-sponsored by eight Democrats and six Republicans in the Senate and three Democrats and one Republican in the House.

It is important that the DOJ inspector general be empowered to investigate alleged misconduct in the DOJ without such investigations being delayed because the DOJ, unlike most other federal agencies, has a separate OPR. OPR has an important role in the DOJ given the importance of professional ethics to the work of DOJ attorneys, but the inspector general's work should not be hindered because of OPR's additional level of review.

10. Require all DOJ attorneys to comply with ethics advice from DOJ ethics officials.

Federal ethics statutes and regulations do not change from administration to administration and are not to be interpreted based upon political ideology. Most DOJ ethics officials are career DOJ attorneys rather than political appointees and, with civil service job protection, are well suited to give ethics advice that may not be popular with senior DOJ officials. DOJ should report—and perhaps be required by statute to report—to Congress instances in which a presidentially appointed DOJ official acts contrary to advice from DOJ ethics officials.

11. Legislatures in states with active investigations of individuals who are held to be immune from prosecution while in office because of interpretations of federal law should amend their criminal statutes to toll their statutes of limitations during those periods of service.

State prosecutors may defer prosecution of a few federal officials—including the president—because of their current positions with the federal government. Whether or not deferral of such prosecutions is constitutionally required is hotly contested but regardless should not result in permanent immunity from prosecution. States that defer prosecutions because the target of a criminal investigation holds federal office should amend their statutes of limitations to provide for tolling during the relevant period of federal service.

12. Congress should expand the reporting requirements of the Federal Election Campaign Act to require notice of any foreign individual's or entity's offer of any assistance, direct or implied, material or otherwise, to a covered political campaign or candidate.

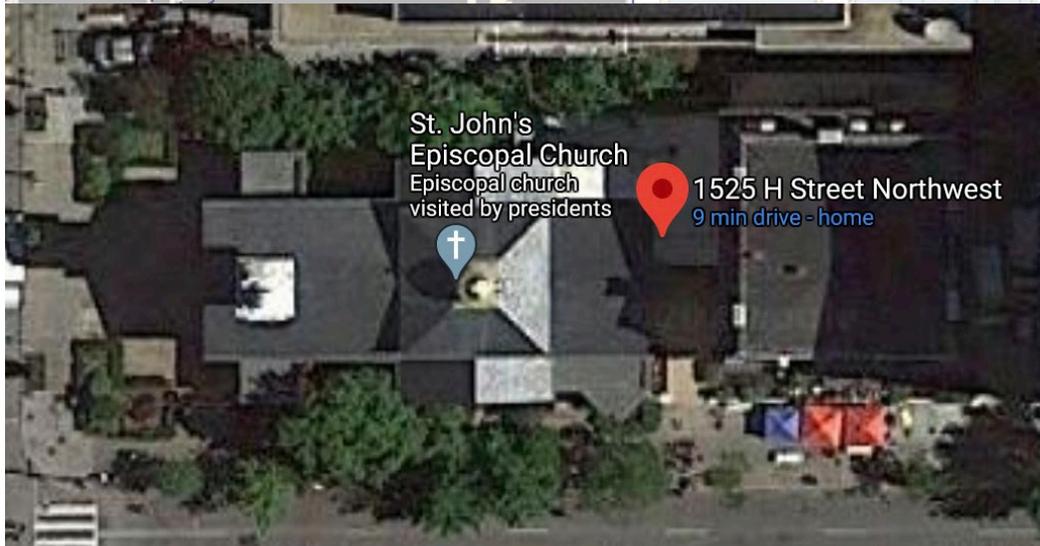
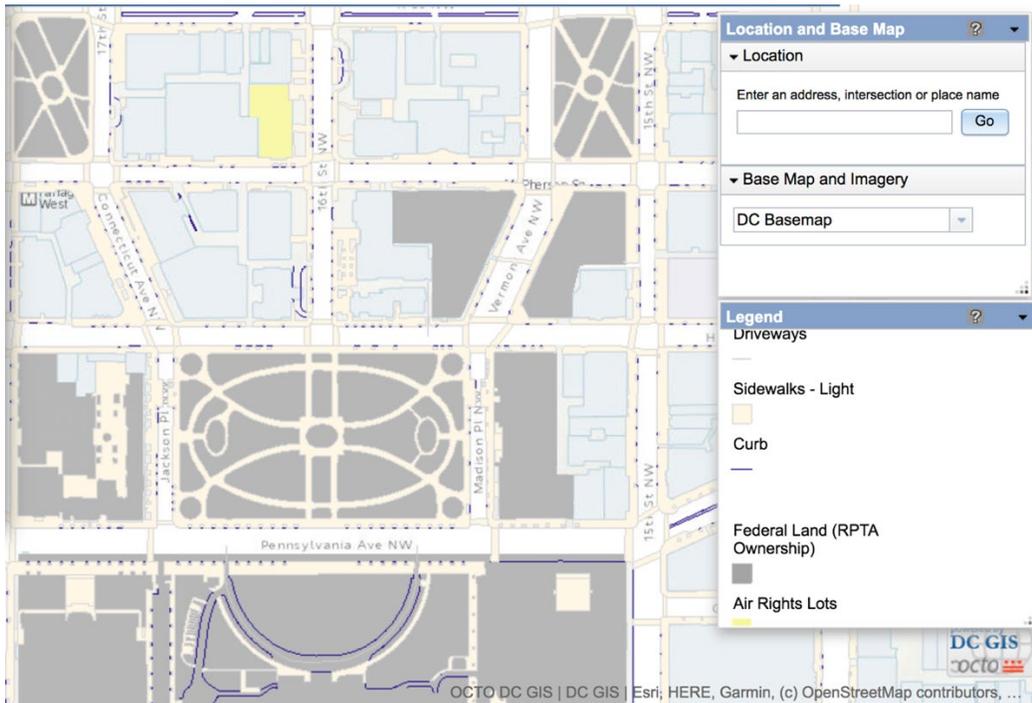
This report is an overview of conduct within the DOJ, not a discussion of federal election law. Nonetheless, we note in this report that the DOJ has been involved in both the Russia investigation and the Ukraine scandal, two instances in which foreign powers were involved or asked to be involved with federal elections in the United States. Such scandals can be prevented or mitigated with more extensive reporting requirements. The Federal Election Commission should be informed of such instances in which foreign assistance to a federal political campaign is offered or requested. Congress should amend the Federal Election Campaign Act accordingly.

## VIII. Appendices

### APPENDIX A: Lafayette Square Incident

*Editor's Note: This Appendix includes a large amount of publicly available data that was collected and assembled by interns with the CERL 2020 Summer Internship and considered by the Working Group.*

#### Relevant Maps and Photographs







### **How was this photo opportunity developed?**

There is disagreement about whether the plan for a photo-op at St. John's was conceived of by President Trump's daughter and Senior Advisor Ivanka Trump or his Counselor, Hope Hicks. The plan was hatched in an Oval Office meeting the day before, after a fire in the basement of St. John's that had allegedly been set by protestors. Participants in the Oval Office meeting were: White House Chief of Staff Mark Meadows, Senior Advisor to the President Ivanka Trump, Senior Advisor Jared Kushner, Counselor to the President Hope Hicks, and the President himself.<sup>814</sup>

### **Who attended this photo opportunity?**

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<sup>814</sup> Peter Baker, Maggie Haberman, Katie Rogers, Zolan Kanno-Youngs, Katie Benner, Haley Willis, Christiaan Triebert and David Botti, *How Trump's Idea for a Photo Op Led to Havoc in a Park*, MSN (Jun. 3, 2020) <https://www.msn.com/en-us/news/politics/how-trump-s-idea-for-a-photo-op-led-to-havoc-in-a-park/ar-BB14Wzh3>.

In addition to the President, the following people attended the photo-op: Ivanka Trump,<sup>815</sup> Jared Kushner,<sup>816</sup> Hope Hicks,<sup>817</sup> Kayleigh McEnany,<sup>818</sup> Mark Meadows,<sup>819</sup> Mark Esper,<sup>820</sup> General Milley,<sup>821</sup> Bill Barr,<sup>823</sup> Robert O'Brien,<sup>825</sup> Unidentified White House Photographer,<sup>826</sup> and Unidentified White House Videographer.<sup>827</sup>

### **Was this photo promoted for political purposes?**

Many twitter accounts affiliated with the White House and the Trump 2020 Campaign promoted the photo opportunity of the President at St. John's Church.<sup>828</sup>

### **Under what legal authority were National Guard troops deployed to Lafayette Square?**

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<sup>815</sup> Emily Goodin & Geoff Earle, *Ivanka Trump carried the Bible Donald Trump posed with in her \$1,540 Max Mara handbag in infamous photo-op 'masterminded by Hope Hicks'*, DAILY MAIL (Jun. 3, 2020), <https://www.dailymail.co.uk/news/article-8381977/Ivanka-Trump-carried-Bible-Donald-Trump-posed-1-540-Max-Mara-handbag.html>.

<sup>816</sup> *Id.*

<sup>817</sup> *Id.*

<sup>818</sup> Alayna Treene and Alexi McCammond, *Trump walks to historic St. John's Church outside White House as protests rage*, AXIOS (Jun. 1, 2020), <https://www.axios.com/trump-st-johns-white-house-protests-953044b8-fab9-425c-94bf-ebcd81f929c7.html>

<sup>819</sup> *Id.*

<sup>820</sup> *Id.*

<sup>821</sup> Washington Post, *A video timeline of the crackdown on protestors before Trump's photo op*, YOUTUBE (Jun. 8, 2020), <https://www.youtube.com/watch?v=JxYMILDya0A>

<sup>822</sup> Helene Cooper, *Milley Apologizes for Role in Trump Photo Op: 'I Should Not Have Been There'*, N.Y. TIMES (Jun. 11, 2020), <https://www.nytimes.com/2020/06/11/us/politics/trump-milley-military-protests-lafayette-square.html>

<sup>823</sup> Philip Bump, *Timeline: The clearing of Lafayette Square*, THE WASHINGTON POST (Jun. 5, 2020), <https://www.washingtonpost.com/politics/2020/06/02/timeline-clearing-lafayette-square/>

<sup>824</sup> *Supra* note 9.

<sup>825</sup> *Id.*

<sup>826</sup> Peter Baker, Maggie Haberman, Katie Rogers, Zolan Kanno-Youngs, Katie Benner, Haley Willis, Christiaan Triebert and David Botti, *How Trump's Idea for a Photo Op Led to Havoc in a Park*, N. Y. TIMES (Jun. 2, 2020), <https://www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html>

<sup>827</sup> *Id.*

<sup>828</sup> See Steve Guest (@steveguest), TWITTER (Jun. 1, 2020 7:40 PM), <https://twitter.com/SteveGuest/status/1267601850775351298?s=20>. See also Steve Guest (@steveguest), TWITTER (Jun. 1, 2020 7:37 PM), <https://twitter.com/SteveGuest/status/1267601275270692865?s=20>, See also Team Trump (Text VOTE to 88022) (@TeamTrump), TWITTER (Jun. 1, 2020 7:17 PM), <https://twitter.com/TeamTrump/status/1267596277312864256>. See also Jason Miller (@JasonMillerinDC), TWITTER (Jun. 1, 2020 7:13 PM), <https://twitter.com/JasonMillerinDC/status/1267595269731954689>. See also Jason Miller (@JasonMillerinDC), TWITTER (Jun. 1, 2020 6:48 PM), <https://twitter.com/JasonMillerinDC/status/1267588875477831683>. See also Kyle Martinsen (@KyleMartinsen), TWITTER (Jun. 1, 2020 7:28 PM), <https://twitter.com/KyleMartinsen/status/1267598904616521728>. See also Hannah Castillo (@thehannahjane), TWITTER (Jun. 1, 2020 7:24 PM), <https://twitter.com/thehannahjane/status/1267597987959787521>. See also Ali Pardo (@alipardo), TWITTER (Jun. 1, 2020 7:28 PM), <https://twitter.com/alipardo/status/1267598809342885889>. See also Abigail Marone us (@abigailmarone), TWITTER (Jun. 1, 2020 8:43 PM), <https://twitter.com/abigailmarone/status/1267617746570928128>. See also Abigail Marone us (@abigailmarone), TWITTER (Jun. 1, 2020 6:50 PM), <https://twitter.com/abigailmarone/status/1267589333063798787>.

When on duty, state National Guard troops can wear three different “hats.” The first, and most common, is “State Active Duty” (SAD) status, in which they are exercising state functions at the request of the state government and are generally governed by state law . . . This first “hat” is often described as “Title 32” status (a reference to that part of the U.S. Code that deals with the National Guard), but that’s incorrect. “Title 32” status is actually the second “hat,” pursuant to which the state National Guard troops remain subject to state command and control but are used for federal missions authorized by Congress—and, perhaps most importantly, are usually paid for by the federal government.

Finally, the third hat, “Title 10” status, is when state National Guard units are “federalized” by the president of the United States pursuant to one of the specific statutory authorities for doing so. Once federalized, National Guard troops come under the full command and control of the Pentagon—specifically the secretary of defense. In essence, National Guard troops become part of the federal military until and unless they are returned to state status.

It’s long been understood that the Posse Comitatus Act (which prohibits “us[ing] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws”) does not apply to National Guard units in either SAD or Title 32 status, because they are not, at that point, part of the Army or the Air Force. By contrast, when National Guard troops are federalized, the Posse Comitatus Act does apply—and requires “express” statutory authorization before those troops can be used to “execute the laws.” To be sure, in situations in which both federal troops and unfederalized National Guard units are deployed, Congress in 2008 authorized the appointment of “dual status commanders” but only to streamline coordination—not to blur the separate chains of command.

The only exception to this structure is the D.C. National Guard. Although four of the six federal territories have National Guards (all but American Samoa and the Commonwealth of the Northern Mariana Islands), the National Guards for Guam, Puerto Rico and the U.S. Virgin Islands are commanded by the territorial governors. D.C.’s Guard, in contrast, is always at the command and control of the president of the United States—at least in part because the Guard predates the creation of the D.C. local government in the early 1970s. Thus, it took no special authority for the president to activate the D.C. National Guard in response to the disorder in Washington.

So by what authority did the president utilize troops from other states’ National Guards for the same purpose? Some time after the incident, the attorney general claimed that the deployment of National Guard from a state was authorized by 32 U.S.C. § 502(f).<sup>829</sup>

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<sup>829</sup> Section 502 - Required drills and field exercises – provides: “**(f)(1)** Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—**(A)** without his consent, but with the pay and allowances provided by law; or **(B)** with his consent, either with or without pay and allowances; be ordered to perform training or other duty in addition to that prescribed under subsection (a). **(2)** The training or duty ordered to be performed under paragraph (1) may include the following:**(A)** Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.**(B)** Support of training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned, but only to the extent that such training missions and training operations—**(i)** are performed in the United States or the Commonwealth of Puerto Rico or possessions of the United States; and **(ii)** are only to instruct active duty military, foreign military (under the same authorities and restrictions applicable to active duty

Whereas § 502(f) is principally about training, it appears to authorize use of state National Guard troops, in their Title 32 status, for any “operations or missions undertaken ... at the request of the President or Secretary of Defense.” This provision was added to § 502 in the National Defense Authorization Act for fiscal 2007, the legislative history of which is somewhat less than clear as to its purpose and scope. And the regulations promulgated under § 502(f)(1) do not appear to provide any further illumination. (The Army’s 2018 “Domestic Operational Law Handbook” is a bit more insightful, but does not appear to support using § 502(f) like this.) The two things that are clear, in context, are that the provision is voluntary (leaving it up to individual governors whether to provide the requested support) and that any National Guard troops so activated would be in Title 32 status—meaning they would remain under the command and control of the state, not the federal government.

It’s still not entirely clear exactly what functions the out-of-state National Guard units were performing (which is problematic enough in its own right). Mr. Barr’s letter to Bowser lists a host of law enforcement-like tasks, including “crowd control, temporary detention, cursory search, measures to ensure the safety of persons on the property, and establishment of security perimeters,” among others. But by all accounts, the units were answering not only to state authorities but—directly or indirectly—to Secretary of Defense Mark Esper, as well. Indeed, as the Washington Post reported, Esper himself eventually “ordered” the out-of-state National Guard troops in D.C. not to use firearms or ammunition without consulting the White House—a move that almost got him fired.”

### **The Decision to Clear Lafayette Park and its Implementation**

The decision to clear Lafayette Park was apparently made prior to the decision for the photo opportunity, however it is not clear if the initial boundaries, timeline, and goals were altered to support the photo opportunity. Mr. Barr told the Associated Press that both he and U.S. Park Police agreed on the need to push back the security perimeter. Mr. Barr said he attended a meeting around 2 p.m. June 1<sup>st</sup> with several other law enforcement officials, including Metropolitan Police Chief Peter Newsham, where they looked at a map and decided on a dividing line.<sup>830</sup> Under the plan, the protesters would be moved away from Lafayette Square by 4 p.m. and federal law enforcement officials and members of the National Guard would maintain the perimeter line, Mr. Barr said.<sup>831</sup> This plan was developed at FBI Headquarters.<sup>832</sup>

White House spokeswoman Kayleigh McEnany told reporters it was Mr. Barr who made the decision to push back the security perimeter outside the White House on Monday morning.

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troops), Department of Defense contractor personnel, or Department of Defense civilian employees.(3) Duty without pay shall be considered for all purposes as if it were duty with pay.

<sup>830</sup> Michael Balsamo, *Barr says he didn’t give tactical order to clear protesters*, AP NEWS (Jun 5, 2020), <https://apnews.com/1a993a6e99b4ecd1062a7552efed2d96>

<sup>831</sup> Id.

<sup>832</sup> Alexander Nazaryan, *‘Still unclear’ who ordered action against protesters at Lafayette Park, defense secretary says*, YAHOO NEWS (Jul. 9, 2020), <https://news.yahoo.com/still-unclear-who-ordered-action-against-protesters-at-lafayette-park-defense-secretary-says-222356838.html>

McEnany said that when Mr. Barr arrived at Lafayette Square later that day to survey the security situation, he was surprised to see that action had not yet been taken.<sup>833</sup>

Mr. Barr arrived at the Square at 6 p.m. and claims the plan to clear the square by 4 p.m. had not yet been implemented but that he saw law enforcement officers were already moving to push back protesters from a park in front of the White House. There have been claims made that the delay in the clearing of the park was due to a request for more fencing that hadn't yet been fulfilled.<sup>834</sup> Mr. Barr immediately told police to clear the area, according to an official.<sup>835</sup> Mr. Barr stated he did not give a command to disperse the crowd, though he supported the decision.<sup>836</sup>

"They told me they were about to make the announcement and I think they stretched the announcements over 20 minutes. During the time I was there, I would periodically hear announcements," Mr. Barr said. "They had the Park Police mounted unit ready, so it was just a matter of execution. So, I didn't just say to them, 'Go.'"<sup>837</sup> [video footage only caught one announcement, immediately after Barr left the square, that was garbled.<sup>838</sup>]

Mr. Barr said it was a Park Police tactical commander — an official he never spoke to — who gave the order for the law enforcement agencies to move in and clear the protesters.<sup>839</sup> "I'm not involved in giving tactical commands like that," he said. "I was frustrated and I was also worried that as the crowd grew, it was going to be harder and harder to do. So my attitude was get it done, but I didn't say, 'Go do it.'"<sup>840</sup>

Nobody obtained permission from the church.<sup>841</sup> However, it appears that President Trump was off church property on the sidewalk, and that there are no air rights for the property. However, personnel working in the church were forced out before the President posed for the photo. The curfew was set by D.C. Mayor Bowser after several nights of unrest. The curfew was for 7pm and

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<sup>833</sup> Barr says he didn't give tactical order to clear protesters, FOX NEWS (Jun. 6, 2020), <https://www.foxnews.com/politics/barr-didnt-give-tactical-order-clear-protesters>

<sup>834</sup> Hearing on Incident with U.S. Park Police and Protesters, CSPAN at 25:29 (Jun. 29, 2020), <https://www.c-span.org/video/?473458-1/hearing-removal-protesters-lafayette-park>

<sup>835</sup> Evan Perez & David Shortell, *Attorney General Barr ordered authorities to clear protesters near White House, DOJ official says*, CNN (Jun. 2, 2020), <https://www.cnn.com/2020/06/02/politics/barr-protests-white-house/index.html>; see also [https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b\\_story.html?hpid=hp\\_hp-banner-high\\_protestwhitehouse-345pm%3Ahomepage%2Fstory-ans](https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b_story.html?hpid=hp_hp-banner-high_protestwhitehouse-345pm%3Ahomepage%2Fstory-ans)

<sup>836</sup> Barr says he didn't give tactical order to clear protesters, FOX NEWS (Jun. 6, 2020), <https://www.foxnews.com/politics/barr-didnt-give-tactical-order-clear-protesters>

<sup>837</sup> Id.

<sup>838</sup> WASHINGTON POST, *A video timeline of the crackdown on protestors before Trump's photo op*, YOUTUBE (Jun. 8, 2020), <https://www.youtube.com/watch?v=JxYMILDya0A>

<sup>839</sup> Barr says he didn't give tactical order to clear protesters, FOX NEWS (Jun. 6, 2020), <https://www.foxnews.com/politics/barr-didnt-give-tactical-order-clear-protesters>

<sup>840</sup> Id.

<sup>841</sup> Hunter, *Trespassing: St. John's Bishop says Trump was on church property 'without permission'*, DAILY KOS (Jun. 1, 2020), <https://www.dailykos.com/stories/2020/6/1/1949565/-Trespassing-St-John-s-Bishop-says-Trump-was-on-church-property-without-permission>

there is no sign that it underwent any official change, nor has the curfew been cited by the various law enforcement agencies in justifying their clearing of the park.<sup>842</sup>

Both federal officers and the Metropolitan Police Department (MPD) were involved in clearing the area. “Video evidence, being used in the ACLU lawsuit, reviewed by WUSA9 shows uniformed MPD officers marching in a line south on 17th Street, just south of H Street, minutes after federal police cleared out protesters. The role of the MPD is apparently being contested.

The day after the event, MPD Chief Peter Newsham denied taking part in that federal push. And in a statement Wednesday, the department continued to deny it. “The Metropolitan Police Department was not involved in the unscheduled movement of the President from Lafayette Square to St. John’s church on June 1,” an MPD spokesperson said. While there is no evidence at this time that MPD took part in the “movement” to get the President to St. John’s church as it states, there is video that shows MPD cleared out scattered protesters just outside the federal barricade set up minutes prior.”<sup>843</sup> “There is a video that shows MPD clearing out scattered protesters just outside the federal barricade set up minutes prior to the Park being cleared.”<sup>844</sup>

On July 9, 2020, during testimony before the House Armed Services Committee, Defense Secretary Esper said that it is “unclear” who ordered Lafayette Park to be cleared.<sup>845</sup> General Milley, at the same hearing, concurred, stating he didn’t “know with certainty” who ordered the park to be cleared. However, Milley did reveal that earlier in the day on June 1st, there had been “a planning session down at the FBI building.” At that meeting, Milley said, “they divided up who was gonna do what to whom.”<sup>846</sup> Barr led the teams from the US Marshalls, Bureau of Prisons, FBI Hostage Team, and DEA from an FBI command center.<sup>847</sup>

### **Which Units were involved in clearing Lafayette Square?**

Listed separately below are the units of federal officers that were involved in the Lafayette Square incident. Citations to the statutory authority for each unit appear in footnotes. The following also includes a description based on publicly available reports, and before any thorough investigation, of what officers in each unit did in connection with clearing Lafayette

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<sup>842</sup> Brooke Singman, *DC mayor announces evening curfew after riots tear through community*, FOX NEWS (Jun. 1, 2020), <https://www.foxnews.com/politics/washington-dc-mayor-imposes-7pm-curfew-after-riots>

<sup>843</sup> Nathan Baca, *Protesters and ACLU sue DC Police over Lafayette Square actions*, WUSA9 (Jul. 8, 2020), <https://www.wusa9.com/article/news/local/protests/aclu-sues-dc-police-over-lafayette-park-protest/65-9ef1050a-1b9d-48cb-a5a5-91e6816ec918>

<sup>844</sup> *Id.*; see also *ACLU Letter to AG Barr on Violent Clearing of White House Protesters*, AMERICAN CIVIL LIBERTIES UNION (Jul. 14, 2020), <https://www.aclu.org/letter/aclu-letter-ag-barr-violent-clearing-white-house-protesters>

<sup>845</sup> Alexander Nazaryan, *'Still unclear' who ordered action against protesters at Lafayette Park, defense secretary says*, YAHOO NEWS (Jul. 9, 2020), <https://news.yahoo.com/still-unclear-who-ordered-action-against-protesters-at-lafayette-park-defense-secretary-says-222356838.html>

<sup>846</sup> *Id.*

<sup>847</sup> Devlin Barrett, *Barr seeks to subdue D.C. protests by 'flooding the zone' with federal firepower*, THE WASHINGTON POST (Jun 3, 2020), [https://www.washingtonpost.com/national-security/william-barr-george-floyd-protests-fbi-atf-us-marshals/2020/06/02/6d093d0a-a515-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/national-security/william-barr-george-floyd-protests-fbi-atf-us-marshals/2020/06/02/6d093d0a-a515-11ea-b473-04905b1af82b_story.html)

Square Also, where available, we have included some published first-hand accounts from the officers themselves.

**D.C. National Guard** - “The crowd was loud but peaceful, and at no point did I feel in danger, and I was standing right there in the front of the line,” according got one guard officer. “A lot of us are still struggling to process this, but in a lot of ways, I believe I saw civil rights being violated in order for a photo-op.” The officer said he even told Gen. Mark Milley, the chairman of the Joint Chiefs of Staff, just before the Park Police moved in, that the protests had been peaceful that day, a sentiment that was shared by three other Guardsmen who were there. One Guardsman told her, “I never thought I’d get a bottle thrown at me and be told I should die and I should kill myself,” Osterholm said. “There’s not enough Kevlar to protect you from those kinds of statements spoken in your own language.”<sup>848</sup>

**U.S. Park Police (USPP) & Park Police SWAT** - The park police ran the command center<sup>849</sup> and were responsible for physically smashing an Australian.<sup>850</sup> Acting U.S. Park Police chief Gregory T. Monahan has acknowledged that Park Police used smoke canisters and pepper balls containing an irritant powder. But denies the use of CS gas, claiming that this is supported by the written radio logs.<sup>851</sup> Par Police authority is very limited and may have been exceeded that day because none of the protesters appeared to have committed a serious crime and there was so risk of death or serious bodily harm. For example, the Park Police can’t use lethal force unless there is “imminent danger of death or serious bodily harm.”<sup>852</sup>

**U.S. Secret Service** - The Secret Service used pepper spray,<sup>853</sup> and were the ones coordinating with the White House operations director and who met with Barr before the clearing.<sup>854</sup> Previously under Treasury, now under DHS. Director of the USSS reports to the DHS

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<sup>848</sup> Daniel Lippman, *‘What I saw was just absolutely wrong’: National Guardsmen struggle with their role in controlling protests*, POLITICO (Jun. 9, 2020),

<https://www.politico.com/news/2020/06/09/national-guard-protests-309932>

<sup>849</sup> Philip Bump, *Timeline: The clearing of Lafayette Square*, THE WASHINGTON POST (Jun. 5, 2020),

<https://www.washingtonpost.com/politics/2020/06/02/timeline-clearing-lafayette-square/>

<sup>850</sup> Charlie Nash, *U.S. Park Police Officers Reassigned Pending Investigation Into Beating of Australian News Crew in D.C.*, MEDIAITE (Jun. 4, 2020), <https://www.mediaite.com/tv/u-s-park-police-officers-reassigned-pending-investigation-into-beating-of-australian-news-crew-in-d-c/>

<sup>851</sup> Carol D. Leonnig, *Park Police spokesman acknowledges chemical agents used on Lafayette Square protesters are similar to tear gas*, THE WASHINGTON POST (Jun. 5, 2020), [https://www.washingtonpost.com/politics/park-police-spokesman-acknowledges-chemical-agents-used-on-lafayette-square-protesters-are-similar-to-tear-gas/2020/06/05/971a8d78-a75a-11ea-b473-04905b1af82b\\_story.html?itid=lk\\_inline\\_manual\\_22](https://www.washingtonpost.com/politics/park-police-spokesman-acknowledges-chemical-agents-used-on-lafayette-square-protesters-are-similar-to-tear-gas/2020/06/05/971a8d78-a75a-11ea-b473-04905b1af82b_story.html?itid=lk_inline_manual_22)

<sup>852</sup> Tom Jackman, *Video shows Park Police fired nine shots into Bijan Ghaisar’s Jeep at close range, killing him*, THE WASHINGTON POST (Jan. 24, 2018),

<https://www.washingtonpost.com/news/true-crime/wp/2018/01/24/video-shows-park-police-fired-nine-shots-into-bijan-ghaisars-jeep-at-close-range-killing-him/?noredirect=on>

<sup>853</sup> Jamie Crawford, *US Secret Service says it used pepper spray in June 1st event near Lafayette Park*, CNN (Jun. 13, 2020),

<https://www.msn.com/en-us/news/us/us-secret-service-says-it-used-pepper-spray-in-june-1st-event-near-lafayette-park/ar-BB15roQZ>

<sup>854</sup> Philip Bump, *Timeline: The clearing of Lafayette Square*, THE WASHINGTON POST (Jun. 5, 2020),

<https://www.washingtonpost.com/politics/2020/06/02/timeline-clearing-lafayette-square/>

secretary.<sup>855</sup> USSS Authority also is limited when it comes to civil disturbances, chiefly to protecting the President.<sup>856</sup>

**Arlington County Police Department** - This Virginia police department was present as additional force, but there is no clear evidence that they were involved in any of chemical use, the use of violence or the threat of violence to clear the square.<sup>857</sup> Jurisdiction is technically only Arlington County, Virginia and they report to the Chief of Police and ultimately it seems that they report to the Arlington County Manager. The Arlington County Board, the County Manager, and the Chief of Police made the decision to withdraw from D.C.<sup>858</sup>

**Bureau of Prisons (BoP) Special Operations Response Team** - This team used pepper ball guns and canister launchers at the protesters.<sup>859</sup> They were also seen in the days leading up to the protests and were criticized for not wearing any markings and, in response to queries, responding only that they were with the DOJ.<sup>860</sup> BoP Authority is limited to administration of the federal prisons,<sup>861</sup> and may have been exceeded by deployment of BoP personnel to Lafayette Square:

### **Injuries During the Clearing of Lafayette Square**

The American Civil Liberties Union and the Black Lives matter organization are suing many of the agencies listed above plus the President, Attorney General Barr, Secretary Esper, the D.C. Chief of Police requesting: 1) unspecified damages due to physical and mental injuries; 2) a court order declaring that Trump, Barr and other administration officials conspired to and did violate protesters' First and Fourth amendment rights, and 3) a court order barring officials from repeating what the plaintiffs say are unlawful activities.<sup>862</sup>

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<sup>855</sup> *Secret Service Overview*, DEP'T OF HOMELAND SEC., *Overview* (Last accessed Sept. 3), <https://www.secretservice.gov/about/overview/>.

<sup>856</sup> 18 U.S.C § 3056 (2020).

(a). Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons:

(1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.

(2) The immediate families of those individuals listed in paragraph (1).

<sup>857</sup> <https://www.washingtonpost.com/crime-law/2020/07/07/park-police-did-not-record-their-radio-transmissions-during-lafayette-square-operation-june-1/>; see also <https://www.youtube.com/watch?v=JxYmILDya0A>

<sup>858</sup> Justine Coleman, *Arlington County withdraws police from DC after being 'put in a compromising position'*, THE HILL (June 1, 2020), <https://thehill.com/blogs/blog-briefing-room/news/500600-arlington-withdraws-police-from-dc-after-being-put-in-a->

<sup>859</sup> WASHINGTON POST, *A video timeline of the crackdown on protestors before Trump's photo op*, YOUTUBE (Jun. 8, 2020), <https://www.youtube.com/watch?v=JxYmILDya0A>

<sup>860</sup> Devlin Barrett, *Barr seeks to subdue D.C. protests by 'flooding the zone' with federal firepower*, WASHINGTON POST (June 3, 2020), [https://www.washingtonpost.com/national-security/william-barr-george-floyd-protests-fbi-atf-us-marshals/2020/06/02/6d093d0a-a515-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/national-security/william-barr-george-floyd-protests-fbi-atf-us-marshals/2020/06/02/6d093d0a-a515-11ea-b473-04905b1af82b_story.html).

<sup>861</sup> 18 U.S.C.A. § 4042(a) (2020); 18 U.S.C.A. § 3050 (2020).

<sup>862</sup> Spencer S. Hsu, *Civil liberties groups sue Trump, Barr for forcefully removing Lafayette Square protesters*, THE WASHINGTON POST (Jun. 4, 2020), [https://www.washingtonpost.com/local/legal-issues/civil-liberties-groups-sue-president-trump-barr-for-forcefully-removing-lafayette-square-protesters/2020/06/04/e32c799a-a676-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/local/legal-issues/civil-liberties-groups-sue-president-trump-barr-for-forcefully-removing-lafayette-square-protesters/2020/06/04/e32c799a-a676-11ea-b619-3f9133bbb482_story.html)

An Australian camera crew on edge of Lafayette Square were apparently injured by the USPP<sup>863</sup>: Amelia Brace, a journalist stated that she and her cameraman identified themselves as members of the media but were smacked by batons and hit by “pepper ball” projectiles.<sup>864</sup>

Six Secret Service personnel appear to have been injured during the clearing operation.<sup>865</sup> The Park Police say that 50 officers were injured and 1 had to receive emergency medical treatment.<sup>866</sup>

### **Did the clearing of Lafayette Square Infringe on DC Home Rule?**

The President of the United States is the commander-in-chief of the DC National Guard.<sup>867</sup> The president can deploy the National Guard following a request from the DC Mayor, DC US Marshall, or National Capital Service Director<sup>868</sup> It is unclear whether the president can deploy absent a prior request from these officials. *Posse comitatus* (use of military as domestic law enforcement) is not implicated by use of National Guard<sup>869</sup>

Trump considered seizing control of the DC police department; Mayor Bowser claimed that this violated DC home rule.<sup>870</sup> Section 470 of the Home Rule Act allows the president to command the DC MPD under some circumstances, but this is without precedent and it is unclear whether the circumstances rose to the level of “special conditions of an emergency nature” outlined in the Act.<sup>871</sup>

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<sup>863</sup> Andreas Wiseman, *Australian Camera Crew Attacked By Police On Live TV In Washington; Oz PM Calls For Investigation*, DEADLINE (Jun. 2, 2020), <https://deadline.com/2020/06/australian-camera-crew-attacked-by-police-on-live-tv-in-washington-oz-pm-calls-for-investigation-1202949071/>

<sup>864</sup> Samone Blair, *Protesters injured by police before Trump photo-op testify: ‘It hurts’*, THE GRIO (Jun. 29, 2020), <https://thegrio.com/2020/06/29/protesters-lafayette-square-trump/>

<sup>865</sup> Vandana Rambaran, *At least 60 Secret Service members injured during George Floyd protests in DC*, FOX NEWS (May 31, 2020), <https://www.foxnews.com/us/more-than-60-secret-service-officers-injured-during-violent-george-floyd-protests-in-washington-d-c>

<sup>866</sup> *Hearing on Incident with U.S. Park Police and Protesters*, CSPAN (Jun. 29, 2020), <https://www.c-span.org/video/?473458-1/hearing-removal-protesters-lafayette-park>

<sup>867</sup> D.C. Code § 49–409, <https://code.dccouncil.us/dc/council/code/sections/49-409.html>

<sup>868</sup> *Id.*

<sup>869</sup> *Use of the National Guard to Support Drug Interdiction Efforts in the District of Columbia*, DEPARTMENT OF JUSTICE, at 92 (Apr. 4, 1989), <https://www.justice.gov/file/24191/download#page=2>

<sup>870</sup> Scott R. Anderson, *Emma Broches, Eric Halliday, Julia Solomon-Strauss, What Made Trump’s Protest Response in D.C. Unique?*, LAWFARE BLOG (Jun. 8, 2020), <https://www.lawfareblog.com/what-made-trumps-protest-response-dc-unique>

<sup>871</sup> *Id.*

## APPENDIX B: Responses to Violent Extremism

*Editor's Note: This Appendix contains a large amount of publicly available data assembled by interns with the CERL 2020 Summer Internship*

### Information on the Incidence Far-Right Terror Threat

Since the 1990s, far-right terrorism has overtaken far-left terrorism as the most dangerous domestic terrorist threat to the country.<sup>872</sup> Of the 85 violent extremist incidents that resulted in death since September 12, 2001, “far right wing violent extremist groups were responsible for 62 (73 percent) while radical Islamist violent extremists were responsible for 23 (27 percent).”<sup>873</sup> *The Washington Post* found that “92 of the 263 incidents of domestic terrorism between 2010 and 2017 were committed by right-wing attackers; 38 and 34 of the incidents were attributed to Islamic terrorists and left-wing attackers, respectively.”<sup>874</sup>

In recent years, far-right violent extremism remains the primary domestic terror threat. In July 2019, FBI Director Christopher Wray told the Senate Judiciary Committee that there had been approximately 100 domestic terrorism-related arrests made since October of 2018 and that the majority of those arrests were connected to white supremacy.<sup>875</sup> David Hickton, a former U.S. Attorney who directs the University of Pittsburgh Institute for Cyber Law, Policy and Security, warned, “White supremacy is a greater threat than international terrorism right now ... We are being eaten from within.”<sup>876</sup> Right-wing extremists perpetrated two thirds of the attacks and plots in the United States in 2019 and over 90 percent between January 1 and May 8, 2020.<sup>877</sup> Additionally, in 2019, right-wing extremists were responsible for the great majority (38 of 42, or 90%) of domestic extremist-related murders.<sup>878</sup>

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<sup>872</sup> Dale L. Watson, *Testimony Before the Senate Select Committee on Intelligence*, FBI (Feb. 6, 2002), <https://archives.fbi.gov/archives/news/testimony/the-terrorist-threat-confronting-the-united-states>

<sup>873</sup> *Countering Violent Extremism Actions Needed to Define Strategy and Assess Progress of Federal Efforts*, United States Government Accountability Office (Apr. 2017), <https://www.gao.gov/assets/690/683984.pdf>

<sup>874</sup> Wesley Lowery, Kimberly Kindy & Andrew Ba Tran, *In the United States, right-wing violence is on the rise*, *The Washington Post* (Nov. 25, 2018), [https://www.washingtonpost.com/national/in-the-united-states-right-wing-violence-is-on-the-rise/2018/11/25/61f7f24a-deb4-11e8-85df-7a6b4d25cfbb\\_story.html](https://www.washingtonpost.com/national/in-the-united-states-right-wing-violence-is-on-the-rise/2018/11/25/61f7f24a-deb4-11e8-85df-7a6b4d25cfbb_story.html)

<sup>875</sup> Morgan Chalfant, *FBI's Wray says most domestic terrorism arrests this year involve white supremacy*, *The Hill* (July 23, 2019), <https://thehill.com/homenews/administration/454338-fbis-wray-says-majority-of-domestic-terrorism-arrests-this-year>

<sup>876</sup> Vera Bergengruen & W.J. Hennigan, *'We Are Being Eaten From Within.' Why America Is Losing the Battle Against White Nationalist Terrorism*, *Time* (Aug. 8, 2019), <https://time.com/5647304/white-nationalist-terrorism-united-states/>. See Also James Pasley, *Trump frequently accuses the far-left of inciting violence, yet right-wing extremists have killed 329 victims in the last 25 years, while antifa members haven't killed any, according to a new study*, *Business Insider* (July 31, 2020), <https://www.businessinsider.com/right-wing-extremists-kill-329-since-1994-antifa-killed-none-2020-7>

<sup>877</sup> Seth G. Jones, Catrina Dooxsee & Nicholas Harrington, *The Escalating Terrorism Problem in the United States*, Center for Strategic & International Studies (June 17, 2020), <https://www.csis.org/analysis/escalating-terrorism-problem-united-states>.

<sup>878</sup> *Murder and Extremism in the United States in 2019*, The Center on Extremism (2019), <https://www.adl.org/murder-and-extremism-2019>

## Statements of President Trump that Potentially Enhance the Threat of Far-Right Violent Extremism

- President Trump tweeted calls for people to “liberate” states, drawing the ire of Governors as militia movements led protests in states like Washington and Michigan.<sup>879</sup>
- In response to the Charlottesville White supremacist marches, Trump stated “you also had people that were very fine people, on both sides.”<sup>880</sup>
- On April 26, 2019, Trump attempted to clarify his Charlottesville remarks stating: “I was talking about people that went because they felt very strongly about the monument to Robert E. Lee, a great general. Whether you like it or not, he was one of the great generals.”<sup>881</sup>
- On February 28, 2016, Trump stated, “I don’t know David Duke” and “I know nothing about white supremacists” when pressed about Duke endorsing him days before. In fact, Trump made statements about Duke during his brief 2000 campaign, so he did know Duke.<sup>882</sup>
- In June 2020, the President tweeted and then deleted a video in which somebody screamed out “White power.”<sup>883</sup>
- In private discussions, President Trump has suggested shooting people illegally crossing the border to deter such crossings.<sup>884</sup>
- Just one day after pipe bombs were mailed to members of the media as well as top Democrats, President Trump attacked the media after a very punctual condemnation of the pipe bomber.<sup>885</sup>
- In July 2017, Trump shared an edited video of somebody tackling a person whose face was replaced with the CNN logo.<sup>886</sup>
- In 2018, Trump praised a Republican Representative who body-slammed a reporter.<sup>887</sup>

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<sup>879</sup> William Cummings, *Governors Slam Trump's Call to 'Liberate' States Where Protesters Object to Coronavirus Restrictions*, USA Today (Apr. 20, 2020), <https://www.usatoday.com/story/news/politics/2020/04/19/governors-decry-trump-call-liberate-states-coronavirus-restrictions/5162196002/>

<sup>880</sup> Angie Drobnic Holan, *In Context: Donald Trump's 'very fine people on both sides' remarks (transcript)*, PolitiFact (Apr. 26, 2020), <https://www.politifact.com/article/2019/apr/26/context-trumps-very-fine-people-both-sides-remarks/>

<sup>881</sup> *Id.*

<sup>882</sup> Glenn Kessler, *Donald Trump and David Duke: For the Record*, Washington Post (Mar. 1, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/03/01/donald-trump-and-david-duke-for-the-record/>

<sup>883</sup> Zeke Miller, *Trump Tweets Video with White Power Chant, Then Deletes It*, Associated Press (June 28, 2020), <https://apnews.com/7eea48b80f14474b7057967a9654c4f0>

<sup>884</sup> Michael Shear & Julie Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. Times (Oct. 2, 2019), <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html>

<sup>885</sup> Libby Cathey & Meghan Kenaeally, *A look back at Trump comments perceived by some as inciting violence*, ABC News (May 30, 2020), <https://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766>

<sup>886</sup> *Id.*

<sup>887</sup> *Id.*

- In August 2020, the President praised QAnon conspiracy theorists, stating “I heard that these are people that love our country.”<sup>888</sup>
- In response to unrest after the George Floyd shooting, President Trump tweeted “when the looting starts, the shooting starts.”<sup>889</sup>
- A 2016 Mashable article cites 12 different occasions where Trump encouraged violence against those protesting his rallies.<sup>890</sup>
- In August 2019, Trump tweeted a mock campaign logo that had been popular among White supremacists during the 2016 election.<sup>891</sup>
- In August 2017, Trump retweeted Jack Posobiec, a Pizzagate (precursor to QAnon) theorist.<sup>892</sup>
- Trump tweeted congratulations to Laura Loomer, an alt-right figure who won the GOP nomination in Florida’s 21st Congressional district.<sup>893</sup>
- In August 2016, Trump tweeted out praise for Paul Nehlen, a Republican candidate running in Wisconsin’s First Congressional District infamous for using alt-right messaging.<sup>894</sup>
- Trump praised QAnon Support Marjorie Taylor Greene on Twitter after her primary election victory.<sup>895</sup>
- President Trump invited right-wing congressional candidate and QAnon backer Marjorie Taylor Greene to the 2020 Republican National Convention.<sup>896</sup>
- In 2016, Trump retweeted an image of Hillary Clinton with a Star of David on it accusing her of corruption. He proceeded to double down and defend his tweet.<sup>897</sup>

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<sup>888</sup> Zeke Miller, Jill Colvin, & Amanda Seitz, *Trump praises QAnon conspiracists, appreciates support*, Associated Press (Aug. 19, 2020), <https://apnews.com/535e145ee67dd757660157be39d05d3f>

<sup>889</sup> Barbara Sprunt, *The History Behind 'When The Looting Starts, The Shooting Starts'*, National Public Radio (May 29, 2020), <https://www.npr.org/2020/05/29/864818368/the-history-behind-when-the-looting-starts-the-shooting-starts>

<sup>890</sup> Kate Sommers-Dawes, *All the times Trump has called for violence at his rallies*, Mashable (Mar. 12, 2016), <https://mashable.com/2016/03/12/trump-rally-incite-violence/>

<sup>891</sup> Katharine Schwab, *Trump tweets 2020 campaign logo linked to alt-right and white supremacy groups*, (Aug. 29, 2019), <https://www.fastcompany.com/90397217/trump-tweets-2020-campaign-logo-linked-to-alt-right-and-white-supremacy-groups>

<sup>892</sup> David A. Graham, *Why White Supremacists Find Comfort in Trump's Erratic Messaging*, The Atlantic (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/dr-trump-and-mr-donald/536925/>

<sup>893</sup> Donald Trump (@RealDonaldTrump) Twitter (Aug. 19, 2020, 12:32 AM), <https://twitter.com/realDonaldTrump/status/1295941701555687424>.

<sup>894</sup> Donald Trump (@RealDonaldTrump) Twitter (Aug. 1, 2016, 7:25 PM), <https://twitter.com/realDonaldTrump/status/760255085561597952>

<sup>895</sup> Donald Trump (@RealDonaldTrump), Twitter (Aug. 12, 2020, 8:29 AM), <https://twitter.com/realDonaldTrump/status/1293525010523578375>

<sup>896</sup> Charles Davis, *Trump invites 'QAnon' conspiracy theorist to RNC speech, while members of Congress introduce resolution condemning the anonymous hoax*, BusinessInsider (Aug. 25, 2020), <https://www.businessinsider.com/trump-invites-qanon-conspiracy-theorist-to-rnc-speech-2020-8>

<sup>897</sup> Jose A. DelReal & Julie Zauzmer, *Trump's vigorous defense of anti-Semitic image a 'turning point' for many Jews*, Washington Post (Jul. 8, 2016), [https://www.washingtonpost.com/politics/trumps-vigorous-defense-of-anti-semitic-image-a-turning-point-for-many-jews/2016/07/08/720858e2-4450-11e6-bc99-7d269f8719b1\\_story.html](https://www.washingtonpost.com/politics/trumps-vigorous-defense-of-anti-semitic-image-a-turning-point-for-many-jews/2016/07/08/720858e2-4450-11e6-bc99-7d269f8719b1_story.html)

- Right before the 2016 election, Trump’s campaign released an ad that was accusing of playing on anti-Semitic tropes by flashing images of mainly Jewish people and claiming that there is a “global power structure.”<sup>898</sup>
- A Trump speech to the Israeli American Council invoked various anti-Semitic tropes.<sup>899</sup>
- The Washington Post compiled a list of anti-Muslim statements made by President Trump between 2015 and 2017.<sup>900</sup>

## Trump Hires with Links to the Far-Right

**Sebastien Gorka** - Formerly Deputy Assistant to the President from January 2017 to August 2017 and currently serving on the National Security Education Board.<sup>901</sup> Gorka called Islam an inherently violent religion.<sup>902</sup> Additionally, he has donned the medal of the Nazi-linked Hungarian nationalist group Vitezi Rend, endorsed a far-right militia in Hungary, wrote for an anti-Semitic paper in Hungary, and co-founded a political party alongside far-right Jobbik Party.<sup>903 904</sup>

**Steve Bannon** - Served as Trump’s Chief Strategist and Senior Counselor. Bannon, formerly the executive chairman of Breitbart bragged about how that publication became “the platform for the alt-right.”<sup>905</sup> Bannon’s hire led to praise from the KKK and American Nazi Party.<sup>906</sup>

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<sup>898</sup> Josh Marshall, *Trump Rolls Out Anti-Semitic Closing Ad*, Talking Points Memo (Nov. 5, 2016), <https://talkingpointsmemo.com/edblog/trump-rolls-out-anti-semitic-closing-ad>

<sup>899</sup> Meagan Flynn, *Trump accused of ‘dipping into a deep well of anti-Semitic tropes’ during speech to Jewish voters*, Washington Post (Dec. 9, 2019), <https://www.washingtonpost.com/nation/2019/12/09/trump-israeli-american-council-anti-semitic-claims/>

<sup>900</sup> Twelve particularly egregious examples include: Responding ambiguously to a man calling for getting rid of Muslims (Sept. 17, 2015), pledging to kick all Syrian refugees out (Sept. 30, 2015), saying he would “look at” closing mosques (Oct. 21 AND Nov. 16, 2015), being open to making a database of Muslims (Nov. 20, 2015), claiming that Muslims cheered 9/11 (Nov. 21/22, 2015), calling for a “total and complete shutdown of Muslims entering the United States” (Dec. 7, 2015), claiming that 25% of Muslims believe in Jihad against the US (Dec. 8, 2015), suggesting that “Islam hates us” (Mar. 9, 2016), stating “We’re having problems with the Muslims” (Mar. 22, 2016), calling it a “hateful foreign ideology” (July 21, 2016), read a poem comparing refugees to snakes for a second time (Apr. 29, 2017). See Jenna Johnson & Abigail Hauslohner, *‘I think Islam hates us’: A timeline of Trump’s comments about Islam and Muslims*, Washington Post (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/>.

<sup>901</sup> Max Cohen, *Trump plans to appoint controversial former aide Sebastian Gorka to national security education position*, Politico (July 14, 2020), <https://www.politico.com/news/2020/07/14/sebastian-gorka-national-security-education-board-361237>

<sup>902</sup> *Id.*

<sup>903</sup> Alexander Smith & Vladimir Banic, *Sebastian Gorka Made Nazi-Linked Vitezi Rend ‘Proud’ by Wearing Its Medal*, NBC News (Apr. 8, 2017), <https://www.nbcnews.com/news/world/sebastian-gorka-made-nazi-linked-vitezi-rend-proud-wearing-its-n742851>

<sup>904</sup> Larry Cohler-Esses, *Sebastian Gorka’s Ties To Nazi-Allied Group Stretch Back Decades*, Forward (Apr. 24, 2017), <https://forward.com/news/369683/exclusive-sebastian-gorkas-ties-to-nazi-allied-group-stretch-back-decades/>

<sup>905</sup> Alex Altman, *How Donald Trump Is Bringing the Alt-Right to the White House*, Time Magazine (Nov. 14, 2016), <https://time.com/4569895/donald-trump-stephen-bannon-alt-right/>

<sup>906</sup> Tim Devaney, *KKK, American Nazi Party praise Trump’s hiring of Bannon*, The Hill (Nov. 14, 2016), <https://thehill.com/blogs/blog-briefing-room/305912-kkk-american-nazi-party-praise-trumps-hiring-of-bannon>

**Stephen Miller** – Serves as Senior Advisor for Policy to President Donald Trump. Miller has shared links from White Nationalist websites in the past and has garnered praise from Richard Spencer upon his appointment.<sup>907</sup> <sup>908</sup> Miller has anti-immigrant views usually previously consigned to the fringe of American politics,<sup>909</sup> and has filled various lower-order administration positions with right-wing conspiracy theorists including a WorldNetDaily writer, Curtis Ellis.<sup>910</sup>

**Julia Hahn** – Serves as Special Assistant to the President since January 2017. As a Breitbart reporter, she wrote an article glorifying a far-right French novel popular among White supremacists.<sup>911</sup> Informally, she is referred to as “Steve Bannon’s Steve Bannon”.<sup>912</sup>

### **Actions of President Trump that Potentially Enhance the Threat of Far-Right Violent Extremism**

- President Trump hosted a social media summit with invitees like QAnon fan Bill Mitchell and others that led the SPLC to condemn the gathering.<sup>913</sup>
- By 2019, the Trump Administration had cut funding to the Office of Targeted Violence and Terrorism Protection and scaled back FBI investigations into domestic terrorism.<sup>914</sup>
- Ignored the pleas of DHS officials to focus on domestic violent extremism, leading people to abandon the Administration.<sup>915</sup>

### **Background Information on Antifa**

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<sup>907</sup> Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, SPLC (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails>

<sup>908</sup> Josh Hawkinson, *Trump’s Newest Senior Adviser Seen as a White Nationalist Ally*, Mother Jones (Dec. 14, 2016), <https://www.motherjones.com/politics/2016/12/trumps-newest-senior-adviser-seen-ally-white-nationalists/>

<sup>909</sup> Michael Shear & Katie Benner, *How Anti-Immigration Passion Was Inflamed From the Fringe*, N.Y. Times (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/immigration-children-sessions-miller.html/>. See also Dan Diamond, *Stephen Miller’s hard-line policies on refugee families make a comeback at HHS*, Politico (Apr. 16, 2020), <https://www.politico.com/news/2020/04/16/stephen-miller-hhs-family-separation-189784>

<sup>910</sup> Justin Elliott, Al Shaw, & Derek Kravitz, *Meet the Hundreds of Officials Trump Has Quietly Installed Across the Government*, ProPublica (Mar. 8, 2017), <https://www.propublica.org/article/meet-hundreds-of-officials-trump-has-quietly-installed-across-government>

<sup>911</sup> Ben Terris, *Who is Julia Hahn? The unlikely rise of Steve Bannon’s right-hand woman.*, The Washington Post (Mar. 29, 2017), [https://www.washingtonpost.com/lifestyle/style/who-is-julia-hahn-the-unlikely-rise-of-steve-bannons-right-hand-woman/2017/03/29/c242504c-125e-11e7-ada0-1489b735b3a3\\_story.html](https://www.washingtonpost.com/lifestyle/style/who-is-julia-hahn-the-unlikely-rise-of-steve-bannons-right-hand-woman/2017/03/29/c242504c-125e-11e7-ada0-1489b735b3a3_story.html)

<sup>912</sup> Andrew Marantz, *Becoming Steve Bannon’s Bannon*, The New Yorker (Feb. 13, 2017), <https://www.newyorker.com/magazine/2017/02/13/becoming-steve-bannons-bannon>

<sup>913</sup> Luke O’Neil, *Trump’s far-right Twitter summit: the most bizarre highlights*, The Guardian (Jul. 12, 2019), <https://www.theguardian.com/us-news/2019/jul/12/trumps-far-right-twitter-summit-the-most-bizarre-highlights>

<sup>914</sup> *Hearing on Federal Response to White Supremacy Before the H. Comm. On Oversight and Reform Subcomm.*, 116th Cong. (2019) (Statement of Brette Steele), <https://www.c-span.org/video/?461379-1/hearing-federal-response-white-supremacy>. See also Devlin Barrett, *FBI Faces Skepticism Over its Efforts Against Domestic Terrorism*, The Washington Post (Aug. 5, 2019), [https://www.washingtonpost.com/national-security/fbi-faces-skepticism-over-its-anti-domestic-terror-efforts/2019/08/04/c9c928bc-b6e0-11e9-b3b4-2bb69e8c4e39\\_story.html](https://www.washingtonpost.com/national-security/fbi-faces-skepticism-over-its-anti-domestic-terror-efforts/2019/08/04/c9c928bc-b6e0-11e9-b3b4-2bb69e8c4e39_story.html)

<sup>915</sup> Betsy Woodruff Swan, *They tried to get Trump to care about right-wing terrorism. He ignored them.*, Politico (Aug. 26, 2020), <https://www.politico.com/news/2020/08/26/trump-domestic-extemism-homeland-security-401926>

## *An Introduction to Antifa*

Antifa encompasses a diverse set of ideologies. Some groups are more prone to violence while others protest peacefully; some mobilize through mutual aid societies while others prefer direct action on the streets.<sup>916</sup> Mark Bray, who wrote a book about antifa, believes that “most, if not all, members do wholeheartedly support militant self-defense against the police and the targeted destruction of police and capitalist property that has accompanied it.”<sup>917</sup> In his book, he also posits that antifa is less about opposing actual fascists and more about fighting organizations or actors giving a platform to views that uphold inequality.<sup>918</sup>

When antifa members gather, they temporarily organize separate entities or individuals. Importantly, “It is not a unified organization, but rather a loose ideological label for a subset of left-wing radicals who believe in using street-level force to prevent the rise of what they see as fascist movements”.<sup>919</sup> Therefore, there is no list of antifa members, no central assembly or even a shared constitution. There is little evidence of a chain of command or a stable leadership structure.<sup>920</sup> In keeping with this decentralization, Antifa activists often rely on social media platforms like Twitter to organize. Because of these characteristics, antifa cannot be a unified organization but a movement without hierarchical leadership, comprising multiple autonomous groups and individuals. Antifa groups often coordinate through websites like the *Torch Network* and *It’s Going Down*, but these hubs do not control the activities of cells.<sup>921</sup> Groups exist all over the United States.<sup>922</sup> In other words, antifa is not a highly organized entity.

While very few concrete principles exist and the group is not firmly organized, some U.S. antifa members have articulated four “obligations.” According to a movement text, antifa members must (1) track the activity of fascist groups, (2) oppose their public organizing, (3) support antifascist allies attacked by fascists or arrested by police, and (4) not cooperate with law enforcement.<sup>923</sup> Meanwhile, antifa activity often involves nonviolent protest such as hanging posters, delivering speeches, and marching. As a core purpose, these groups tend to track and react to the activities of

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<sup>916</sup> Michael Kenney and Colin Clarke, *What Antifa Is, What It Isn’t, and Why It Matters*, WAR ON THE ROCKS (Jun. 23, 2020), <https://warontherocks.com/2020/06/what-antifa-is-what-it-isnt-and-why-it-matters/>.

<sup>917</sup> Mark Bray, *Antifa isn’t the problem. Trump’s bluster is a distraction from police violence.*, THE WASHINGTON POST (Jun. 1, 2020), <https://www.washingtonpost.com/outlook/2020/06/01/trump-antifa-terrorist-organization/>

<sup>918</sup> Carlos Lozada, *The history, theory and contradictions of antifa*, THE WASHINGTON POST (Sep. 1, 2017), <https://www.washingtonpost.com/news/book-party/wp/2017/09/01/the-history-theory-and-contradictions-of-antifa/>

<sup>919</sup> Zack Beauchamp, *Antifa, explained*, Vox (Jun. 8, 2020), <https://www.vox.com/policy-and-politics/2020/6/8/21277320/antifa-anti-fascist-explained>.

<sup>920</sup> Gary LaFree, *Is Antifa A Terrorist Group*, 55 SOCIETY 248 (2018).

<sup>921</sup> Michael Kenney and Colin Clarke, *What Antifa Is, What It Isn’t, and Why It Matters*, WAR ON THE ROCKS (Jun. 23, 2020), <https://warontherocks.com/2020/06/what-antifa-is-what-it-isnt-and-why-it-matters/>

<sup>922</sup> One group is Anti-Racist Action (ARA), an antiracism group which formed in the late 1980s and embraced provocative and occasionally violent tactics. See *Roots of the ARA*, SPLC (May 16, 2013), <https://www.splcenter.org/fighting-hate/intelligence-report/2013/roots-ara>. In 2013, activists rebranded ARA into the Torch Network, a loose coalition of about a dozen antifa groups. See *History*, Torch Network (Last accessed Aug. 31, 2020), <https://torchantifa.org/history/>. Another one of the most popular groups, Rose City Antifa (RCA) was founded in 2007 in Portland. See *About*, Rose City Antifa (Last accessed Aug. 31, 2020), <https://rosecityantifa.org/about/>. Some groups may not resemble what one would imagine to be anti-capitalist activists. Redneck Revolt is a group of rural, working-class, pro-gun antifa activists. See *About*, Redneck Revolt (Last accessed Aug. 31, 2020), <https://www.redneckrevolt.org/about>.

<sup>923</sup> CONGRESSIONAL RESEARCH SERVICE, ANTIFA—BACKGROUND (2018).

individuals or groups advocating far-right views. That said, many members of antifa also support radical far-left views. This has led to attacks on statutes, courthouses, and Trump supporters. Just 22% of Americans have a favorable view of Antifa.<sup>924</sup> This renders them a convenient foil for politicians seeking to attack opponents, leading to the attribution of political opposition to Antifa.<sup>925</sup> Of course, political tropes have always existed in this country.

Some on the right, including popular news host Tucker Carlson, have attempted to connect antifa-related incidents with “terrorism” which would justify a potential terror designation like the one ostensibly issued by President Trump.<sup>926</sup>

## Violent Incidents Linked to Antifa

### *Attacking Free Expression*

There have been several incidents of antifa-related individuals inciting violence against members of the press and individuals exercising free speech. Journalist Andy Ngo was beaten by antifa members protesting a Proud Boys rally in 2019.<sup>927</sup> Some people sought to blame Ngo for his predicament because Ngo writes for right-leaning publication *Quillette* and discusses who antifa members are.<sup>928</sup> While reporting on the fallout of alt-right mobilization in Charlottesville in 2017, *The Hill* journalist Taylor Lorenz was assaulted by an antifa member trying to stop her from reporting.<sup>929</sup>

Peaceful protesters have also been the target of antifa-connected violence. A Bernie Sanders supporter holding an American flag and protesting a right-wing rally in Portland was beaten to the point of a concussion by antifa members who called his American flag a symbol of fascism. In 2017, a peaceful right-wing march in Berkeley was attacked by small groups of antifa assailants with sticks and shields; multiple Trump supporters were beaten.<sup>930</sup> Antifa members arrived “with

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<sup>924</sup> Rasmussen Reports, *Voters Still See ‘Antifa’ As More Trouble Than Good*, RASMUSSEN (Jul. 8, 2019), [https://www.rasmussenreports.com/public\\_content/politics/current\\_events/social\\_issues/voters\\_still\\_see\\_antifa\\_as\\_more\\_trouble\\_than\\_good](https://www.rasmussenreports.com/public_content/politics/current_events/social_issues/voters_still_see_antifa_as_more_trouble_than_good).

<sup>925</sup> See Tina Nguyen, *How ‘antifa’ became a Trump catch-all*, POLITICO (Jun. 2, 2020), <https://www.politico.com/news/2020/06/02/how-antifa-became-a-trump-catch-all-297921> (“Antifa has become a conservative catch-all under President Donald Trump. Any left-leaning protest that grows unruly is antifa. A mob of people protesting the president could be antifa”); Paul Waldman, *Antifa All Around*, THE AMERICAN PROSPECT (Jun. 16, 2020), <https://prospect.org/civil-rights/antifa-all-around-trump-media-fox-news-fear-protests/>.

<sup>926</sup> Mark Joyella, *Tucker Carlson Has Highest-Rated Program In Cable News History*, FORBES (Jun. 30, 2020), <https://www.forbes.com/sites/markjoyella/2020/06/30/tucker-carlson-has-highest-rated-program-in-cable-news-history/#72455bd26195>

<sup>927</sup> *Antifa Attacks a Journalist*, THE WALL STREET JOURNAL (Jul. 1, 2019), <https://www.wsj.com/articles/antifa-attacks-a-journalist-11562021361>

<sup>928</sup> Charlotte Clymer (@cmclymer), TWITTER (Jun. 30, 2019, 2:39 AM), <https://twitter.com/cmclymer/status/1145220196539539457>; Zack Beauchamp, *The assault on conservative journalist Andy Ngo, explained*, VOX (Jul. 3, 2019), <https://www.vox.com/policy-and-politics/2019/7/3/20677645/antifa-portland-andy-ngo-proud-boys>

<sup>929</sup> *Journalist Taylor Lorenz punched while filming aftermath of fatal attack*, U.S. PRESS FREEDOM TRACKER (Aug. 12, 2017), <https://pressfreedomtracker.us/all-incidents/journalist-taylor-lorenz-punched-while-filming-aftermath-fatal-attack/>

<sup>930</sup> Kyle Swenson, *Black-clad antifa members attack peaceful right-wing demonstrators in Berkeley*, THE WASHINGTON POST (Aug. 28, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/black-clad-antifa-attack-right-wing-demonstrators-in-berkeley/>

makeshift weapons and M-80 firecrackers” and even nonviolent antifa-aligned protestors tried to justify the violence.<sup>931</sup> Agreements were signed beforehand with other organizers to “come in a nonviolent stance” and those using violence were a minority of counter-protestors.<sup>932</sup> When alt-lite provocateur Milo Yiannopoulos spoke at UC-Berkeley, 100 to 150 people clad in all-black, some of whom identified as antifa, “tore down barricades, shot projectiles at police and lit a light stand on fire, causing more than \$100,000 worth of damage.”<sup>933</sup> Members of the College Republicans were assaulted while giving interviews.<sup>934</sup> Some of these antifa members justify their violence by claiming speech they disagree with as “real violence.”<sup>935</sup>

### *Destroying and Looting*

Ostensibly antifa-related people took down statues of Union army members, George Washington (while burning the American flag), attempted to destroy King Louis IX, Ulysses Grant, and more.<sup>936 937 938 939</sup> An antifa-related “ringleader” was behind attempts to destroy federal property in the form of an Andrew Jackson statue in Washington DC.<sup>940</sup> Trump’s recent executive order mandates that the DOJ prosecute anybody who “destroys, damages, vandalizes, or desecrates a monument, memorial, or statue within the United States or otherwise vandalizes government property.”<sup>941</sup> In 2018, Berkeley antifa Black Bloc members smashed the windows of a US Marine Corps Recruiting Office.<sup>942</sup> In May 2012 “anarchist extremist(s)” claimed responsibility for throwing an incendiary device through a window of a Portland, Oregon bank.<sup>943</sup>

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<sup>931</sup> *Behind Berkley’s Semester of Hate*, THE NEW YORK TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/education/edlife/antifa-collective-university-california-berkeley.html>

<sup>932</sup> <https://www.berkeleyinsider.com/wp-content/uploads/2017/09/agreement.pdf>

<sup>933</sup> Katy Steinmetz, *Fighting Words: A Battle in Berkeley Over Free Speech*, TIME (Jun. 1, 2017), <https://time.com/4800813/battle-berkeley-free-speech/>

<sup>934</sup> Madison Park and Kyung Lah, *Berkeley protests of Yiannopoulos caused \$100,000 in damage*, CNN (Feb. 2, 2017), <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>

<sup>935</sup> *Behind Berkley’s Semester of Hate*, THE NEW YORK TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/education/edlife/antifa-collective-university-california-berkeley.html>

<sup>936</sup> *Anti-racism protesters mistakenly topple statue of US anti-slavery leader Heg, Charleston’s Calhoun statue removed after 16 hours*, AUSTRALIAN BROADCAST CORPORATION (June 25, 2020), <https://www.abc.net.au/news/2020-06-25/protesters-pull-down-wrong-us-statue/12390702>

<sup>937</sup> Soo Kim, *George Washington Statue in Portland Toppled, Covered in Burning U.S. Flag*, NEWSWEEK (June 19, 2020), <https://www.newsweek.com/george-washington-statue-portland-toppled-covered-burning-us-flag-1512075>

<sup>938</sup> Sophie Hurwitz, *Catholics and alt-right clashed with protestors in Forest Park as activists called for removal of Louis IX statue*, THE ST. LOUIS AMERICAN (June 27, 2020), [http://www.stlamerican.com/news/local\\_news/catholics-and-alt-right-clashed-with-protestors-in-forest-park-as-activists-called-for-removal/article\\_9702459c-b8ee-11ea-b462-ff1dc6577f64.html](http://www.stlamerican.com/news/local_news/catholics-and-alt-right-clashed-with-protestors-in-forest-park-as-activists-called-for-removal/article_9702459c-b8ee-11ea-b462-ff1dc6577f64.html)

<sup>939</sup> Nico Savidge, *Statues of Junipero Serra, Ulysses S. Grant toppled at Golden Gate Park*, THE MERCURY NEWS (June 22, 2020), <https://www.mercurynews.com/2020/06/20/junipero-serra-statue-toppled-at-golden-gate-park/>

<sup>940</sup> Ebony Bowden, *Feds nab Antifa-linked ‘ringleader’ of attack on Andrew Jackson statue*, NEW YORK POST (July 2, 2020), <https://nypost.com/2020/07/02/feds-nab-antifa-linked-organizer-in-attack-on-dc-andrew-jackson-statue/>

<sup>941</sup> Steven Nelson, *Trump signs order promising ‘long prison terms’ for defacing monuments*, NEW YORK POST (June 26, 2020), <https://nypost.com/2020/06/26/trump-signs-executive-order-for-defacing-monuments/>

<sup>942</sup> Travis Fedschun, *Antifa members in Berkeley smash windows of US Marine Corps recruiting office during protest*, FOX NEWS (August 6, 2018), <https://www.foxnews.com/us/antifa-members-in-berkeley-smash-windows-of-us-marine-corps-recruiting-office-during-protest>

<sup>943</sup> *Baseline Comparison of US and Foreign Anarchist Extremist Movements*, HOMELAND SECURITY OFFICE OF INTELLIGENCE AND ANALYSIS; FEDERAL BUREAU OF INVESTIGATION, at 13 (April 4, 2016), [https://www.oodaloop.com/wp-content/uploads/2016/04/Comparison\\_of\\_US\\_and\\_Foreign\\_Anarchist\\_Extremists\\_Movements.pdf](https://www.oodaloop.com/wp-content/uploads/2016/04/Comparison_of_US_and_Foreign_Anarchist_Extremists_Movements.pdf)

In July 2019, a self-proclaimed anarchist extremist and anti-fascist (Antifa), Willem Van Spronsen, attempted to firebomb the US Immigration and Customs Enforcement detention facility in Tacoma, Washington, while armed with a rifle. He was killed in a confrontation with police. Van Spronsen tossed lit objects at vehicles and buildings, causing one car fire, and unsuccessfully tried to ignite a propane tank.<sup>944</sup> In July 2019, antifa members attempted to burn down the federal courthouse in Portland.<sup>945</sup> However, it's tough to track antifa incidents because there is no official membership and those who partake communicate via encrypted backchannels. But according to Bush National Security Council member James M. Casey: "Many of the tactics of violence we've witnessed are classic antifa methods, including vast destruction of businesses, covert organization and planning to facilitate transportation and logistics, and antifa symbols on clothing or spray-painted on buildings."<sup>946</sup>

### *Attacking Law Enforcement*

During a "Unite the Right 2" (referencing the Nazi march in Charlottesville) rally in Washington DC, a small group of antifa activists threw projectiles and launched fireworks at police officers.<sup>947</sup> The official Berkeley Antifa Twitter account RTed praise for people savagely beating law enforcement officers in Los Angeles.<sup>948</sup> During climate change rallies in Portland, antifa members harassed law enforcement officers. While this is free speech, it's still indicative of their ideology.<sup>949</sup>

### *Killings*

On August 29, 2020, Aaron J. Danielson, a member of the right-wing group Patriot Prayer, was shot and killed by a Michael Reinoehl, a man identifying with antifa groups, during clashes between protesters in Portland, Oregon.<sup>950</sup> In connection with this killing, the State of Oregon issued an arrest warrant against Reinoehl, charging him with murder in the second degree with a firearm, and unlawful use of a weapon with a firearm.<sup>951</sup> Before he could be apprehended by

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<sup>944</sup> *Anarchist Extremists Support Violent Tactics*, STATE OF NEW JERSEY OFFICE OF HOMELAND SECURITY AND PREPAREDNESS (2020), <https://www.njhomelandsecurity.gov/analysis/anarchist-extremists-support-violent-tactics>

<sup>945</sup> Andy Ngô (@MrAndyNgo), TWITTER (July 13, 2020, 4:34 AM), <https://twitter.com/MrAndyNgo/status/1282594264929771522>

<sup>946</sup> James M. Casey, *Why it's likely to be antifa, not neo-Nazis, behind the anarchy in America's streets*, THE HILL (June 3, 2020), <https://thehill.com/opinion/criminal-justice/500764-why-its-likely-to-be-antifa-not-neo-nazis-behind-the-anarchy-in-america>

<sup>947</sup> Jennifer Williams, *Antifa clashes with police and journalists in Charlottesville and DC*, VOX (August 12, 2018), <https://www.vox.com/identities/2018/8/12/17681986/antifa-leftist-violence-clashes-protests-charlottesville-dc-unite-the-right>

<sup>948</sup> Berkeley Antifa (@berkeleyantifa), TWITTER (May 30, 2020, 7:57 PM), <https://twitter.com/Indybay/status/1266881425149739013/retweets>

<sup>949</sup> Joshua Nelson, *WATCH: Antifa members caught on camera harassing Portland police near climate rally*, FOX NEWS (September 23, 2020), <https://www.foxnews.com/media/antifa-members-harass-portland-police-climate-rally>

<sup>950</sup> Stephanie Pagonis, *Portland police investigating man who allegedly identifies as '100% Antifa' in fatal shooting: report*, FOX NEWS (Aug. 31, 2020), <https://www.foxnews.com/us/portland-police-fatal-shooting-political-rally>

<sup>951</sup> DA 2426789-1, Circuit Court of the State of Oregon for Multnomah County, <https://www.mcda.us/index.php/documents/state-of-oregon-vs-michael-forest-reinoehl-affidavits-warrant-da-info.pdf/>

Oregon Police, Reinoehl was killed during a confrontation with the US Marshals Service near Lacey, Washington on September 4, 2020.<sup>952</sup>

### **Timeline of Trump Administration Actions against Antifa**

**August 15, 2017** - President Trump’s first veiled reference to antifa was in August 2017 when he claimed that an “alt-left” group was partially responsible for violence at Charlottesville.<sup>953</sup>

**September 2017** - A previously confidential 2016 joint intelligence assessment by DHS and the FBI that detailed the threat posed by “anarchist extremist violence” was shared with the news media.<sup>954</sup>

**November 30, 2017** - FBI Director Christopher Wray, appearing before the House Homeland Security Committee indicated that a number of individuals associated with “the Antifa ideology” were under investigation for potential criminal activity. Mr. Wray stated “While we're not investigating Antifa as Antifa — that's an ideology and we don't investigate ideologies — we are investigating a number of what we would call anarchist-extremist investigations, where we have properly predicated subjects of people who are motivated to commit violent criminal activity on kind of an Antifa ideology.” Mr. Wray continued that “In order to open an investigation there has to be credible evidence of federal crime, [and] threat of force or violence to further a political or social goal. And if we have all of those three things then we open a very aggressive investigation.”<sup>955</sup>

**March 1, 2018** - The Congressional Research Service published a report about ANTIFA, which examine the tactics and ideological underpinnings of ANTIFA and explored the possibility of designating “antifa followers suspected of criminal activity as domestic terrorists”<sup>956</sup>

**November 14, 2018** - President Trump’s first explicit reference to Antifa was on November 14, 2018. In an interview with the Daily Caller, Trump said, “These people, like the Antifa — they better hope that the opposition to Antifa decides not to mobilize. Because if they do, they’re much tougher. Much stronger. Potentially much more violent. And Antifa’s going to be in big trouble. But so far they haven’t done that and that’s a good thing”<sup>957</sup>

**July 23, 2019**, during a Senate Judiciary Committee meeting, Texas Senator Ted Cruz urged Mr. Wray to open a RICO investigation into antifa.<sup>958</sup> Mr. Wray responded that while the FBI is “absolutely concerned about violence committed on behalf of any ideology,” but stressed that “the

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<sup>952</sup> Sara Gentzler, Rolf Boone, and Brandon Block, *Portland shooting suspect fatally shot by US Marshals task force near Lacey*, THE OLYMPIAN (Sep. 4, 2020), <https://www.theolympian.com/news/local/crime/article245485220.html>

<sup>953</sup> Peter Beinart, *What Trump Gets Wrong About Antifa*, THE ATLANTIC (Aug. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/08/what-trump-gets-wrong-about-antifa/537048/>

<sup>954</sup> Josh Meyer, *FBI, Homeland Security warn of more ‘antifa’ attacks*, POLITICO (Sept. 1, 2017), <https://www.politico.com/story/2017/09/01/antifa-charlottesville-violence-fbi-242235>

<sup>955</sup> Luke Mikelionis, *FBI probe of ‘Antifa ideology’ underway, Wray tells House panel*, FOX NEWS (Dec. 1, 2017), <https://www.foxnews.com/politics/fbi-probe-of-antifa-ideology-underway-wray-tells-house-panel>

<sup>956</sup> CONGRESSIONAL RESEARCH SERVICE, ANTIFA—BACKGROUND (2018).

<sup>957</sup> Saagar Enjeti and Benny Johnson, *Trump Warns Antifa — You Could Be In Big Trouble*, DAILY CALLER (Nov. 14, 2018), <https://dailycaller.com/2018/11/14/trump-antifa-opposition-mobilize/>

<sup>958</sup> Ted Cruz (@SenTedCruz), TWITTER (Jul. 23, 2019, 1:08 PM), <https://twitter.com/SenTedCruz/status/1153713533802164224>

FBI doesn't investigate ideology, we investigate violent criminal activity.” In the same meeting, Mr. Wray stated that the FBI considers “antifa (is) more of an ideology than an organization” and that the FBI doesn’t “think of antifa so much as an organization.”<sup>959</sup>

**July 27, 2019**, President Trump first floated the idea of “designating” ANTIFA as a terrorist organization, tweeting, “Consideration is being given to declaring ANTIFA, the gutless Radical Left Wack Jobs who go around hitting (only non-fighters) people over the heads with baseball bats, a major Organization of Terror (along with MS-13 & others). Would make it easier for police to do their job!”<sup>960</sup>

**May 31, 2020**, President Trump tweeted that “The United States of America will be designating ANTIFA as a Terrorist Organization.”<sup>961</sup> Shortly thereafter, Attorney General Barr issued a “Statement on Riots and Domestic Terrorism” where he said:

“Federal law enforcement actions will be directed at apprehending and charging the violent radical agitators who have hijacked peaceful protest and are engaged in violations of federal law. To identify criminal organizers and instigators, and to coordinate federal resources with our state and local partners, federal law enforcement is using our existing network of 56 regional FBI Joint Terrorism Task Forces (JTTF). The violence instigated and carried out by Antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly.”<sup>962</sup>

Mr. Barr’s remarks stopped short of giving antifa a designation. Instead, Mr. Barr’s remarks indicated that he was assigning the Department of Justice’s existing counterterrorism task forces to investigate crimes connected to antifa.<sup>963</sup>

**June 4, 2020**, Mr. Barr and Mr. Wray held a news conference where members of the press asked for clarification about how exactly the DOJ and FBI were designating and investigating antifa. Without citing specific examples, Mr. Barr stated that “we have evidence that Antifa and other similar extremist groups, as well as actors of a variety of different political persuasions have been involved in instigating and participating in the violent activity.” Mr. Wray concurred, stating “We’re seeing people who are exploiting this situation to pursue violent extremist agendas. Anarchists like Antifa and other agitators.” Additionally, Mr. Barr claimed that “and we are also seeing foreign actors playing all sides to exacerbate the violence.” Mr. Wray noted that “the FBI [has] quite a number of ongoing investigations of violent anarchist extremists, including those motivated by an Antifa or Antifa like ideology. And we categorize and treat those as domestic

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<sup>959</sup> Elizabeth Nolan Brown, *Ted Cruz Wants Antifa Investigated by the FBI*, REASON (July 24, 2019), <https://reason.com/2019/07/24/ted-cruz-wants-antifa-investigated-by-the-fbi/>

<sup>960</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 27, 2019, 3:55 PM), <https://twitter.com/realDonaldTrump/status/1155205025121132545>

<sup>961</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 31, 2020, 12:23 PM), <https://twitter.com/realDonaldTrump/status/1155205025121132545>

<sup>962</sup> *Attorney General William P. Barr's Statement on Riots and Domestic Terrorism*, U.S. DEPT. OF JUSTICE (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>

<sup>963</sup> ArLuther Lee, *FBI finds no evidence of Antifa’s involvement in national unrest*, AJC (Jun. 6, 2020), <https://www.ajc.com/news/fbi-finds-evidence-antifa-involvement-national-unrest/qVI3U9wb8Q6u1QEVSJ7AJ/>

terrorism investigations and are actively pursuing them through our joint terrorism task forces.”<sup>964</sup>

**June 8, 2020** - In an interview with Fox News on June 8, 2020, Mr. Barr stated that “focused investigations” that “relate to ANTIFA” were underway.<sup>965</sup>

**June 26, 2020** – Mr. Barr issued a memo to all heads of department components and United States attorneys “directing the creation of a task force devoted to the countering violent anti-government extremists.”<sup>966</sup>

**August 3, 2020** – Reporting from *The Nation* indicates that the DOJ has already begun to use its investigatory powers to seek links between Antifa to international terrorism (particularly with regard to links to Kurdish militias) in order to implicate the far more extensive surveillance and prosecution possibilities that accompany international terrorism.<sup>967</sup>

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<sup>964</sup> William Barr & Chris Wray DOJ Press Conference Transcript on George Floyd Death, REV (Jun. 4, 2020), <https://www.rev.com/blog/transcripts/william-barr-chris-wray-doj-press-conference-transcript-on-george-floyd-death>

<sup>965</sup> Gregg Re, *Barr, in FNC interview, confirms 'focused investigations' of Antifa, hammers 'dangerous' push to defund police*, FOX NEWS (Jun. 8, 2020), <https://www.foxnews.com/politics/barr-exclusive-fox-news-interview>

<sup>966</sup> Memorandum from William Barr, Attorney General of the United States, to the Department of Justice (Jun. 26, 2020) (on file with author).

<sup>967</sup> Ken Klippenstein, *Homeland Security Is Quietly Tying Antifa to Foreign Powers*, THE NATION (Aug. 3, 2020), <https://www.thenation.com/article/society/dhs-antifa-syria/>

## APPENDIX C: The Office of Legal Counsel in Barr's DOJ

*Editor's Note: This Appendix was drafted by student interns from the CERL 2020 Summer Internship*

### **a. The Role of the Office of Legal Counsel (OLC) in the DOJ Response to Congressional Subpoenas**

Over several decades OLC has occupied a central role in delineating and justifying DOJ's refusal to comply with congressional subpoenas. The six OLC opinions issued in 2019 and 2020 under AG Barr are relevant to matters of executive prerogative, compelled congressional testimony, and impeachment present noncompliance as a long-standing DOJ policy addressed and affirmed in Assistant AG William Rehnquist's February 5, 1971 Memorandum for Assistant to the President for Domestic Affairs John Ehrlichman (Rehnquist Memorandum), Assistant AG Theodore B. Olson's July 29, 1982 Memorandum for Deputy AG Edward Schmults (Olson Memorandum), and AG Janet Reno's September 16, 1999 Opinion *Assertion of Executive Privilege with Respect to Clemency Decision* (Reno Opinion). These documents capture the ostensible legal foundation for noncompliance: congressional subpoenas upend the separation of powers doctrine by enabling legislative encroachment on executive independence, executive privilege, and absolute immunity, which preclude Congress from compelling the appearance of even presidential aides and crucially preserve executive autonomy and functioning.

According to the Rehnquist Memorandum, "The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee."<sup>968</sup> The Olson Memorandum explains how compelled congressional testimony raises important separation of power concerns: "The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it."<sup>969</sup> The Reno Opinion contextualizes executive privilege and absolute immunity in the unitary executive theory's notion of alter egos: "A senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities."<sup>970</sup> While these quotations capture but one facet of the arguments presented in each document, they provide valuable insight into how the 2019 and 2020 OLC opinions intentionally slot into an established lineage of noncompliance.

OLC has since devised a legal framework that supports broad interpretations of executive authority, extends immunity to both current and former presidential aides, justifies the invocation

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<sup>968</sup> Memorandum from William H. Rehnquist, Assistant Attorney General to the Honorable John D. Ehrlichman, Assistant to the President for Domestic Affairs (Feb. 5, 1971) (on file with DOJ).

<sup>969</sup> Memorandum from Assistant AG Theodore B. Olson to Deputy AG Edward Schmults (Jul. 29, 1982) (on file with DOJ).

<sup>970</sup> *Opinion of the Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. OLC 1 (1999).

of executive privilege during impeachment proceedings, invalidates congressional subpoenas when agency counsel is prohibited, and advises other federal agencies to follow suit.

*May 20, 2019 OLC Opinion: Testimonial Immunity Before Congress of the Former Counsel to the President* ([link](#))

The justification for former White House Counsel Don McGahn’s refusal to comply with the April 22, 2019 subpoena and testify before the House Judiciary Committee was outlined in the May 20, 2019 OLC opinion. The legal arguments are comprised of three parts: upholding the separation of powers doctrine requires that presidential aides have immunity from compelled congressional testimony; immunity is broader than and easily differentiable from executive privilege in that it precludes Congress from even compelling the appearance of presidential aides; and there is no civil or criminal penalty for refusing to complying with a subpoena under the President’s direction.

According to the OLC opinion, presidential advisers are understood as an extension of the President himself, thereby entitling them to the same standard of absolute immunity. The alter ego theory establishes an equivalency between the President and his advisors; therefore, an encroachment on the advisors’ autonomy through compelled congressional testimony is tantamount to an encroachment on the independence of the executive. The Olson Memorandum explains this in stark terms: “Congress may no more summon the President to a congressional committee room than the President may command Members of Congress to appear at the White House.”<sup>971</sup> In contrast to Senate-confirmed agency heads, presidential advisors exercise no statutory authority, serving the sole purpose of assisting the President. Allowing for compelled congressional testimony would necessarily interfere with the President’s prerogatives, undermine the independence and candor of his closest advisors, and impede the duties and responsibilities of the executive branch.

The OLC opinion attempts to undercut the holding in *Committee on the Judiciary v. Miers* and limit that of *Harlow v. Fitzgerald*:

It is true that in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court declined to extend *Gravel*’s alter-ego reasoning to a civil suit for damages against senior presidential advisers, and instead concluded that such advisers are entitled only to qualified immunity in those civil actions. *Id.* at 810–11, 813–15. *Harlow* thus distinguished the President’s immediate advisers from the President himself, whom the Court held (in another decision issued the same day) to be absolutely immune from civil suits based on official acts. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Yet we have previously declined to extend *Harlow* to the context of testimonial immunity because the prospect of compelled congressional testimony raises separation of powers concerns that are not present in a civil damages lawsuit brought by a private party. *Immunity of the Assistant to the President*, 38 Op. O.L.C. at \*5–7. ...

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<sup>971</sup> *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. OLC 1 (May 20, 2019) <https://www.justice.gov/olc/opinion/file/1215066/download>.

We recognize that in *Miers*, a federal district court read Harlow to imply that senior presidential advisers do not enjoy absolute immunity from congressionally compelled testimony. See *Miers*, 558 F. Supp. 2d at 100–03. But we believe that the court did not adequately consider the different and heightened separation of powers concerns bearing upon the testimony of the President’s immediate advisers before Congress....we respectfully disagree with the district court’s conclusion in *Miers* and adhere to this Office’s long-established position that the President’s immediate advisers are absolutely immune from compelled congressional testimony.<sup>972</sup>

The OLC opinion draws no distinction between former and current advisers to the President when invoking absolute immunity, an assertion grounded in *Nixon v. General Services Administration* where the court adopted the following statement by the Solicitor General in the Brief for Federal Appellees:

This Court held in *United States v. Nixon* ... that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he [433 U.S. 425, 449] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.<sup>973</sup>

Throughout the OLC opinion, the issue of complying with a subpoena is considered independently of whether the testimony itself would involve privileged information, marking a clear distinction between testimonial immunity and executive privilege. Although the President maintains the right to invoke executive privilege, compelled congressional testimony creates an environment where there is “an inherent and substantial risk of inadvertent or coerced disclosure of confidential information.”<sup>974</sup> The sheer possibility of compelled congressional testimony coupled with the difficulty of mitigating tensions between congressional inquiry and obligations to protect privileged executive information may effectively censor presidential advisers. A disruption of candor implies a disruption of executive functioning, the consequences of which are outlined in the July 15, 2014 OLC opinion:

[Senior presidential advisers] could be asked, under the express or implied threat of contempt of Congress, a wide range of unanticipated and hostile questions about highly sensitive deliberations and communications. In the heat of the moment, without the opportunity for careful reflection, the adviser might have

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<sup>972</sup> *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. OLC (May 20, 2019), <https://www.justice.gov/olc/opinion/file/1215066/download>

<sup>973</sup> *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 97 S. Ct. 2777 (1977), <https://supreme.justia.com/cases/federal/us/433/425/>

<sup>974</sup> *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, 38 Op. OLC 1, 4 (Jul. 15, 2014), <https://www.justice.gov/file/30896/download>

difficulty confining his remarks to those that do not reveal such sensitive information. Or the adviser could be reluctant to repeatedly invoke executive privilege, even though validly applicable, for fear of the congressional and media condemnation she or the President might endure.<sup>975</sup>

Harkening back to McGahn's testimony, the OLC opinion argues that public disclosure of the Mueller Report, while voiding confidentiality claims for the disclosed information, had no impact on absolute immunity:

The constitutional interest in protecting the autonomy and independence of the Presidency remains the same no matter whether the compelled testimony from a presidential adviser would implicate public or potentially privileged matters. The President does not waive his own immunity from compelled congressional testimony by making public statements on a given subject. It follows then that the derivative immunity of senior presidential advisers is not waived either.<sup>976</sup>

Congress' lack of constitutional authority to compel McGahn to testify in tandem with the President's prerogative to direct his aides not to comply means that McGahn cannot be civilly or criminally penalized. According to the February 29, 2008 OLC opinion:

Application of the criminal contempt statute to Presidential assertions of executive privilege would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the [criminal contempt] statute were construed to apply to Presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege.<sup>977</sup>

**b. A Collection of Relevant OLC Opinions and Actions Supporting the Trump Administration's Resistance to Congressional Oversight.**

*May 23, 2019 OLC Opinion: Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*

On April 2, 2019 subpoenas were issued to John Gore, Principal Deputy Assistant AG for the DOJ Rights Division, and Carl Kline, former Director of White House Personnel Office, compelling them to testify before the House Committee on Oversight and Reform regarding the citizenship question on the census and security clearances, respectively. The May 23, 2019 OLC opinion outlines the legal framework underpinning their noncompliance, specifically that "a congressional committee may not constitutionally compel an executive branch witness to testify

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<sup>975</sup> *Id.*

<sup>976</sup> *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. OLC 17

<sup>977</sup> *Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress*, 32 Op. OLC 65, 68 (Feb. 29, 2008), <https://www.justice.gov/opinion/file/832851/download>.

about potentially privileged matters while depriving the witness of the assistance of agency counsel.”<sup>978</sup> The presence of agency counsel ensures that privileged information is properly safeguarded; in turn, the prohibition of agency counsel undermines the executive’s ability to protect its confidentiality interests and assert executive privilege when necessary. Executive branch employees may not have enough experience or legal expertise to effectively circumnavigate privileged information in their testimony. The OLC opinion argues that the lack of agency counsel invalidates the subpoena and prevents any civil or criminal enforcement.

The OLC opinion condemns Committee Rule 15(e), the prohibition of agency counsel from depositions of executive branch members, as a violation of the separation of powers and an unconstitutional infringement of the President’s Article II authority to supervise and control the dissemination of information pertaining to executive branch functioning. As suggested in the May 21, 2004 OLC opinion and elaborated on in the 2019 opinion, Committees’ rules of procedure cannot override executive privilege claims:

An agency representative, by contrast, is charged with protecting the Executive Branch’s interests during the deposition—ensuring that the information the employee provides to Congress is accurate, complete, and within the proper scope, and that privileged information is not disclosed. The Committee’s rule prohibiting agency counsel from accompanying an agency employee to a deposition would effectively, and unconstitutionally, require that employee to report directly to Congress on behalf of the Executive Branch, without an adequate opportunity for review by an authorized representative of the Executive Branch.<sup>979</sup>

The OLC opinion is careful not to conflate the admittance of private counsel with the presence of agency counsel. Agency counsel serves the unique function of protecting the information the President has not yet asserted executive privilege over, as explained below:

Even if the President has not yet asserted a particular privilege, excluding agency counsel would diminish the President’s ability to decide whether a privilege should be asserted. The Executive Branch cannot foresee every question or topic that may arise during a deposition, but if questions seeking privileged information are asked, agency counsel, if present, can ensure that the employee does not impermissibly disclose privileged information.<sup>980</sup>

The OLC opinion concludes with a two-pronged argument against Congress seeking judicial remedy to enforce subpoenas: “The criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege”; and Congress may not

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<sup>978</sup> *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. OLC 1 (May 23, 2019), <https://www.justice.gov/olc/file/1215056/download>.

<sup>979</sup> *Id.* at 13

<sup>980</sup> May 23, 2019 OLC Opinion: *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, <https://www.justice.gov/olc/file/1215056/download>

“utilize its inherent ‘civil’ contempt powers to arrest, bring to trial, and punish an executive official who assert[s] a Presidential claim of executive privilege.”<sup>981</sup>

*June 13, 2019 OLC Opinion: Congressional Committee’s Request for the President’s Tax Returns Under 26 U.S.C. § 6103(f)*<sup>982</sup>

The June 13, 2019 OLC opinion was written in response to Chairman of the Ways and Means Committee Richard Neal’s April 3, 2019 request for the last six years of President Trump’s individual tax returns and those of eight associated business entities. Under 26 U.S.C. § 6103(f) the Committee is not required to state a purpose for its requests; however, the OLC opinion contends, “Congress could not constitutionally confer upon itself the right to compel a disclosure by the Executive Branch of confidential information that does not serve a legitimate legislative purpose.”<sup>983</sup> Despite the language of the statute, the Treasury Department argued that it had a responsibility to assess and confirm the legitimacy of the Committee’s legislative purpose. Consequently, the Treasury Department asserted that the “interest in the IRS’s audit of presidential returns was pretextual,”<sup>984</sup> the true purpose of the requests was to publicly disclose the President’s tax returns.

The Internal Revenue Code “requires that the Department of the Treasury keep tax returns and related information confidential, subject to certain exceptions, and makes the unauthorized disclosure of such information a federal crime.”<sup>985</sup> § 6103(f)(1) provides an exception to this rule if the Chairman of the Ways and Means Committee submits a written request to the Treasury Secretary for tax return information. The absence of a legitimate legislative purpose, however, voids this exception, meaning that in this context Section 6103(a) and the Constitution prohibit the transfer of information for the sole purpose of disclosing it to the public. The OLC opinion argues that the Committee attempted to distance itself from its previous statements regarding the release of President Trump’s tax returns. Therefore, the “Committee’s proffered reason was pretextual” and the request was invalid since “the public disclosure of the President’s tax returns—fell outside Congress’s constitutional power of inquiry, and that section 6103(f) would not authorize disclosure.”<sup>986</sup> Treasury Secretary Steven Mnuchin wrote,

Because Congress may only conduct investigations to further a legitimate legislative purpose, Congressional investigations ordinarily begin with a legislative purpose, and that purpose defines the scope of the documents that are pertinent to the Committee’s investigation. But here, by the Committee’s own admission, the Committee’s investigation began in the opposite direction. The Committee started with the documents it planned to obtain and release (the President’s tax returns), and then it sought—in Chairman Neal’s words—to ‘construct’ a ‘case’ for seeking

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<sup>981</sup> *Id.*

<sup>982</sup> *Congressional Committee’s Request for the President’s Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. OLC 1 (Jun. 13, 2019) <https://www.justice.gov/olc/file/1173756/download>.

<sup>983</sup> *Id.* at 3

<sup>984</sup> *Id.*

<sup>985</sup> 26 U.S.C. §§ 6103(a), 7213(a)

<sup>986</sup> *Congressional Committee’s Request for the President’s Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. OLC 14, 31 (Jun. 13, 2019) <https://www.justice.gov/olc/file/1173756/download>.

the documents that would appear to be in furtherance of a legitimate legislative purpose.<sup>987</sup>

Constitutional limitations prevent the Committee from gaining the “right to obtain confidential information that did not serve a legitimate legislative purpose”; therefore, the Treasury was acting within its legal authority when it rejected the Committee’s request.<sup>988</sup> When the legislative purpose is self-evidence and not pretextual, however, the Treasury should comply with the Committee’s request under section 6103(f). In the absence of a legitimate legislative purpose, the subpoenas are invalidated and cannot be enforced. The OLC opinion notes that in order to preserve the separation of powers, the agency must uphold a high standard of vigilance to challenge requests that lack legislative purpose. In doing so

Treasury acts as part of a politically accountable branch with a constitutional duty to resist legislative intrusions upon executive power and therefore does not act under the same institutional constraints as the Judiciary. Here, because the Committee lacked a legitimate legislative purpose, its request did not qualify for the statutory exception to taxpayer confidentiality, and the law required Treasury to deny that request.<sup>989</sup>

*July 12, 2019 OLC Opinion: Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President*<sup>990</sup>

On June 26, 2019, the Committee on Oversight and Reform issued a subpoena compelling Kellyanne Conway, Assistant to the President and Senior Counselor to the President, to testify on July 15 concerning potential Hatch Act violations. The July 12, 2019 OLC opinion reiterates the legal arguments for noncompliance given in the May 20, 2019 and May 23, 2019 OLC opinions. One important point of emphasis, however, was that Conway’s testimonial immunity was not affected by the fact that she was being investigated for official impropriety:

Although Chairman Cummings has stated that the Committee wishes to question Ms. Conway about her public statements on television and social media—rather than her confidential communications with the President—that distinction does not bear upon the applicability and purpose of Ms. Conway’s immunity. In contrast with the doctrine of executive privilege, testimonial immunity is based upon the role of the White House official, not the confidentiality of the particular communications at issue. *See Immunity of the Former Counsel*, 43 Op. O.L.C. at \*4. While the immunity in part serves the confidentiality interests of the President, it more fundamentally protects the independence and autonomy of the office. *See id.* at \*4, \*17. Therefore, the Committee’s interest in questioning Ms.

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<sup>987</sup> *Id.* at 14

<sup>988</sup> *Id.* at 19

<sup>989</sup> *Id.* at 17

<sup>990</sup> *Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President*, 43 Op. OLC 1 (Jul. 12, 2019). <https://www.justice.gov/olc/file/1183271/download>

Conway about public, rather than confidential, matters is not material to the applicability of the immunity itself.<sup>991</sup>

This OLC opinion argues that testimonial immunity only affords executive branch members the necessary protections if it can also be invoked during congressional investigations into improper and/or unlawful activity.

*November 1, 2019 OLC Opinion: Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context*<sup>992</sup>

The November 1, 2019 OLC opinion argues that it would be unconstitutional for Committees involved in the impeachment inquiry to insist that members of the executive branch appear in closed-door depositions without agency counsel. The context is summarized below:

The HPSCI impeachment inquiry seeks information concerning presidential communications, internal executive branch deliberations, and diplomatic communications arising in connection with U.S. foreign relations with Ukraine. As a result, the depositions seek testimony from executive branch employees concerning matters potentially protected by executive privilege. Consistent with our prior advice, we conclude that the congressional committees participating in the impeachment investigation authorized by the resolution may not validly require executive branch witnesses to appear without the assistance of agency counsel in connection with such depositions.<sup>993</sup>

The OLC opinion claims that the context of the impeachment inquiry does not change DOJ's long-standing position that Congress cannot compel the testimony of executive branch officials, the legal basis of which is expounded in the May 23, 2019 OLC opinion. As a result, the Committee exceeded its lawful authority when issuing the subpoena, thus rendering it invalid and unenforceable. The OLC opinion also clarifies that subpoenas issued prior to October 31, 2019 and justified under the impeachment inquiry were invalid given that "the House had not vested any committee in the current Congress with the authority to issue subpoenas in connection with an impeachment inquiry."<sup>994</sup> House Resolution 660 did not provide Committees with sufficient authority to conduct their investigation nor did it express an explicit ratification of previous subpoenas. These issues are the subject of the January 19, 2020 OLC opinion.

*January 19, 2020 OLC Opinion: House Committees' Authority to Investigate for Impeachment*<sup>995</sup>

The January 19, 2020 OLC opinion was written in response to Speaker Nancy Pelosi's September 24, 2019 announcement that the House was beginning an official impeachment inquiry and that she was directing "six Committees to proceed with" several previously pending

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<sup>991</sup> *Id.* at 4

<sup>992</sup> *Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context*, 43 Op. OLC 1 (Nov. 1, 2019), <https://www.justice.gov/olc/file/1214996/download>.

<sup>993</sup> *Id.*

<sup>994</sup> *Id.* at 5

<sup>995</sup> *House Committees' Authority to Investigate for Impeachment*, 44 Op. OLC 1 (Jan. 19, 2020). <https://www.justice.gov/olc/file/1236346/download>

“investigations under that umbrella of impeachment inquiry.”<sup>996</sup> On September 27, the House Foreign Affairs Committee issued a subpoena to Secretary of State Mike Pompeo for documents on the U.S.’ relationship with Ukraine. The Committee asserted that the legal basis for the subpoena was grounded in the furtherance of the impeachment inquiry, a basis that the OLC opinion challenges given that, at the time, the House had not adopted any resolution authorizing the Committees to issue subpoenas for impeachment related matters. Therefore, the Committees were acting within their legislative jurisdiction since no delegation of authority had been made to shift the justification from legislative oversight to impeachment under the Impeachment Clause: “Speaker Pelosi purported to direct the committees to conduct an official impeachment inquiry, but the House Rules do not give the Speaker any authority to delegate investigative power. The committees thus had no delegation authorizing them to issue subpoenas pursuant to the House’s impeachment power.”<sup>997</sup>

According to the OLC opinion, the shift from legislative investigation to impeachment inquiry should be marked by a resolution that grants specific investigative authority to the Committees. Pat Cipollone discusses the impeachment inquiry’s constitutional invalidity in his October 8, 2019 letter to Speaker Pelosi: “But those investigative powers are not interchangeable. The House has broadly delegated to committees its power to investigate for legislative purposes, but it has held impeachment authority more closely, granting authority to conduct particular impeachment investigations only as the need has arisen.”<sup>998</sup> The OLC opinion addresses how the nature of the House’s investigative powers requires explicit delegation of authority to Committees requesting documents relating to impeachment, not legislative oversight:

While a committee may study some matters without exercising the investigative powers of the House, a committee’s authority to compel the production of documents and testimony depends entirely upon the jurisdiction provided by the terms of the House’s delegation. ... Because a committee possesses only the authorities that have been delegated to it, a committee may not use compulsory process to investigate impeachment without the formal authorization of the House. ...

The committees claimed that Rule XI confers authority to issue subpoenas in connection with an impeachment investigation. ... Those rules confer legislative oversight jurisdiction on committees and authorize the issuance of subpoenas to that end, but they do not grant authority to investigate for impeachment purposes. While the House committees could have sought some information relating to the same subjects in the exercise of their legislative oversight authority, the subpoenas they purported to issue ‘pursuant to the House of Representatives’ impeachment inquiry’ were not in support of such oversight. We therefore conclude that they were unauthorized.<sup>999</sup>

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<sup>996</sup> *Id.* at 3

<sup>997</sup> *Id.* at 3

<sup>998</sup> Letter from Pat Cipollone, White House Counsel, to Members of the House, Nancy Pelosi, Eliot Engel, and Elijah Cummings, (Oct. 8, 2019) (on file with authors), <https://www.whitehouse.gov/wp-content/uploads/2019/10/PAC-Letter-10.08.2019.pdf>.

<sup>999</sup> *House Committees’ Authority to Investigate for Impeachment*, 44 Op. OLC at 40 (Jan. 19, 2020)

Furthermore, House Resolution 660 did not ratify any subpoena issued before October 31, 2019 meaning that they lacked compulsory force as explained below:

Here, the House committees claiming to investigate impeachment issued subpoenas before they had received *any* actual delegation of impeachment-related authority from the House. Before October 31, the committees relied solely upon statements of the Speaker, the committee chairmen, and the Judiciary Committee, all of which merely asserted that one or more House committees had already been conducting a formal impeachment inquiry. There was, however, no House resolution actually delegating such authority to any committee, let alone one that did so with ‘sufficient particularity’ to compel witnesses to respond. *Watkins*, 354 U.S. at 201; *cf. Gojack v. United States*, 384 U.S. 702, 716–17 (1966). A Lacking a delegation from the House, the committees could not compel the production of documents or the testimony of witnesses for purposes of an impeachment inquiry.<sup>1000</sup>

The OLC opinion notes that executive branch officials have other legal justifications for noncompliance independent of the impeachment inquiry’s authorization. Given that executive privilege may be invoked in contexts of legislative oversight and impeachment investigations alike, Assistant AG Steven Engel wrote the following in the November 3, 2019 letter to White House Counsel Pat Cipollone: “[The] committee may not compel an executive branch witness to appear for a deposition without the assistance of agency counsel, when that counsel is necessary to assist the witness in ensuring the appropriate protection of privileged information during the deposition.”<sup>1001</sup> Consequently, the OLC opinion states that refusing to comply with congressional subpoenas does not constitute obstruction and that members of the executive branch cannot be held liable for following the President’s direction:

First, because the subpoenas exceeded the committees’ investigative authority and lacked compulsory effect, the committees were mistaken in contending that the recipients’ failure or refusal to comply with the subpoena [would] constitute evidence of obstruction of the House’s impeachment inquiry. ...

There was no valid impeachment inquiry. To the extent that the committees’ subpoenas sought information in support of an unauthorized impeachment inquiry, the failure to comply with those subpoenas was no more punishable than were the failures of the witnesses in *Watkins*, *Rumely*, *Kilbourn*, and *Lamont* to answer questions that were beyond the scope of those committees’ authorized jurisdiction.<sup>1002</sup>

*Assistant AG Steven Engel and White House Counsel Pat Cipollone Letters on Absolute Immunity*

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<sup>1000</sup> *Id.* at 46

<sup>1001</sup> Letter from Steven Engel, Assistant A.G., to Pat Cipollone, White House Counsel (Nov. 3, 2019) (on file with authors).

<sup>1002</sup> *House Committees’ Authority to Investigate for Impeachment*, 44 Op. OLC at 50 (Jan. 19, 2020)

The letters from Assistant AG Steven Engel and White House Counsel Pat Cipollone make evident how DOJ’s policy of noncompliance served as the legal framework across multiple federal agencies. Further information regarding DOJ’s efforts to advise and defend other federal agencies that ignore subpoenas as well as more detailed discussion of the letters themselves is discussed in Section V.7.f

Prior to the September 17, 2019 “Presidential Obstruction of Justice and Abuse of Power” hearing before the House Judiciary Committee, Assistant AG Steven Engel provided legal justification for former White House Staff Secretary Rob Porter’s and former White House Deputy Chief of Staff Rick Dearman’s “absolute immunity” claims. The language in the letters is explicitly adopted from the aforementioned OLC opinions. These letters include:

- September 16, 2019 Letter to Pat Cipollone on Rob Porter’s “Absolute Immunity”<sup>1003</sup>
- September 16, 2019 Letter to Pat Cipollone on Rick Dearman’s “Absolute Immunity”<sup>1004</sup>

The following three letters address “absolute immunity” claims in the context of the impeachment proceedings, having been included in the Trial Memorandum of President Donald J. Trump.

- October 25, 2019 Letter to Pat Cipollone on Charles Kupperman “Absolute Immunity”<sup>1005</sup>
- November 3, 2019 Letter to Pat Cipollone on John Eisenberg “Absolute Immunity”<sup>1006</sup>
- November 7, 2019 Letter to Pat Cipollone on Mick Mulvaney “Absolute Immunity”<sup>1007</sup>

The following letter from White House Counsel Pat Cipollone, along with the aforementioned OLC opinions, was an oft cited basis for noncompliance during the impeachment proceedings.

- October 8, 2019 Letter to Speaker Nancy Pelosi, Chairman Eliot L. Engel, Chairman Adam Schiff & Chairman Elijah Cummings<sup>1008</sup>

### *Litigation over Subpoenas*

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<sup>1003</sup> Letter from Steven Engle, Assistant Attorney General, to Pat Cipollone, White House Counsel (Oct. 25, 2019) (on file with DOJ), <https://www.justsecurity.org/wp-content/uploads/2019/10/White-House-letter-to-Kupperman-10-25-19-1.pdf>.

<sup>1004</sup> Letter from Steven Engle, Assistant Attorney General, to Pat Cipollone, White House Counsel (Sept. 16, 2019) (on file with DOJ). <https://www.justice.gov/olc/page/file/1203071/download>

<sup>1005</sup> Letter from Steven Engle, Assistant Attorney General, to Pat Cipollone, White House Counsel (Oct. 25, 2019) (on file with DOJ). <https://www.justsecurity.org/wp-content/uploads/2019/10/White-House-letter-to-Kupperman-10-25-19-1.pdf>

<sup>1006</sup> Letter from Steven Engle, Assistant Attorney General, to Pat Cipollone, White House Counsel (Nov. 3, 2019) (on file with DOJ). <https://docs.house.gov/meetings/JU/JU00/20191211/110331/HMKP-116-JU00-20191211-SD849.pdf>

<sup>1007</sup> Letter from Steven Engle, Assistant Attorney General, to Pat Cipollone, White House Counsel (Nov. 7, 2019) (on file with DOJ). <https://www.justsecurity.org/wp-content/uploads/2020/01/ukraine-clearinghouse-olc-letter-opinion-immunity-of-wh-chief-of-staff-2019.11.7.pdf>

<sup>1008</sup> Letter from Pat Cipollone, White House Counsel, to Representative Nancy Pelosi, Representative Eliot Engel, Representative Adam Schiff, and Representative Elijah Cummings (Oct. 8, 2019) (on file with the White House). <https://www.whitehouse.gov/wp-content/uploads/2019/10/PAC-Letter-10.08.2019.pdf>.

Given the long line of cases beginning in the 1960s and gaining particular notoriety in the Watergate investigation during the Nixon Administration, this report cannot discuss all of the relevant case law on Congressional subpoenas. This Report briefly mentions to cases from before the Trump Administration and then discusses in more detail several of the most recent and relevant cases related to congressional subpoenas of the Trump Administration.

In Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (link), Chairman of the House Judiciary Committee John Conyers issued a subpoena<sup>1009</sup>The Committee had launched an investigation into the unexplained dismissals in early 2007 based on suspicion of improper motivations. Documents produced by DOJ and congressional testimonies indicated that Miers had a significant personal role in the termination process. President Bush blocked Miers' testimony and invoked executive privilege, the legal justifications of which are outlined in Solicitor General and Acting AG Paul D. Clement's June 27, 2007 letter to President Bush as well as<sup>1010</sup>. Fielding<sup>1011</sup>Chairman of the House Judiciary Committee John Conyers issued a subpoena<sup>1011</sup> on June 13, 2008 compelling former White House Counsel Harriet Miers to testify on the forced resignation of nine U.S. Attorneys. The<sup>1012</sup>suspicion of improper motivations. Documents produced by DOJ and congressional testimonies indicated that Miers had a significant personal role in the termination process. President Bush blocked Miers' testimony and invoked executive privilege, the legal justifications of which are outlined in Solicitor General and Acting AG Paul D. Clement's June 27, 2007 letter to President Bush<sup>1013</sup> as well as White House Counsel Fred Fielding's June 28, 2007 letter to Chairman Patrick Leahy and Chairman Conyers<sup>1013</sup> Fielding<sup>1014</sup> Fielding summarizes:

The President was not willing to provide your Committees with documents revealing internal White House communications or to accede to your desire for senior advisors to testify at public hearings. The reason for these distinctions rests upon a bedrock Presidential prerogative: for the President to perform his constitutional duties, it is imperative that he receive candid and unfettered advice and that free and open discussions and deliberations occur among his advisors and between those advisors and others within and outside the Executive Branch. Presidents would not be able to fulfill their responsibilities if their advisors<sup>3/4</sup>on fear of being commanded to Capitol Hill to testify or having their documents produced to Congress<sup>3/4</sup>were reluctant to communicate openly and honestly in the course of rendering advice and reaching decisions. ...

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<sup>1012</sup> *Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 86 (D.D.C. 2008).*

*See also* Dana Bash & Kathleen Koch, *White House officials subpoenaed in U.S. attorneys probe*, CNN (June 13, 2007), <https://www.cnn.com/2007/POLITICS/06/13/us.attorneys.subpoenas/index.html>.

<sup>1013</sup> Letter from Paul D. Clement, Solicitor General and Acting Attorney General, to President George W. Bush (Jun. 27, 2007) (on file with the White House). <https://fas.org/sgp/bush/sg062707.pdf>

<sup>1014</sup> Letter from Fred Fielding, White House Counsel to Senator Patrick Leahy and Senator John Conyers (Jun. 28, 2007) (on file with the White House). <https://www.wsj.com/articles/SB118304017543351506>

Further, it remains unclear precisely how and why your Committees are unable to fulfill your legislative and oversight interests without the unfettered requests you have made in your subpoenas. Put differently, there is no demonstration that the documents and information you seek by subpoena are critically important to any legislative initiatives that you may be pursuing or intending to pursue.<sup>1015</sup>

Miers was held in contempt of Congress on February 14, 2008; however, Acting AG Clement determined that DOJ would not bring the congressional contempt citations before a grand jury or prosecute Miers given that noncompliance with Committee subpoenas did not constitute a crime and Miers had acted under the White House's direction.<sup>1016</sup> The Committee sought declaratory judgment that Miers was required to testify pursuant to the subpoena. The executive branch moved to dismiss the action, and the Committee filed motion for partial summary judgment.

DOJ argued that the Committee cannot invoke judicial process to compel senior presidential aides to testify; the President has the authority to direct former and current aides to ignore congressional subpoenas based on their testimonial immunity; and federal courts cannot exercise subject-matter jurisdiction over subpoena-related disputes between the legislative and the executive branch based on separation of powers concerns. The opinion of the U.S. District Court for D.C., written by John D. Bates, rejected each of these claims, holding that the Committee had standing to bring civil action to enforce congressional subpoenas issued to senior presidential aides; Miers was not entitled to absolute or qualified immunity; and federal courts could exercise subject-matter jurisdiction over subpoena-related disputes. Bates wrote,

The aspect of this lawsuit that is unprecedented is the notion that Ms. Miers is absolutely immune from compelled congressional process. The Supreme Court has reserved absolute immunity for very narrow circumstances, involving the president's personal exposure to suits for money damages based on his official conduct or concerning matters of national security or foreign affairs. The executive's current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law. ...

The court holds only that Ms. Miers (and other senior presidential advisers) do not have absolute immunity from compelled congressional process in the context of this particular subpoena dispute. There may be some instances where absolute (or qualified) immunity is appropriate for such advisers, but this is not one of them.<sup>1017</sup>

Bates rejected the executive branch's claim that absolute immunity absolves senior presidential aides from their legal responsibility to even respond to congressional subpoenas, particularly in cases of executive privilege. Although the court did not address whether Miers could use executive privilege to justify refusing to answer questions from congressional investigators, it

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<sup>1015</sup> *Id.*

<sup>1016</sup> *See Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress*, 35 Op. OLC 65 (Feb. 29, 2008), <https://www.justice.gov/opinion/file/832851/download>.

<sup>1017</sup> *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 106 (D.D.C. 2008). <https://casetext.com/case/committee-on-judiciary-v-miers-3>

determined that White House aides are obligated to respond to subpoenas prior to raising executive privilege claims.<sup>1018</sup>

*Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) is rooted in a Congressional investigation of an operation under the Obama Administration that was particularly unpopular with a Republican Congress.<sup>1019</sup> In November 2009, the Phoenix Field Division of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) launched “Operation Fast and Furious” to identify ranks of a drug cartel by tracking guns bought by drug-cartel straw purchasers in the U.S. across the Mexican border. The House Oversight Committee began its investigation in 2011 after it was discovered that these firearms were connected to the deaths of hundreds of Mexicans and U.S. Border Patrol Agent Brian Terry.<sup>1020</sup> On October 12, 2011 the Committee issued a subpoena for communications from AG Eric Holder and other high-ranking DOJ officials regarding the federal gunrunning operation, specifically information pertaining to Terry’s death and DOJ communications with the White House.<sup>1021</sup> The subsequent friction between AG Holder’s insistence that he had been fully responsive to document requests and the Committee’s assertion that DOJ continued to withhold thousands of key pages reached its apex in June 2012. President Obama asserted executive privilege over the documents on June 20, 2012, and Holder was held in contempt of Congress eight days later, an action unprecedented in U.S. history.<sup>1022</sup> In the June 20, 2012 letter to Chairman Darrell E. Issa, Deputy AG James M. Cole outlined the legal basis for executive privilege:

The legal basis for the President's assertion of executive privilege is set forth in the enclosed letter to the President from the Attorney General. In brief, the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would have significant, damaging consequences. As I explained at our meeting yesterday, it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these two co-equal branches of the Government.<sup>1023</sup>

Deputy AG Cole also provided justification for DOJ’s decision not to bring the congressional contempt citations before a grand jury or prosecute Holder in the June 18, 2012 letter to Speaker

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<sup>1018</sup> *Id.*; John Bresnahan, *Federal judge rules against Miers, White House on subpoenas*, POLITICO (July 31, 2008), <https://www.politico.com/blogs/politico-now/2008/07/federal-judge-rules-against-miers-white-house-on-subpoenas-010681>.

<sup>1019</sup> *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 3 (D.D.C. 2013).

<sup>1020</sup> Ian Tuttle, *El Chapo's Capture Puts 'Operation Fast and Furious' Back in the Headlines*, NATIONAL REVIEW (Jan. 22, 2016), <https://www.nationalreview.com/2016/01/fast-furious-obama-first-scandal/>

<sup>1021</sup> *Congress subpoenas 'Fast and Furious' documents*, CNN (Oct. 13, 2011), <https://www.cnn.com/2011/10/12/politics/fast-and-furious/index.html>

<sup>1022</sup> *Operation Fast and Furious Fast Facts*, CNN (Sept. 13, 2019), <https://www.cnn.com/2013/08/27/world/americas/operation-fast-and-furious-fast-facts/index.html>

<sup>1023</sup> Letter from James M. Cole to Darrell E. Issa (Jun. 20, 2012) (on file with authors), <https://graphics8.nytimes.com/packages/pdf/national/20120621-holder/062011Letter.pdf>

John A. Boehner, <sup>1024</sup> citing both an OLC opinion written by Theodore Olson during the Reagan Administration and DOJ's position in the 2008 Miers case. The Committee brought action to enforce the subpoena, and AG Holder moved to dismiss.

DOJ argued that executive privilege was validly invoked; the suit did not present a case or controversy; the Committee did not have standing; and the court lacked subject-matter jurisdiction to hear the case based on separation of powers concerns. The opinion of the U.S. District Court for D.C., written by Amy Berman Jackson, rejected each of these claims, holding that AG Holder was required to comply with the subpoena; the Committee adequately alleged concrete and particularized injury; and the court had jurisdiction because the political question doctrine did not apply. Judge Jackson references the decision in *Miers*:

In *Miers*, the House of Representative's Committee on the Judiciary filed for a declaratory judgment that the former White House counsel was required to comply with a Congressional subpoena and appear before the Committee to testify regarding its investigation into the resignation of nine United States Attorneys. The executive filed a motion to dismiss and the court denied it. The court held:

‘[T]here can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.’

The Court can identify no reason why that right cannot be vindicated by recourse to the federal courts through the [Declaratory Judgment Act].<sup>1025</sup>

Judge Jackson elaborated on the importance of the court exercising its jurisdiction:

In the Court's view, endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here. After all, the Constitution contemplates not only a separation, but a balance, of powers.<sup>1026</sup>

In 2016, Judge Jackson ruled in *Committee on Oversight and Government Reform v. Loretta E. Lynch* that AG Holder must turn over the documents to the Committee despite executive privilege claims.<sup>1027</sup> She explained, “The qualified privilege invoked to shield material that the Department has already disclosed has been outweighed by a legitimate need that the Department does not dispute, and therefore, the records must be produced”; however, “documents ... that reveal the Department’s internal deliberations about how to respond to press and Congressional

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<sup>1024</sup> Letter from Eric Holder, Attorney General, to John Boehner, Speaker of the House (Jun. 18, 2012) (on file with authors)

<https://abcnews.go.com/images/Politics/062812%20letter.pdf>

<sup>1025</sup> *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 10 (D.D.C. 2013),

<https://casetext.com/case/oversight-v-holder>.

<sup>1026</sup> *Id.*, at 3.

<sup>1027</sup> *Committee on Oversight and Government Reform v. Loretta E. Lynch* 156 F. Supp. 3d 101 (D.D.C 2016).

inquiries ... are protected by the deliberative process privilege.”<sup>1028</sup> A settlement was reached in 2019.<sup>1029</sup>

The number of subpoena cases has multiplied in the Trump Administration since Democrats obtained control of the House of Representatives in the 2018 elections. Two of the most prominent cases are United States House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020) (link); and Comm. on Judiciary v. McGahn, 951 F.3d 510, 513 (D.C. Cir. 2020), reh'g en banc granted, opinion vacated sub nom. (August 2020).

In *Mnuchin*, the House of Representatives sued multiple executive branch officials and departments, namely, the Secretary and Department of the Treasury, the Acting Secretary of Defense, the Secretary and Department of Homeland Security, and the Secretary and Department of the Interior.<sup>1030</sup> The House sued to challenge the use of funds for the construction of the wall on the southern border.<sup>1031</sup> While the main issue in the case is the alleged violation of the Appropriations Clause (Art. I, § 9, cl. 7) through the expenditure of a greater amount of funds for border wall construction than Congress had allocated, the threshold issue was whether Congress had standing to enforce the subpoena in court.<sup>1032</sup> Because this issue was the same one as in *McGahn*, the cases were combined.<sup>1033</sup> The outcome of both *Mnuchin* and *McGahn* is outlined below.

In *McGahn*, White House Counsel Don McGahn, a central witness to multiple alleged episodes of obstruction of justice by President Trump, was subpoenaed to testify before the House Judiciary Committee on May 21, 2019 on matters investigated by Special Counsel Robert Mueller. The Trump Administration issued a legal opinion claiming McGahn was “absolutely immune” the day before McGahn’s scheduled testimony, thereby supposedly invalidating the Committee’s subpoena. The White House’s argument was outlined in the May 20, 2019 OLC opinion<sup>1034</sup> discussed earlier in this report. White House Press Secretary Sarah Huckabee Sanders defended DOJ’s position:

The Department of Justice has provided a legal opinion stating that, based on long-standing, bipartisan, and constitutional precedent, the former counsel to the

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<sup>1028</sup> *Comm. on Oversight & Gov't Reform v. Lynch*, No. 1:2012cv01332 - Document 117 (D.D.C. 2016), [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2012cv1332-117](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1332-117)

<sup>1029</sup> Katelyn Polantz, *Settlement in Fast and Furious executive privilege lawsuit between DOJ and the House*, CNN (May 8, 2019), <https://www.cnn.com/2019/05/08/politics/fast-and-furious-settlement-doj-house/index.html>. See also Chris Armstrong, *A Costly Victory for Congress: Executive Privilege after Committee on Oversight and Government Reform v. Lynch*, FEDERALIST SOCIETY (Jun. 16, 2016), <https://fedsoc.org/commentary/publications/a-costly-victory-for-congress-executive-privilege-after-committee-on-oversight-and-government-reform-v-lynch>.

<sup>1030</sup> *U.S. House of Representatives v. Mnuchin*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE (Nov. 22, 2019), <https://clearinghouse.net/detail.php?id=17220>

<sup>1031</sup> Jonathan H. Adler, *En Banc D.C. Circuit Concludes House Has Standing to Enforce Subpoena in Court (Updated)*, REASON (Aug. 7, 2020), <https://reason.com/2020/08/07/en-banc-d-c-circuit-concludes-house-has-standing-to-enforce-subpoena-in-court/>

<sup>1032</sup> Marty Lederman, *When does the House of Representatives Have Standing to Sue?: What to Expect from the D.C. Circuit En Banc Argument in McGahn and Mnuchin*, BALKINIZATION (Jun. 3, 2020), <https://balkin.blogspot.com/2020/06/when-does-house-of-representatives-have.html>

<sup>1033</sup> *Id.*

<sup>1034</sup> *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. OLC 1 (May 20, 2019), <https://www.justice.gov/olc/opinion/file/1215066/download>.

president cannot be forced to give such testimony, and Mr. McGahn has been directed to act accordingly. ... This action has been taken in order to ensure that future presidents can effectively execute the responsibilities of the office of the presidency.<sup>1035</sup>

After multiple attempts to reach an accommodation with the Trump Administration, the Committee filed its lawsuit in August and sought an expedited ruling. The House Judiciary Committee brought action for declaratory and injunctive relief against McGahn to force him to comply with the subpoena and testify as part the investigation into Russian interference in the 2016 presidential election and possible obstruction of justice charges against President Trump. The U.S. District Court for D.C. granted summary judgment to the Committee and the case was appealed.

DOJ argued that the Committee did not have standing to use federal courts as a means to enforce subpoenas to senior presidential aides; the court lacked subject-matter jurisdiction over subpoena-related disputes based on separation of powers concerns; and the Committee's claim that McGahn was legally obligated to testify fails on its merits since it has been the long-standing position of the OLC that the President may declare senior presidential aides absolutely immune from congressional testimony. On November 25, 2019 the opinion of the U.S. District Court for D.C., written by Ketanji Brown Jackson, rejected each of these claims, holding that McGahn was not absolutely immune from congressional testimony; the Committee had standing; and the court had subject-matter jurisdiction to hear the case. The latter two conclusions are explained below:

Jurisdiction exists because the Judiciary Committee's claim presents a legal question, and it is "emphatically" the role of the Judiciary to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). It also plainly advances constitutional separation-of-powers principles, rather than subverts them, when a federal court decides the question of whether a legislative subpoena that a duly authorized committee of the House of Representatives has issued to a senior-level aide of the President is valid and enforceable, or, alternatively, is subject to the President's invocation of absolute testimonial immunity. Furthermore, *Miers* was correct to conclude that, given the indisputable Article I power of the House of Representatives to conduct investigations of potential abuses of power and subpoena witnesses to testify at hearings concerning such investigations, the Judiciary Committee has both standing and a cause of action to file an enforcement lawsuit in federal court if the

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<sup>1035</sup> *Statement from the Press Secretary* (May 20, 2019) (on file with the White House). <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-57/>. See also Rachael Bade, Josh Dawsey & Devlin Barrett, *White House blocks former counsel McGahn from testifying to Congress*, The WASHINGTON POST (May 20, 2019), [https://www.washingtonpost.com/politics/white-house-intends-to-block-former-counsel-mcgahn-from-testifying-to-congress/2019/05/20/47f61f94-7b1b-11e9-a5b3-34f3edf1351e\\_story.html](https://www.washingtonpost.com/politics/white-house-intends-to-block-former-counsel-mcgahn-from-testifying-to-congress/2019/05/20/47f61f94-7b1b-11e9-a5b3-34f3edf1351e_story.html)

Executive branch blocks a current or former presidential aides' performance of his duty to respond to a legislative subpoena. *Seeid.* at 65–75, 78–94.<sup>1036</sup>

Judge Jackson's rejection of DOJ's absolute testimonial immunity claim is expressed in stark terms below:

Thus, ultimately, the arguments that DOJ advances to support its claim of absolute testimonial immunity for senior-level presidential aides transgress core constitutional truths (notwithstanding OLC's persistent heralding of these and similar propositions). By contrast, textbook constitutional law readily reveals that, precisely because the Constitution bestows upon the Judiciary the power to demarcate the boundaries of lawful conduct by government officials, the federal courts have subject-matter jurisdiction to entertain subpoena-enforcement disputes concerning legislative subpoenas that have been issued to Executive branch officials. It is similarly well established that, because the Constitution vests the Legislature with the power to investigate potential abuses of official authority—when necessary to hold government officials (up to, and including, the President) accountable, as representatives of the People of the United States—then House committees have both Article III standing and a cause of action to pursue judicial enforcement of their duly authorized and legally enforceable requests for information. What is missing from the Constitution's framework as the Framers envisioned it is the President's purported power to kneecap House investigations of Executive branch operations by demanding that his senior-level aides breach their legal duty to respond to compelled congressional process.

Luckily for this Court, an existing precedent that is on all fours with the instant matter (*Miers*) already systematically dismantles the edifice that DOJ appears to have erected over the years to enshrine the proposition that a President's senior-level aides have absolute immunity with respect to legislative subpoenas that Congress issues in the course of its investigations; *Miers* does this by squarely refuting each of the threshold and merits arguments that DOJ seeks to advance in the instant case.<sup>1037</sup>

On March 1, 2020, however, a divided panel of the U.S. Court of Appeals for the D.C. Circuit held that the court lacked jurisdiction to hear the case, although the majority did not endorse the absolute testimonial immunity argument. The following statements by Judge Thomas Griffith are completely antithetical to the assessments of the District Court:

In this case, the Committee's dispute with the Executive Branch is unfit for judicial resolution because it has no bearing on the 'rights of individuals' or some entity beyond the federal government. *Marbury*, 5 U.S. at 170. The Committee is not a private entity seeking vindication of its 'constitutional rights and liberties ... against oppressive or discriminatory government action.' *Raines*, 521 U.S. at 829

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<sup>1036</sup> *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 513 (D.C. Cir. 2020), reh'g en banc granted, opinion vacated sub nom. *United States House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), <https://casetext.com/case/comm-on-judiciary-v-mcgahn>.

<sup>1037</sup> *Id.*

(internal quotation marks omitted). Nor does the Committee seek the ‘production or nonproduction of specified evidence . . . in a pending criminal case’—the ‘kind of controversy’ threatening individual liberty that ‘courts traditionally resolve.’ *United States v. Nixon*, 418 U.S. 683, 696-97 (1974).

Instead, the Committee claims that the Executive Branch’s assertion of a constitutional privilege is ‘obstructing the Committee’s investigation.’ Committee Br. 15. That obstruction may seriously and even unlawfully hinder the Committee’s efforts to probe presidential wrongdoing, but it is not a “judicially cognizable” injury. *Raines*, 521 U.S. at 819; *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). ...

Judicial entanglement in the branches’ political affairs would not end here. If the Committee can enforce this subpoena in the courts, chambers of Congress (and their duly authorized committees) can enforce *any* subpoena. Though momentous, the legal issue in this case is quite narrow: whether the President may assert absolute testimonial immunity on behalf of McGahn. But future disagreements may be complicated and fact-intensive, and they will invariably put us in the “awkward position of evaluating the Executive’s claims of confidentiality and autonomy,” *Cheney*, 524 U.S. at 389, against Congress’s need for information, e.g., *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), *cert. granted*, 140 S. Ct. 660 (2019). ...

If we order McGahn to testify, what happens next? McGahn, compelled to appear, asserts executive privilege in response to the Committee’s questions. The Committee finds those assertions baseless. In that case, the Committee assures us, it would come right back to court to make McGahn talk. *See* Oral Arg. Tr. 60:25-61:1. The walk from the Capitol to our courthouse is a short one, and if we resolve this case today, we can expect Congress’s lawyers to make the trip often.<sup>1038</sup>

Then on August 7, 2020 the District of Columbia Circuit by a 7-2 vote reversed the decision of the three-judge panel on both *McGahn* and *Mnuchin*. The Court held that the House committee did have standing to sue in federal court to enforce its subpoena.

In *McGahn*, the en banc panel, in an opinion written by Judge Rogers, observed<sup>1039</sup>:

The power of each House of Congress to compel witnesses to appear before it to testify and to produce documentary evidence has a pedigree predating the Founding and has long been employed in Congress’s discharge of its primary constitutional responsibilities: legislating, conducting oversight of the federal government, and, when necessary, checking the President through the power of impeachment. Congressional subpoenas have their historical basis in the “emergence of [the English] Parliament.” *Watkins*, 354 U.S. at 188. Congress

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<sup>1038</sup> *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 513 (D.C. Cir. 2020), <https://www.politico.com/f/?id=00000170-8dbe-d93c-a979-bfff3cf80000>

<sup>1039</sup> *Id.*

began using its investigative powers from the earliest days of the Republic to investigate national problems and probe for possible federal solutions.

The power to impeach the President or another officer, rests with the House and that power is impotent if a President can simply refuse to comply with a Congressional subpoena. As the McGahn Court went on to observe<sup>1040</sup>:

As far back as 1796, George Washington, the Nation's first President, acknowledged that the House may compel the President to turn over some Executive Branch information if sought as part of an impeachment investigation. See Pres. George Washington, Message to the House Regarding Documents Relative to the Jay Treaty (Mar. 30, 1796); see Mazars, 140 S. Ct. at 2029–30. Decades later, Congress also issued subpoenas to President Nixon during its impeachment investigation of him. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726–27 (D.C. Cir. 1974).

The *McGahn* Court, however, also made it clear that the President still had the right to assert Executive Privilege, and that as a result McGahn might not be required to answer some of the questions put to him by the Committee. The Court was not deciding the scope of the Executive Privilege. The Court thus observed:

What the Committee seeks through its subpoena enforcement lawsuit is resolution of a discrete and limited legal issue: whether McGahn must appear before it to testify, absent invocation of a valid privilege that would excuse his refusal to answer specific questions. Given McGahn's previous role as a close presidential advisor, it is plausible that Executive privilege could be properly asserted in response to at least some of the Committee's questions, depending on their substance. See generally *United States v. Nixon*, 418 U.S. 683, 705 (1974). Such a potentially available privilege is a powerful protection of the President's interest in Executive Branch confidentiality, and it remains unaffected by an order compelling McGahn to appear and testify before the Committee.<sup>1041</sup>

It remains to be seen what claims of Executive Privilege will be made with respect to McGahn's testimony if and when he appears before the Committee as he is presumably required to do under the *en banc* opinion of the District of Columbia Circuit.

#### Department of Justice v. House Committee on the Judiciary

In *Department of Justice v. House Committee on the Judiciary*, the House sued for the release of grand jury material from the Mueller Report.<sup>1042</sup> They argued that it was necessary to the impeachment process.<sup>1043</sup> The DC Circuit ruled in favor of the Judiciary Committee, ruling that

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<sup>1040</sup> *Id.* at 524.

<sup>1041</sup> *Id.* at 537.

<sup>1042</sup> Jeremy Herb and Manu Raju, *House Democrats escalate impeachment fight with suit to obtain Mueller grand jury information*, CNN POLITICS (Jul. 26, 2019), <https://www.cnn.com/2019/07/26/politics/nadler-democrats-grand-jury/index.html>

<sup>1043</sup> *Id.*

the court controlled the requested materials, not the executive branch.<sup>1044</sup> The Supreme Court, however, granted a stay in May 2020 and certiorari was granted in July 2020.<sup>1045</sup> Information regarding AG Barr’s refusal to release the complete and unredacted Mueller Report is outlined in Section V.1 to this report.

The case *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir.), cert. granted, 140 S. Ct. 660, 205 L. Ed. 2d 418 (2019), 591 U.S. \_\_\_\_ (2020) is rooted in attempts by the House to subpoena Trump financial records.

On February 27, 2019 President Trump’s former attorney Michael Cohen testified before the House Oversight Committee that President Trump had changed the estimated value of his assets and liabilities on financial statements prepared by his accounting firm, Mazars USA, LLP. The Committee subpoenaed Mazars for documents related to President Trump’s and his businesses’ finances from 2011 until the present, which led them to sue Mazars, asking the U.S. District Court for D.C. to declare the subpoena invalid and unenforceable. The Oversight Committee intervened to defend its subpoena. A hearing on the preliminary injunction was consolidated with resolution of the merits. The U.S. District Court for D.C. granted summary judgment in favor of Committee; the President appealed; and the Supreme Court released its decision on July 9, 2020.

DOJ filed an amicus brief urging a federal appeals court to block the House Oversight Committee’s subpoena of the President’s financial records. DOJ cited separation of powers concerns and constitutional-avoidance principles, arguing that the Committee did not clearly authorize the request for the information, nor could it identify a legitimate legislative purpose to justify the inquiry. The initial court ruling rejected these claims, holding that the committee was engaged in legitimate legislative investigation, not an unconstitutional oversight inquiry when issuing the subpoena; the requested documents were relevant to the congressional investigation; and the Committee was properly authorized to issue subpoena. The July 9, 2020 Supreme Court decision affirmed Congress’ broad investigatory powers, which allow it to investigate both the executive branch and the President himself; rejected the President and Solicitor General’s proposed heightened standard for presidential subpoenas, reserving it for official communications subject to executive privilege; and held that in contrast to other congressional subpoenas, subpoenas seeking records involving the President should be subject to a more stringent standard.<sup>1046</sup> Chief Justice Roberts wrote,

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. “[O]ccasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible.” *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 389–390 (2004) (quoting *Nixon*, 418 U. S., at 692). Congress may not rely on the President’s information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective.

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<sup>1044</sup> Robert Legare and Melissa Quinn, *Appeals court orders DOJ to turn over secret Mueller grand jury docs to Congress*, CBS NEWS (Mar. 10, 2020), <https://www.cbsnews.com/news/appeals-court-doj-secret-mueller-grand-jury-materials-house-judiciary-committee/>

<sup>1045</sup> *Docket for 19-1328*, SUPREMECOURT.GOV, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-1328.html>

<sup>1046</sup> *Trump v. Mazars*, 591 U.S. \_\_\_\_ (2020), [https://www.supremecourt.gov/opinions/19pdf/19-715\\_febh.pdf](https://www.supremecourt.gov/opinions/19pdf/19-715_febh.pdf).

The President’s unique constitutional position means that Congress may not look to him as a “case study” for general legislation. Cf. 943 F. 3d, at 662–663, n. 67.

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Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective. The specificity of the subpoena’s request “serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.” *Cheney*, 542 U. S., at 387.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress’s legislative purpose, the better. See *Watkins*, 354 U. S., at 201, 205 (preferring such evidence over “vague” and “loosely worded” evidence of Congress’s purpose). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is “impossible” to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President’s information will advance its consideration of the possible legislation. *Id.*, at 205–206, 214–215.

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President’s time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance*, *ante*, at 12–14; *Clinton*, 520 U. S., at 704–705. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.<sup>1047</sup>

*Trump v. Vance*, 591 U.S. \_\_\_\_ (2020) does not involve a Congressional subpoena but instead a subpoena from a New York grand jury. Nonetheless, this case, decided the same day as *Mazars*, is indicative of the Supreme Court’s willingness to uphold subpoenas directed at the President. In *Trump v. Vance*, the Supreme Court unanimously rejected the concept of absolute presidential immunity – the notion that the president cannot be served with a state grand jury subpoena while in office.<sup>1048</sup> The case arose out of a subpoena of Trump Organization financial records by Cyrus Vance, the Manhattan District Attorney who was investigating various financial crimes.

The majority opinion in *Trump v. Vance* did not impose any heightened showing on prosecutors seeking to subpoena the president than on prosecutors serving a subpoena on anyone else. The clear message from this holding: The President is not above the law.

The case does not directly answer the question of whether a president can be indicted while still in office, but just about everything the Supreme Court has said about presidential immunity

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<sup>1047</sup> *Id.*

<sup>1048</sup> See *Trump v. Vance*, 591 U.S. \_\_\_\_ (2020).

clearly cuts in favor of the conclusion that the answer is yes. The Court's decision in *Trump v. Vance* categorically rejected the theory of presidential immunity from criminal process. And this very likely means that a president not only can be investigated and required to comply with criminal subpoenas while in office, but also that a sitting president can be indicted.

Indeed, the president's lawyers' own arguments in *Vance* support this conclusion. They argued that if it were possible to serve a criminal subpoena on a sitting president, it would be possible to indict him, too. They tried to argue that – because a president cannot be indicted, he cannot be subpoenaed. But now the Supreme Court has gone the other way, beyond a shadow of a doubt, and with unanimous support, ruling that a sitting president can be investigated and is subject to subpoenas in criminal cases. This implication from the majority opinion emerges as well from Justice Samuel Alito's dissent, where he describes a parade of horrors that could ensue if a president were to be indicted while in office.

Two Office of Legal Counsel memos – one written in 1974 at the height of the Watergate scandal and the second written in 2000 at the end of the Clinton Administration -- have been misunderstood widely as suggesting a constitutional basis for DOJ's reluctance to indict a sitting president. This proposition – indeed the entire Presidential Immunity Theory -- is rejected by the Court in *Vance*.

The decision in *Trump v. Vance* is a repudiation of the most extreme version of the “unitary executive theory” described in the beginning of this Report. Originally a thesis about the ability of the president to remove senior executive branch officials at will, the unitary executive theory has over the years morphed into an excuse for the president's power to defy the law and the view that laws that constrain Article II powers – even laws against obstruction of justice and laws against torture – are somehow unconstitutional. That view of Article II was rejected by the Court in *Trump v. Vance*.

## APPENDIX D: Primer on Masking and Minimization Procedures

*Editor's Note: The Primer was drafted by Working Group member George Croner, a career military and retired intelligence professional, to help the readers of this report to gain a better understanding of the concepts of minimization and masking as they are used within the intelligence community.*

### **A Brief Historical Background of “Minimization” in Electronic Surveillance**

“Minimization,” as a term that relates to electronic surveillance, has its genesis in a single line in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 - legislation that, in turn, was responsive to the constitutional standards for electronic surveillance that had been announced in two 1967 U.S. Supreme Court decisions: *Berger v. N.Y.* and *Katz v. U.S.* The totality of the statutory requirement to “minimize” is found in the following provision in 18 U.S.C. § 2518(5): “Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, ***shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter***, and must terminate upon attainment of the authorized objective, or in any event in thirty days.” (emphasis added)

The Supreme Court has considered Title III's minimization requirement in a substantive way in only one case: *U.S. v. Scott*, 436 U.S. 128 (1978). *Scott* involved a Title III surveillance where the defendant challenged the legitimacy of the surveillance on grounds that the government had violated the minimization requirement found in 18 U.S.C. §2518(5). As the Court described the facts: pursuant to a court wiretap authorization order requiring such minimization, government agents intercepted for a one-month period virtually all conversations over a particular telephone suspected of being used in furtherance of a conspiracy to import and distribute narcotics. Forty percent of the calls were clearly narcotics related, and the remaining calls were for the most part very short, such as wrong-number calls, and calls to persons unavailable to come to the phone, or were ambiguous in nature, and in a few instances were between the person to whom the telephone was registered and her mother. After the interceptions were terminated, defendants, among others, were indicted for various narcotics offenses.

The district court, after the defendants moved to suppress the results of the surveillance, ordered suppression of all the intercepted conversations and derivative evidence, on the ground that the agents had failed to comply with the wiretap order's minimization requirement, primarily because only 40% of the conversations were shown to be narcotics related. The Court of Appeals reversed and, after granting certiorari, in an opinion by Chief Justice Rehnquist, the Supreme Court held: (1) The proper approach for evaluating compliance with the minimization requirement, like evaluation of all alleged violations of the Fourth Amendment, is objectively to assess the agent's or officer's actions in light of the facts and circumstances confronting him at the time without regard to his underlying intent or motive; (2) Even if the agents fail to make good-faith efforts at minimization, that is not itself a violation of the statute requiring suppression, since the use of the word “conducted” in § 2518(5) makes it clear that the focus was to be on the agents' actions, not their motives, and since the legislative history shows that the statute was not intended to extend the scope of suppression beyond search-and-seizure law under

the Fourth Amendment. The Supreme Court affirmed the Court of Appeals ruling that the scope of the surveillance had not violated the “minimization” requirement of 18 U.S.C. § 2518(5).

*Scott* says that minimization efforts are evaluated by objectively examining the manner in which the surveillance was conducted, not by the subjective motivations of the officers. In other words, there is no “good faith” requirement implicit in the Title III minimization requirement and the adequacy of “minimization” efforts will be governed by the Fourth Amendment’s reasonableness standard.

In the absence of any extended statutory criteria in Title III governing “minimization,” most guidance for the conduct of federal wiretaps emanates from the Justice Department. DOJ has an internal entity, the Office of Enforcement Operations, charged with carefully scrutinizing all Title III applications to ensure statutory compliance. The Justice Manual offers additional guidance regarding “minimization” in the Title III context.

### **The Minimization Requirements Found in FISA**

The Supreme Court decided *Scott* in May 1978. The Foreign Intelligence Surveillance Act (FISA) was being debated in Congress throughout 1978 so it seems likely that the Court’s interpretation of “minimization” in Title III was not lost on Congress as it put the finishing touches on FISA, which President Carter signed into law in October 1978.

*Scott* and the relatively minimal statutory reference to “minimization” in Title III might have suggested that FISA’s treatment of “minimization” would be similarly cursory. But, apart from Title III’s precedent, there were other factors that impacted on the manner in which “minimization” was addressed in FISA. The congressional investigations into intelligence activities (conducted in the mid-1970s by the Church (Senate) and Pike (House) Committees) had (1) resulted in the first official public acknowledgement of the existence of the National Security Agency (NSA), and (2) had revealed two particular NSA collection programs (*Projects Shamrock* and *Minaret*) that had been employed to target and acquire U.S. person communications without either a judicial warrant or any sort legislative approval. FISA was designed, *inter alia*, to bring the types of activities revealed in *Shamrock* and *Minaret* within the reach of the statute.

In its exhaustive review of NSA’s Section 702 surveillance program completed by the Privacy and Civil Liberties Oversight Board (PCLOB) in July 2014 following the disclosures by Edward Snowden, the PCLOB described “minimization” in the context of foreign intelligence surveillance as: “Minimization is one of the most confusing terms in FISA. Like traditional FISA electronic surveillance and physical search, Section 702 requires that all acquired data be subject to “minimization procedures.” *Minimization procedures are best understood as a set of controls on data to balance privacy and national security interests.*” (emphasis added).

In FISA, the requirements for “minimization” are specifically outlined in two particular overarching concepts (found in FISA at 50 U.S.C. §1801(h)(1) and (2)) that must be observed with respect to every FISA electronic surveillance. Fealty to these procedures is assured by requiring that minimization procedures consistent with the principles defined in §101(h) of FISA must be included with every FISA surveillance application and every Foreign Intelligence

Surveillance Order (FISC) order approving a surveillance application must direct that these minimization procedures be followed. The two principal minimization concepts are:

“(1) Specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to 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; and

(2) Procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1), shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance.

The first “minimization” concept prohibits the dissemination of any nonpublic information concerning unconsenting U.S. persons *consistent with the need of the United States to obtain, produce and disseminate foreign intelligence information*. Admittedly, the exception theoretically could be seen to swallow the whole, but the underlying concept is designed to prevent the dissemination of U.S. person information that is not foreign intelligence information (a defined term in FISA (50 U.S.C. § 1801(e)).

The second overarching minimization principle provided in FISA requires that nonpublic information, which is not foreign intelligence information as defined in FISA, shall not be disseminated in a manner that identifies any U.S. person without such person’s consent, *unless such person’s identity is necessary to understand foreign intelligence information or assess its importance*.

“Masking” is an intelligence reporting technique used primarily to secure compliance with the second principal “minimization” requirement; *i.e.*, that nonpublic information that is not foreign intelligence information (as defined in FISA) not be disseminated in a manner that identifies any unconsenting U.S. person. Since the Intelligence Community does not, as a matter of course, seek the consent of U.S. persons whose names are included in reporting based on electronic surveillance, it has developed a practice that applies a series of rules and procedures to govern when U.S. person identities can be disclosed in intelligence reports disseminated outside an originating agency.

For most of the first three decades of its existence, the concept of “minimization” provoked little controversy with respect to FISA surveillances. This was largely attributable to the fact that FISA’s Title I surveillance, which is the type most generally recognized by outsiders as “traditional” electronic surveillance, largely employs an approval format similar to Title III wiretaps: that is, there is a written application that requires, *inter alia*, (1) the identity or a specific description of the target, (2) the identity of the facilities to be surveilled, (3) a description of the nature of the information sought and the types of communications to be surveilled, (4) a certification by a senior executive branch official attesting that (a) the information sought is foreign intelligence information as defined in FISA, (b) that a significant purpose of the surveillance is the acquisition of foreign intelligence information, and (c) that the foreign intelligence information cannot be acquired by normal investigative techniques, and (5) a

set of minimization procedures to be used with respect to the information acquired by the surveillance. The FISC then must determine that each of these statutory requirements have been supplied in the application and, perhaps most importantly, that there is probable cause to believe that the target of the surveillance is either a foreign power or an agent of foreign power as defined in FISA.

Title I FISA surveillances are not foolproof, as the Carter Page fiasco so painfully demonstrates, but the requirements mirror those found in Title III. Moreover, Title I surveillance packages are all classified and use a particular set of minimization procedures unique to each surveillance (although built around a relatively common set of minimization precepts). Before the release of the Carter Page applications, no Title I FISA application package ever had been publicly disclosed in full (even, as with the Page FISA applications, in redacted form), so there has been very little available information upon which to make a public judgment about the effectiveness of the Title I minimization procedures approved by the FISC. However, any concern over the efficacy of the minimization procedures employed with respect to any particular Title I surveillance is ameliorated, at least to some extent, by the fact that Title I surveillances are individually approved by the FISC and can lawfully target only a “foreign power” or an “agent of a foreign power” as those defined terms are used in FISA (50 U.S.C. §§ 1801(a) and (b)).

### **The Enactment of FISA Section 702 Has Brought Renewed Attention to “Minimization” in Foreign Intelligence Reporting**

The passage of the FISA Amendments Act of 2008 introduced an entirely different sort of electronic surveillance into the FISA structure. FISA Section 702 (50 U.S.C. § 1881a) permits the attorney general and the director of national intelligence to jointly authorize, for up to one year, the targeting of persons reasonably believed to be outside the United States to acquire foreign intelligence. The statutory scope of Section 702 can be synopsisized as follows: Section 702 of FISA permits the attorney general and the director of national intelligence to jointly authorize the (1) targeting of persons who are not United States persons, (2) who are reasonably believed to be located outside the United States, (3) with the compelled assistance of an electronic communication service provider, (4) in order to acquire foreign intelligence information.

There are a number of limitations that govern Section 702 acquisitions (*see, e.g.*, 50 U.S.C. § 1881a(b)(1)-(6)) and Section 702 requires that all collection be conducted consistent with the Fourth Amendment, but, unlike “traditional” Title I FISA, the FISC makes no particularized finding of probable cause with respect to either the target of the surveillance or the places or facilities to be surveilled. Thus, authority for a Section 702 acquisition is obtained in a manner materially different from a traditional FISA surveillance. FISA Title I, as noted, requires an application to the FISC for an order which can be issued only after an individualized determination that there is probable cause that the target is a foreign power or an agent of a foreign power, that the target is using or about to use specified facilities, and a certification that the foreign intelligence information sought cannot be acquired by normal investigative techniques.

Conversely, a Section 702 acquisition is initiated by a written “certification” of the attorney general and the director of national intelligence (DNI) attesting that there are procedures (*i.e.*, targeting procedures) that have been submitted for approval to the FISC (or will be submitted with the certification) that are reasonably designed to: (1) ensure that the proposed acquisition is limited to targeting persons reasonably believed to be outside the United States; and (2) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States. The certification also attests that there are guidelines, as required by Section 702(g), that, *inter alia*, mandate compliance with the statutory limitations on Section 702 acquisitions and that the acquisition will be conducted in accordance with those guidelines and with minimization procedures that meet the standards of FISA - in other words, the minimization requirements for Section 702 and Title I surveillances are the same. Like FISA Title I surveillance applications, a Section 702 certification must include an attestation that “a significant purpose” of the acquisition is to obtain foreign intelligence information. However, in a clear departure from the requirements of a traditional FISA surveillance, a certification is not required to identify any particular target or to disclose the specific facilities, places, premises, or property at which an acquisition will be directed. There is no requirement to attest that normal investigative techniques have been exhausted nor does the FISC make any probable cause determination in connection with its consideration of the Section 702 certification.

Section 702 operates by targeting “persons reasonably believed to be located outside the U.S.” but it acquires, as “incidental collection,” tens of thousands of communications of U.S. persons communicating with foreign targets. In terms of the volume of electronic surveillance conducted by the U.S. Intelligence Community, Section 702 dwarfs “traditional” Title I surveillances. The DNI Statistical Transparency Report for 2020 (covering CY 2019) reflects that there were 907 orders for Title I surveillance in 2019 covering 1,059 targets. By contrast, there were a reported 204,968 Section 702 targets in 2019. Much of the statistical information concerning the number of communications actually collected pursuant to Section 702 is classified, but in 2011, FISC Judge John Bates issued a heavily redacted opinion in which he estimated that, at that time nearly a decade ago, NSA (which does all Section 702 collection) collected roughly 250 million communications pursuant to Section 702. Beginning in 2013, two years *after* the Bates opinion, the DNI started annually releasing the aforementioned “Statistical Transparency Report” that, for 2013, showed that Section 702 targets numbered 89,138. As noted above, there are now more than 204,000 Section 702 targets. Assuming that the number of collected communications has increased in some rough proportion to the increase in targets, one can fashion a rough guesstimate of how many more communications are being acquired by the Section 702 collection program today than the 250 million that Judge Bates noted in 2011.

This enormous expansion of U.S. electronic surveillance directed at foreign targets while incidentally collecting vast quantities of U.S. person communications has correspondingly brought “minimization” squarely into the focus of Congress and, not coincidentally, of Section 702’s army of critics. Copies of NSA’s minimization procedures used with both Title I and Section 702 surveillances are available on the internet in redacted form. Indeed, given the specific public interest in Section 702, Congress amended FISA to require that the DNI conduct a declassification review of all minimization procedures used with Section 702, and release a public version of those procedures (always redacted to some extent) within 180 days of

completing that review. This is why there are now publicly available versions of the Section 702 minimization procedures of the NSA and the FBI.

As another example of legislative concern with the uses to which the vast quantity of U.S. person information residing in NSA's "unminimized" Section 702 data base may be put, the congressional reauthorization of Section 702 in January 2018 included a completely new mandate that the attorney general, in consultation with the DNI, establish "querying procedures" that the FBI must follow to use a U.S. person query term in searching the "unminimized" Section 702 data base (which is maintained by NSA but shared, subject to a variety of procedures and restrictions, with the FBI, the CIA and the National Counterterrorism Center (NCTC)) in a "predicated criminal investigation unrelated to the national security." In other words, the FBI can no longer search through unminimized Section 702 data for purely law enforcement purposes. Instead, the querying procedures require that the FBI seek an order from the FISC, establishing probable cause to believe that the use of a U.S. person query term to search the Section 702 data base will produce communications which are evidence of criminal activity, contraband or the fruits of crime, or property designed for use in committing a crime.

The reference to the "unminimized" contents of the Section 702 data base reflects another significant difference in how minimization procedures are applied in connection with Section 702 collection as opposed to a typical Title III law enforcement surveillance. In the latter, one generally conjures an agent with headphones who is listening to a conversation in real time and, in fact, the Justice Department Manual requires that "[a]ll wire and oral communications must be minimized in real time [because] [t]he statute [18 U.S.C. § 2518(5)] permits after-the-fact minimization for wire and oral communications only when the intercepted communications are in code or in a foreign language where a foreign language expert is not reasonably available." The Manual recognizes that "[a]fter-the-fact minimization is a necessity for the interception of electronic communications, such as those in the form of text messages, email, or faxes. In such cases, all communications should be recorded and then examined by a monitoring agent to determine their relevance to the investigation." Consequently, in the law enforcement setting, even the standards for electronic communications contemplate a relatively contemporaneous minimization process.

Conversely, as noted earlier, the volume of communications collected by Section 702 acquisition is immense and the ingestion of those communications into the data base is done with relatively minimal attempt to minimize other than insuring that Section 702 acquisitions are, in fact, undertaken to acquire foreign intelligence information. Instead, the minimization procedures used by NSA (the issue of "masking" is most instructively analyzed using NSA minimization procedures since NSA conducts all Section 702 collection), for example, contemplate minimization occurring at the time a communication is retrieved from the unminimized data base pursuant to a query made by an analyst who is searching the data base to find foreign intelligence information. That minimization process occurs in three phases: first, by requiring that queries of the communications stored in NSA's unminimized Section 702 data base be constructed only in a way that is intended to produce foreign intelligence information (as defined in FISA), (2) by placing a series of restrictions on the use of U.S. person identifiers as query terms, (3) by requiring that information of or concerning a U.S. person be destroyed at the earliest practicable point at which such information can be identified as either: (a) clearly not relevant to the authorized purpose of the acquisition, or (b) as not containing evidence of a crime

which may be disseminated under appropriate circumstances consistently with both FISA and NSA minimization procedures, and (4) by “masking” U.S. person identities in published intelligence reports disseminated outside NSA.

### **The Process of “Masking” and When an Identity is “Unmasked”**

This recounting of the scope of Section 702 surveillance with respect to acquiring U.S. person communications, and the fact that Section 702 must be periodically reauthorized (most recently in January 2018), has assured that there is greater public attention to the standards applied by the Intelligence Community, particularly NSA and the FBI, in minimizing information concerning U.S. persons in the Section 702 data base. Referring back to FISA’s second principal rule of minimization which requires that information that is not foreign intelligence information not be disseminated in a manner that identifies any unconsenting U.S. person, a basic rule of thumb is that Section 702-based intelligence reports substitute a generic identifier (e.g. a “US Person”) for any U.S. person identified in that report.

NSA policies require that, in general, when U.S. person information is referenced in NSA’s intelligence reporting it be masked to protect the privacy of the individual or entity, and referenced solely by using a generic term, such as “a named U.S. company” or “a named U.S. person.” NSA’s guidance also emphasizes the need to avoid contextualization that would furnish sufficient detail to allow the identity associated with an underlying generic identifier to be ascertained.

Given that FISA’s minimization requirements permit the disclosure of U.S. person identities when “necessary to understand the foreign intelligence information or assess its importance,” NSA minimization rules allow, in certain specifically defined circumstances, for U.S. person information to be unmasked and disclosed by name, title, and/or context. Upon receiving a request from an authorized consumer for disclosure of a U.S. person identity, NSA will provide that identity if the requester meets at least one of the specific criteria set forth in NSA’s Section 702 minimization procedures, to wit:

(1) the United States person has consented to dissemination or the information of or concerning the United States person is available publicly;

(2) the identity of the United States person is necessary to understand foreign intelligence information or assess its importance, e.g., the identity of a senior official in the Executive Branch;

(3) the information indicates that the United States person may be:

a. an agent of a foreign power;

b. a foreign power as defined in section 101(a) of the Act;

c. residing outside the United States and holding an official position in the government or military forces of a foreign power;

d. a corporation or other entity that is owned or controlled directly or indirectly by a foreign power; or

e. acting in collaboration with an intelligence or security service of a foreign power and the United States person has, or has had, access to classified national security information or material;

(4) the information indicates that the United States person may be the target of intelligence activities of a foreign power;

(5) the information indicates that the United States person is engaged in the unauthorized disclosure of classified national security information or the United States person's identity is necessary to understand or assess a communications or network security vulnerability, but only after the agency that originated the information certifies that it is classified;

(6) the information indicates that the United States person may be engaging in international terrorist activities;

(7) the acquisition of the United States person's information was authorized by a court order issued pursuant to the Act and the information may relate to the foreign intelligence purpose of the surveillance; or

(8) the information is reasonably believed to contain evidence that a crime has been, is being, or is about to be committed, provided that dissemination is for law enforcement purposes and is made in accordance with 50 U.S.C. §§ 1806(b) and 1825(c), Executive Order No. 12333, and, where applicable, the crimes reporting procedures set out in the August 1995 "Memorandum of Understanding: Reporting of Information Concerning Federal Crimes," or any successor document.

The most significant aspects of this process are that the default position is to “mask” any identity of a nonconsenting U.S. person if that identity is not “foreign intelligence information,” that an authorized user may request an “unmasking,” at which point, as NSA describes it, “NSA has a well-developed process by which it records and approves the dissemination of masked and unmasked U.S. person information to authorized recipients, allowing the Agency to be transparent and accountable to its overseers.” At NSA, for example, those internal policies delegate the authority to approve an “unmasking” request to no more than 20 individuals serving in 12 positions across the Agency who possess the authority to approve unmasking requests. The circumstances under which each of these individuals may approve an unmasking request varies based on the U.S. person identity in question and the facts surrounding the request. Further, NSA automated technology allows it to document each approved release of U.S. person information to ensure appropriate records and accountability.

### **“Masking” and “Unmasking” in the Context of Michael Flynn and the Investigation into Obama-Era “Unmaskings”**

Although Section 702 has raised general awareness of the use of minimization procedures in connection with the dissemination of foreign intelligence information, the less-publicized topic of “masking” has received unusual attention in recent months because of its use in

connection with intelligence collection and reporting related to former National Security Advisor Michael Flynn. Initially, there was considerable furor in segments of the media over the alleged “unmasking” of Flynn in connection with communications he had with Russian ambassador Sergei Kislyak that were collected by the U.S. Intelligence Community or, more specifically, by the FBI. After considerable shouting by some that the “unmasking” of Flynn was improper, subsequent media reports confirmed that Flynn’s identity had never been masked at all.

Identifying Flynn by name is almost certainly attributable to the FBI considering that Flynn’s identity was considered “necessary to understand the intelligence and assess its importance.” First, although the Kislyak surveillance that resulted in the acquisition of the Flynn communications was not conducted pursuant to Section 702, the FBI’s Section 702 minimization procedures provide that the FBI “may disseminate FISA-acquired information that reasonably appears to be foreign intelligence information or is reasonably necessary to understand foreign intelligence information or assess its importance.” It is a reasonable presumption that similar minimization procedures applied to the surveillance of Sergei Kislyak that resulted in the collection of his conversations with Flynn. Thus, intelligence reporting related to the surveillance of Flynn’s conversations did not mask his identity because, as former Deputy Attorney General Sally Yates testified, the FBI was conducting a counterintelligence investigation of the Trump campaign’s potential relationship with Russians and Flynn, the incoming National Security Advisor, was engaging in discussions with a senior Russian diplomat that were “essentially neutering the American sanctions.” Including the identity of the U.S. person who was “essentially neutering the American sanctions” reasonably meets the twin needs of understanding the intelligence and assessing its importance. Consequently, the FBI’s reporting derived from this surveillance did not mask Flynn’s identity.

Expanding on the Flynn scenario might offer a better appreciation for how the masking and unmasking process applies. As explained above, Flynn’s identity was never masked because the FBI considered his identity to be part of the intelligence information and/or needed to fully understand the intelligence or assess its importance. Assume, hypothetically, that Flynn and Kislyak knew one another well enough to inquire about the health of each other’s wives as part of their broader conversations on U.S./Russia relations. In subsequent intelligence reporting on their discussions, while Flynn’s name would not be masked for the reasons noted above, his wife’s identity would be masked using a generic identifier since it meets none of those dissemination criteria. Conversely, Kislyak’s wife’s could be referenced by name since she is not a U.S. person subject to the masking requirement.

A second series of revelations concerning the unmasking of Michael Flynn occurred in the context of the declassification and release by former Acting DNI Richard Grenell of a May 4, 2020 memorandum from the Director of NSA. NSA’s memorandum responded to a request from Grenell for the number of occasions where Flynn’s identity in NSA-issued intelligence reports (almost certainly derived from Section 702 collection) had been unmasked between November 8, 2016 (the date of the 2016 presidential election) and January 31, 2017. The NSA memorandum reveals that 16 different authorized recipients of NSA intelligence reporting requested the unmasking of Flynn’s identity during the period in question although, as the NSA memorandum notes, the fact that an unmasking request was received by any one of those 16 authorized principals does not, in and of itself, confirm that the requesting principal actually saw the unmasked information (since, for example, the request could have been made on behalf, or at

the request, of a principal for information to be used by that principal's own national security advisor or assistant).

When the declassified NSA memorandum was subsequently publicly released, its contents, again, sparked controversy in certain segments of the media. However, without knowing why the requestors sought Flynn's identity or how that identity factored into their assessment of the intelligence reporting in which it was included, it is very difficult to reach any judgments about the underlying purpose of any individual unmasking request. NSA, in fact, noted that "[e]ach [requesting] individual was an authorized recipient of the original [masked] report and the unmasking was approved through NSA's standard process which includes a review of the justification for the request."

The NSA memorandum identifies 48 individual unmasking requests during the covered time period, but the number of requests, alone, is not particularly indicative of any detail of consequence. As former former CIA deputy director Mike Morell has stated, "Unmasking is common — literally hundreds of times a year across multiple administrations ... In general, senior officials make the requests when necessary to understand the underlying intelligence ... I myself did it several times a month. You can't do your job without it."

The numbers confirm the relative frequency with which unmaskings occur. The DNI's Statistical Transparency Report for 2020 (covering activity in CY 2019) reports that NSA unmasked 10,012 U.S. person identities in response to unmasking requests received related to intelligence reporting predicated upon Section 702 collection. There were nearly 17,000 such unmaskings in CY 2018, 9,529 in CY 2017, and 9,217 for the period August 2015-September 2016, which was the first period for which the DNI reported this information - and, coincidentally, a period which roughly corresponds to the last year of the Obama Administration.

In sum, other than raw statistical data and the identify of the authorized requesters, very little information about any substantive feature of unmasking is revealed in the May 2020 NSA memorandum declassified by Acting DNI Richard Grenell. Indeed, the most unusual aspect of Grenell's action was the rare decision to declassify this information in the first place since it relates to NSA's highly sensitive Section 702 collection program, and NSA had originally classified the memorandum "SECRET NOFORN" meaning it was classified at the "SECRET" level and there was to be no sharing of the information with foreign allies. Although within his authority as Acting DNI at the time, Grenell's declassification decision abrogated these security parameters without explanation or proffered justification.

## APPENDIX E: Information Potentially Relevant to the Removal of U.S. Attorney Geoffrey Berman

*Editor's Note: This Appendix is an assembly of publicly available information related to the termination of U.S. Attorney Geoffrey Berman. Interns with the CERL 2020 Summer Internship created this document to assist the Working Group.*

### **A. The timeline for Berman's appointment as United States Attorney is as follows:**

- January 3, 2018: 84th U.S. Attorney General, Jeff Sessions appoints Geoffrey Berman to be interim U.S. Attorney, Southern District of New York. pursuant to 28 U.S.C. § 546, which provides that “the Attorney General may appoint a United States Attorney for the district in which the office of United States Attorney is vacant.” This appointment took effect on January 5, 2018.<sup>1049</sup>
- Trump never sent a nomination to the Senate.<sup>1050</sup> Typically, the Senate allows the relevant state Senators to sign off or effectively veto the appointment. Kirsten Gillibrand (D-NY) and Chuck Schumer (D-NY) were not anticipated to sign off on Berman.
- After 120 days, Berman was appointed by a judge of the S.D.N.Y. U.S. District Court as Acting U.S. Attorney, S.D.N.Y.<sup>1051</sup>

### **B. The timeline for Berman's firing and its aftermath is as follows:**

- October, 2019 – Rumors circulate Attorney General William Barr is considering replacing Berman with Edward O’Callaghan.<sup>1052 1053 1054</sup>
- October 15, 2019 – S.D.N.Y. indicts Turkish state-owned Halkbank on six counts.<sup>1055</sup>
- November 25, 2019 – Treasury and Department of Justice officials testify to the Senate Finance Committee that President Donald Trump asked multiple federal agencies to

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<sup>1049</sup> Press Release, U.S. Attorney’s Office, S.D.N.Y., Attorney General Jeff Sessions Appoints Geoffrey S. Berman As Interim United States Attorney (Jan. 3, 2018) (on file at: <https://www.justice.gov/usao-sdny/pr/attorney-general-jeff-sessions-appoints-geoffrey-s-berman-interim-united-states>). Attorney General Jeff Sessions stated in this press release: “Geoffrey Berman brings three decades of invaluable experience to the role of Interim United States Attorney. He was part of the prosecution team charged with investigating the Iran-Contra matter and served as a federal prosecutor in the Southern District of New York. As Interim U.S. Attorney for this same district, he will lead an incredible team of attorneys and investigators and help provide New Yorkers with safety, security, and peace of mind.” *Id.*

<sup>1050</sup> See Rich Lowry & Andrew McCarthy, Podcast, *Episode 87: Barr vs. the SDNY*, NATIONAL REVIEW (Jun. 26, 2020), <https://www.nationalreview.com/podcasts/the-mccarthy-report/episode-87-barr-vs-the-sdny/>.

<sup>1051</sup> Alan Feuer, Katie Benner, Ben Protess, Maggie Haberman, William K. Rashbaum, Nicole Hong, & Benjamin Weiser, *Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle*, N.Y. TIMES (Jun. 20, 2020), <https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html>.

<sup>1052</sup> Feuer et. al, *Trump Fires U.S. Attorney* (Jun. 20, 2020).

<sup>1053</sup> Katie Benner & Michael Schmidt, *Justice Dept. Official and Liaison to Special Counsel to Step Down*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/us/politics/justice-ocallaghan-mueller.html>

<sup>1054</sup> Chris Smith, “*They’re Clearly Looking Right at Giuliani*”: *The SDNY Takes on Rudy, its Former Chief*, Vanity Fair (Oct. 15, 2019), <https://www.vanityfair.com/news/2019/10/the-sdny-takes-on-rudy-giuliani>.

<sup>1055</sup> Laura Kelly, *Top Democrat demands Barr recuse himself from case against Turkish bank*, THE HILL (Feb. 4, 2020), <https://thehill.com/policy/international/481444-top-democrat-demands-barr-recuse-himself-from-case-against-turkish-bank>

address Turkish President Recep Tayyip Erdoğan's concerns that Halkbank would be under threat of U.S. sanctions.<sup>1056</sup>

- February 3, 2020 – Senate Finance Committee Ranking Member Ron Wyden, D-OR calls for Barr to recuse himself from the Halkbank case following reports that Trump instructed Barr and Treasury Secretary, Steven Mnuchin, to “interfere” in the matter.<sup>1057</sup>  
1058 1059 1060
- April 15, 2020 – S.D.N.Y prosecutors inform Lev Parnas and Igor Fruman, two indicted associates of Trump’s personal lawyer Rudy Giuliani, that they expected to file additional charges by July 2020.<sup>1061 1062</sup>
- May 26, 2020 – Joseph Brown, the U.S. Attorney for the Eastern District of Texas, resigns, allegedly following an ultimatum from DOJ officials regarding his attempts to criminally prosecute Walmart for its opioid distribution practices.<sup>1063 1064</sup>
- June 19, 2020 – Trump 2020 Campaign kicks off in Tulsa, Oklahoma.<sup>1065</sup>
- June 19, 2020 – The DOJ Civil Rights Division sends a letter to Mayor Bill de Blasio of New York City, regarding the enforcement of COVID restrictions on religious gatherings but not political protests. Berman was asked to sign on and he had not. It is disputed whether Barr was made aware of Berman’s refusal.<sup>1066 1067</sup>

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<sup>1056</sup> Press Release, U.S. Sen. Comm. On Finance, Wyden Launches Investigation Into Halkbank Scandal (Oct. 24, 2019), <https://www.finance.senate.gov/ranking-members-news/wyden-launches-investigation-into-halkbank-scandal>.

<sup>1057</sup> Laura Kelly, *Top Democrat demands Barr recuse himself from case against Turkish bank*, THE HILL (Feb. 4, 2020), <https://thehill.com/policy/international/481444-top-democrat-demands-barr-recuse-himself-from-case-against-turkish-bank>

<sup>1058</sup> Letter from Ron Wyden, Ranking Minority Member of Sen. Comm. On Finance, to William Barr, Attorney General (Feb. 3, 2020) (on file with authors), <https://www.courthousenews.com/wp-content/uploads/2020/02/wyden-halkbank.pdf>.

<sup>1059</sup> Adam Klasfeld, *When Ron Wyden Talks Turkey, the Senate Listens: Inside the Finance Committee’s Halkbank Probe*, COURTHOUSE NEWS SERVICE (Feb. 28, 2020), <https://www.courthousenews.com/wp-content/uploads/2020/02/wyden-halkbank.pdf>.

<sup>1060</sup> *Id.*

<sup>1061</sup> Feuer et al., *Trump Fires U.S. Attorney* (Jun. 20, 2020).

<sup>1062</sup> Jonathan Stempel, *Trial for Giuliani associates Parnas, Fruman pushed back to February 2021*, REUTERS (Apr. 15, 2020), <https://www.reuters.com/article/us-usa-trump-giuliani/trial-for-giuliani-associates-parnas-fruman-pushed-back-to-february-2021-idUSKCN21X2HK>.

<sup>1063</sup> Kara Scannell, Evan Perez, & Jeremy Herb, *In Texas, questions grow about a lesser-known US Attorney ousted by Attorney General Barr*, CNN (Jun. 26, 2020), <https://www.cnn.com/2020/06/26/politics/barr-texas-questionable-ouster/index.html>.

<sup>1064</sup> Jake Bleiberg, *Trump-appointed US attorney in Texas abruptly resigns*, ABC NEWS (May 26, 2020), <https://abcnews.go.com/Politics/wireStory/trump-appointed-us-attorney-texas-abruptly-resigns-70884515>.

<sup>1065</sup> Charlotte Klein, *Botched Friday Night Massacre: Barr Failed to Oust U.S. Attorney Who’s a Thorn in Trump’s Side*, VANITY FAIR, <https://www.vanityfair.com/news/2020/06/botched-friday-night-massacre-barr-fails-to-oust-us-attorney-whos-thorn-in-trumps-side>.

<sup>1066</sup> Steven Nelson & Julia Marsh, *DOJ pressed de Blasio on religious freedom before Geoffrey Berman ousting*, N.Y. POST (Jun. 22, 2020), <https://nypost.com/2020/06/22/doj-pressed-de-blasio-on-religious-freedom-before-berman-firing/>.

<sup>1067</sup> Zack Budryk, *Berman refused to criticize de Blasio over social distancing rules for religious gatherings, not protests: report*, THE HILL (Jun. 22, 2020), <https://thehill.com/homenews/administration/503895-berman-refused-to-criticize-de-blasio-over-social-distancing-rules>.

- June 19, 2020 – Barr meets with Berman in New York and asks him to resign. Barr offers Berman the position of Chief of the DOJ Civil Rights Division. Berman says he does not wish to be fired and will not resign.<sup>1068</sup>
- June 19, 2020 – On a phone call, Barr offers Berman the Securities and Exchange Commission Chairman position. Berman refuses to resign again and contacts his office and personal attorneys.<sup>1069</sup>
- June 19, 2020 – Barr announces that Berman is stepping down,<sup>1070</sup> to be replaced in the interim by Craig Carpenito, U.S. Attorney N.J., while Jay Clayton, chairman of the SEC, would be nominated for full appointment.<sup>1071</sup>
- June 19, 2020 – Berman issues a press release denying his resignation.<sup>1072</sup>
- June 20, 2020 – Barr sends a letter to Berman announcing that<sup>1073</sup>:
  - At his request, Trump has fired Berman.
  - Audrey Strauss, Deputy U.S. Attorney for S.D.N.Y., is to replace Berman, “by operation of law.”
  - Michael Horowitz, the Department of Justice’s Inspector General (Obama appointed), has been authorized to review claims of the Administration’s improper interference with S.D.N.Y. cases.
- June 20, 2020 – Trump tells reporters that he is not involved in the Berman firing.<sup>1074</sup>
- June 20, 2020 – Berman issues a press release stepping down and expressing confidence in Strauss’ ability to lead the Office.<sup>1075</sup> Note that there is no record of Mr. Barr having had a for-cause reason to fire Berman.<sup>1076</sup>
- June 20, 2020 The House Judiciary Committee chairman, Jerry Nadler, D-N.Y., announced his intention to investigate Berman's removal.<sup>1077</sup>

<sup>1068</sup> Erica Orden, Manu Raju, Evan Perez, & Kara Scannell, *Geoffrey Berman is leaving office immediately after standoff with Trump administration*, CNN (Jun. 20, 2020), <https://www.cnn.com/2020/06/20/politics/trump-fires-berman-barr-says/index.html>.

<sup>1069</sup> Interview of Geoffrey Berman, H. Comm. On the Judiciary, (2020),

[https://judiciary.house.gov/uploadedfiles/berman\\_transcript.pdf?utm\\_campaign=4124-519](https://judiciary.house.gov/uploadedfiles/berman_transcript.pdf?utm_campaign=4124-519).

<sup>1070</sup> Jennifer Rubin, *A Friday night massacre that backfired*, WASHINGTON POST (Jun. 21, 2020),

<https://www.washingtonpost.com/opinions/2020/06/21/friday-night-massacre-that-backfired/>.

<sup>1071</sup> Orden et. al, *Geoffrey Berman is leaving office immediately* (Jun. 20, 2020).

<sup>1072</sup> Press Release, U.S. Attorney’s Office, S.D.N.Y., Statement Of U.S. Attorney Geoffrey S. Berman On Announcement By Attorney General Barr (Jun. 19, 2020) (on file with authors), <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-announcement-attorney-general-barr>.

<sup>1073</sup> Letter from William Barr, Att’y General, to Geoffrey Berman, U.S. Att’y, S.D.N.Y. (Jun. 20, 2020) (on file with authors), <https://theconservativetreehouse.files.wordpress.com/2020/06/barr-statement-1-berman-v1.jpg>.

<sup>1074</sup> Steve Herman (@W7VOA), Twitter (Jun. 20, 2020, 4:04 PM),

<https://twitter.com/W7VOA/status/1274432902470737920>.

<sup>1075</sup> Press Release, U.S. Attorney’s Office, S.D.N.Y., Statement Of Geoffrey S. Berman (Jun. 20, 2020),

<https://www.justice.gov/usao-sdny/pr/statement-geoffrey-s-berman>.

<sup>1076</sup> Interview of Geoffrey Berman, H. Comm. On the Judiciary, (2020),

[https://judiciary.house.gov/uploadedfiles/berman\\_transcript.pdf?utm\\_campaign=4124-519](https://judiciary.house.gov/uploadedfiles/berman_transcript.pdf?utm_campaign=4124-519).

<sup>1077</sup> Barbara Campbell, Ryan Lucas, Colin Dwyer, Jason Slotkin, *President Trump Fires Top U.S. Prosecutor Who Investigated His Allies, Barr Says*, NPR (Jun. 20, 2020), <https://www.npr.org/2020/06/20/881148365/geoffrey-berman-u-s-attorney-who-prosecuted-trump-allies-says-he-wont-quit>.

- June 20, 2020 – Senator Lindsay Graham, R-SC says that he will permit N.Y. Senators to sign off on Berman replacement, effectively granting Democrats a veto.<sup>1078 1079</sup>
- June 22, 2020 – White House Press Secretary Kayleigh McEnany says that Trump was “involved in the sign-off capacity” in the firing of Berman.<sup>1080</sup>
- June 24, 2020 – Aaron Zelinsky, deputy to former special counsel Robert Mueller, and John Elias, a career staffer in DOJ's Antitrust Division, testify before the House Judiciary Committee on the politicization of the Justice Department under Barr.<sup>1081 1082 1083</sup>
- June 24, 2020 – Barr is asked by the House Judiciary Committee to appear July 28, 2020 to discuss Berman firing and Zelinsky testimony.<sup>1084</sup>
- July 2, 2020 – Ghislaine Maxwell, a British socialite known for her association with financier and convicted sex offender Jeffrey Epstein, is arrested following a sealed grand jury indictment.<sup>1085</sup>
- July 8, 2020 -- Geoffrey Berman provided voluntary testimony to the House Judiciary Committee on July 8, 2020. The scope of questioning was limited to the immediate circumstances of Berman’s termination over June 19<sup>th</sup> and 20<sup>th</sup>, by the DOJ and Berman. Additionally, he was not to discuss why he was fired or discuss cases or matters handled by the S.D.N.Y. His testimony:
  - Established the above timeline of events up through June 22.
  - Established Attorney General Barr did not provide for-cause reason for firing.
  - Provided insight into irregularities of transition plan, “unprecedented, unnecessary, and unexplained.”
  - Typically, the Deputy U.S. Attorney acts as interim replacement to reduce disruption or delay of on-going investigations. Why was Carpenito chosen?

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<sup>1078</sup> *Id.*

<sup>1079</sup> Erica Orden et. al, *Geoffrey Berman is leaving office immediately*, CNN POLITICS (Jun. 20, 2020), <https://www.cnn.com/2020/06/20/politics/trump-fires-berman-barr-says/index.html>.

<sup>1080</sup> Paul LeBlanc, Kara Scannell, & Kevin Liptak, *White House admits Trump was involved in firing of top US attorney after Trump claimed he wasn't*, KCTV 5 NEWS (Jun. 22, 2020), [https://www.kctv5.com/politics/white-house-admits-trump-was-involved-in-firing-of-top-us-attorney-after-trump-claimed/article\\_be5c0168-a0e2-5a70-bd20-95b99e18948e.html](https://www.kctv5.com/politics/white-house-admits-trump-was-involved-in-firing-of-top-us-attorney-after-trump-claimed/article_be5c0168-a0e2-5a70-bd20-95b99e18948e.html).

<sup>1081</sup> Katie Benner & Nicole Hong, *U.S. Attorney Ousted by Barr Will Testify Privately Before Congress*, N.Y. TIMES (Jul. 2, 2020), <https://www.nytimes.com/2020/07/02/us/politics/justice-department-barr-berman-congress-testimony.html>.

<sup>1082</sup> Emily Jacobs, *William Barr agrees to House testimony amid subpoena spat with Nadler*, N.Y. POST (Jun. 25, 2020), <https://nypost.com/2020/06/25/barr-agrees-to-house-testimony-amid-subpoena-spat-with-nadler/>.

<sup>1083</sup> Jeremy Herb, *Ex-Stone prosecutor says Stone treated differently 'because of his relationship to the President'*, CNN (Jun. 24, 2020), <https://www.cnn.com/2020/06/23/politics/aaron-zelinsky-roger-stone/index.html>.

<sup>1084</sup> Emily Jacobs, *William Barr agrees to House testimony* (Jun. 25, 2020)

<sup>1085</sup> Haven Orecchio-Egresitz, *Prosecutors say the timing of charges against Jeffrey Epstein associate Ghislaine Maxwell is 'not at all' related to Trump firing Geoffrey Berman*, INSIDER (Jul. 2, 2020), <https://www.insider.com/maxwell-arrest-not-at-all-related-to-geoffrey-berman-firing-2020-7>

- Why was a replacement for the Acting U.S. Attorney necessary in the process of installing a U.S. Attorney who will likely encounter delays in the Senate appointment process?

Illuminated concerns regarding disruption and delay of ongoing investigations.

- Replacement of Berman with external individual would inherently involve delay as individual was brought up to speed on investigations.
  - Abrupt changes in leadership impact office morale and could result in resignations and disruption.
  - Carpenito, the intended new interim U.S. Attorney, would have retained his position as U.S. Attorney for New Jersey, resulting in significant delay to investigations in both offices.
- July 9, 2020 – Berman meets with members of the House Judiciary Committee to discuss the circumstances surrounding his firing.<sup>1086 1087</sup>
  - July 10, 2020 – Barr replaces Eastern District of New York U.S. Attorney, Richard Donoghue with Barr’s former Principal Associate Deputy Attorney General, Seth DuCharme [see discussion in separate section below]
  - July 14, 2020 – Halkbank seeks recusal from district court judge.<sup>1088</sup>
  - July 20, 2020 – Second Circuit affirms the conviction of prominent businessman, Mehmet Hakan Atilla, for conspiracy in the commission of bribery, fraud, and sanction evasion.<sup>1089</sup>
  - July 28, 2020 – Barr voluntarily speaks to House Judiciary Committee.<sup>1090</sup>

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<sup>1086</sup> Katie Benner & Nicole Hong, *U.S. Attorney Ousted by Barr Will Testify*, N.Y. TIMES (Jul. 2, 2020), <https://www.nytimes.com/2020/07/02/us/politics/justice-department-barr-berman-congress-testimony.html>.

<sup>1087</sup> Interview of Geoffrey Berman, H. Comm. On the Judiciary, (2020), [https://judiciary.house.gov/uploadedfiles/berman\\_transcript.pdf?utm\\_campaign=4124-519](https://judiciary.house.gov/uploadedfiles/berman_transcript.pdf?utm_campaign=4124-519).

<sup>1088</sup> Memo of Law in Support of Def.’s Motion to Recuse the Assigned Judge, *United States v. Türkiye Halk Bankasi*, S 15 Cr. 867 (RMB) (S.D.N.Y. Jun. 2020), <https://timinhonolulu.files.wordpress.com/2020/07/20200714-638-memo-to-recuse.pdf>.

<sup>1089</sup> Ryan Goodman & Danielle Schulkin, *Timeline: Trump, Barr, and the Halkbank Case on Iran Sanctions-Busting*, JUST SECURITY (Jul. 27, 2020), <https://www.justsecurity.org/71694/trump-barr-and-the-halkbank-case-timeline/>.

<sup>1090</sup> See Emily Jacobs, *William Barr agrees to House testimony* (Jun. 25, 2020). For Barr’s testimony, see House Judiciary Comm. Hearing, July 28 116<sup>th</sup> Cong. (2020) (Statement of William Barr, Att’y Gen. of the United States), <https://www.rev.com/blog/transcripts/house-judiciary-committee-hearing-of-attorney-general-barr-transcript-july-28>. In the hearing, Rudy Giuliani suggested, according to Val Demings, that Barr removed Berman due to “baseless investigations” (3:33:48). But Barr did not confirm this. Demings further states that due to where President Trump lives and maintains businesses, Berman’s office would have authority over investigating him. Demings suggested that Berman testified that the removal bypassed the normal operation of law and Barr denied it. At 4:07:35, Rep. Joe Neguse began a line of questioning. Barr offered that Berman was removed.

## C. Investigations potentially affected by or motivation for the removal of Geoffrey Berman

### 1. Rudy Giuliani

- Berman requested federal grand jury subpoenas for information about Giuliani and his consulting firm, Giuliani Partners.
- Clients include wealthy foreign individuals with U.S. legal problems<sup>1091</sup>:
  - 2017: mediated a U.S.-Turkey deal that might have freed an Iranian-born, Turkish individual imprisoned in New York who was friendly with President Recep Tayyip Erdogan.<sup>1092</sup>
  - 2017: Ukrainian oligarch named Pavel Fuks financed consulting work Giuliani did for the city of Kharkiv. Fuks seemed to be interested in buying access to the Trump Administration, having bought what he thought were VIP tickets to Trump's inauguration.<sup>1093</sup>
  - 2017: Ukrainian oligarch Victor Pinchuk invited Giuliani to give a speech and meet top leaders in Kyiv.<sup>1094</sup>
  - 2017 or 2018: Giuliani talked to DOJ lawyers about Low Taek Jho, a Malaysian who allegedly ran an \$8 billion scam known as 1MDB. In October, the DOJ made a deal with Low to forfeit \$700 million in assets; among Low's attorneys was Giuliani's friend Chris Christie.<sup>1095</sup>
  - 2018: Hired by Lev Parnas on behalf of the firm, Fraud Guarantee. Feuded with Marie Yovanovitch, the U.S. ambassador to Ukraine, who blocked efforts by Parnas and Igor Fruman, to pursue deals with Naftogaz, the Ukrainian natural gas company, losing millions.<sup>1096</sup>
  - 2019: Giuliani offered to represent a Venezuelan in a DOJ investigation into alleged money laundering and bribery.<sup>1097</sup>

### 2. Lev Parnas and Igor Fruman

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<sup>1091</sup> David Ignatius, *Rudy Inc.*, WASHINGTON POST (Dec. 16, 2019),

[https://www.washingtonpost.com/opinions/2019/12/16/rudy-inc/?arc404=true&itid=lk\\_inline\\_manual\\_7](https://www.washingtonpost.com/opinions/2019/12/16/rudy-inc/?arc404=true&itid=lk_inline_manual_7).

<sup>1092</sup> *Id.*

<sup>1093</sup> Kenneth Vogel, *A Foreigner Paid \$200,000 for Tickets to Trump's Inaugural. Now He Says He Was Duped.*, N.Y. TIMES (Jun. 18, 2019), <https://www.nytimes.com/2019/06/18/us/politics/trump-inaugural-lawsuit-pavel-fuks.html>.

<sup>1094</sup> David Ignatius, *Rudy Inc.* (Dec. 16, 2019)

<sup>1095</sup> *Id.*

<sup>1096</sup> *Id.*

<sup>1097</sup> *Id.*

- Indicted October 2020 on charges of<sup>1098</sup>:
  - Making false statements.
  - Conspiracy to funnel illegal contributions to Republicans, including a Trump-supporting super PAC.
  - Trump signed off on the men’s hiring of attorney John Dowd, the man who represented Trump during a stage of the Mueller Investigation.<sup>1099</sup>
- April trial postponement, S.D.N.Y. attorneys indicated there would be superseding charges filed by the end of July, 2020.<sup>1100 1101</sup>

### 3. Michael Cohen

- Michael Cohen pleaded guilty to tax evasion, bank fraud, and campaign-finance violations in the Southern District of New York. The campaign-finance violations were related to payments to buy the silence of two women, Karen McDougal and Stormy Daniels, who said they had affairs with Trump.<sup>1102</sup>
  - Cohen has alluded to illegal acts committed by Trump or associated officials in testimony.<sup>1103</sup>

### 4. Donald Trump’s Insurance and Tax Irregularities

- The alleged insurance and tax irregularities that Cohen alluded to in testimony to Congress regarding manipulated numbers on tax and loan documents.<sup>1104 1105</sup>

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<sup>1098</sup> *Id.*

<sup>1099</sup> Ben Protess, Michael Rothfeld, & William Rashbaum, *Lev Parnas, Giuliani Associate, Opens Talks With Impeachment Investigators*, N.Y. Times (Nov. 11, 2019), <https://www.nytimes.com/2019/11/04/nyregion/lev-parnas-giuliani-associate.html?searchResultPosition=8>.

<sup>1100</sup> Alan Feuer et. al, *Trump Fires U.S. Attorney in New York* (Jun. 20, 2020).

<sup>1101</sup> Jonathan Stempel, *Trial for Giuliani associates Parnas, Fruman pushed back to February 2021*, Reuters (Apr. 15, 2020), <https://www.reuters.com/article/us-usa-trump-giuliani/trial-for-giuliani-associates-parnas-fruman-pushed-back-to-february-2021-idUSKCN21X2HK>.

<sup>1102</sup> Grace Panetta, *Michael Cohen says there is an investigation regarding Trump that has not been publicly disclosed*, BUSINESS INSIDER (Feb. 27, 2019), <https://www.businessinsider.com/michael-cohen-testimony-prosecutors-sdny-trump-investigation-2019-2>.

<sup>1103</sup> Tess Bonn, *Ex-federal prosecutor: Cohen’s talks with New York prosecutors ‘would send chills down my spine’*, THE HILL (Feb. 28, 2019), <https://thehill.com/hilltv/rising/432045-ex-federal-prosecutor-cohens-talks-with-new-york-southern-district>.

<sup>1104</sup> Ben Protess, William Rashbaum, & Maggie Haberman, *Cohen Gave Prosecutors New Information on the Trump Family Business*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/us/politics/michael-cohen-prosecutors-trump-organization.html>.

<sup>1105</sup> Heather Vogell, *Never-Before-Seen Trump Tax Documents Show Major Inconsistencies*, PROPUBLICA (Oct. 16, 2019), <https://www.propublica.org/article/trump-inc-podcast-never-before-seen-trump-tax-documents-show-major-inconsistencies>.

- An IRS official filed a whistleblower complaint in 2019 regarding Treasury Department interference with an audit of the president’s or vice president’s tax returns.<sup>1106</sup>
- Multiple governmental entities, including two congressional committees and the office of the Manhattan district attorney, have subpoenaed Donald Trump’s tax returns.<sup>1107</sup> While Trump has taken these to court, the Supreme Court recently decided the following:
  - Trump v. Vance: New York grand jury subpoenaed Trump’s accounting firm Mazars USA for financial records relating to Trump’s business organizations. Trump argued that the president was categorically immune from state criminal process. All nine justices rejected the claim of absolute immunity.<sup>1108</sup>
  - Trump v. Mazars: various House committees subpoenaed documents from Deutsche Bank, Capital One and Trump’s accounting firm. Here, Trump argued separation of powers required that Congress display a “demonstrated, specific need (U.S. v. Nixon) in order to subpoena the records. The committees lacked the “legitimate legislative purpose” necessary to justify the subpoenas. SCOTUS decided that, unlike in Nixon, the records did not implicate executive privilege. However, the Court also said that a subpoena of this nature creates interbranch conflict, which the lower court gave too little attention, so they remanded.<sup>1109</sup>

## 5. Deutsche Bank

- Deutsche Bank, Trump’s primary personal lender, quietly settled with regulators for their role in the \$10 billion Russian money-laundering scheme.<sup>1110</sup>
- The House Intelligence Committee and House Committee on Financial Services subpoenaed financial documents from Deutsche Bank, having heard that they have provided more than \$2 billion in loans to Trump, despite bank officials’ concerns about those loans, allegations that shell companies used illicit funds to purchase Trump properties, and numerous reports of the intersection between President Trump’s business interests and Russia-linked entities. Trump has been fighting these subpoenas in court.<sup>1111</sup>

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<sup>1106</sup>Jeff Stein, Tom Hamburger, & Josh Dawsey, *IRS whistleblower said to report Treasury political appointee might have tried to interfere in audit of Trump or Pence*, WASHINGTON POST (Oct. 3, 2019), [https://www.washingtonpost.com/business/economy/irs-whistleblower-said-to-report-treasury-political-appointee-might-have-tried-to-interfere-in-audit-of-trump-or-pence/2019/10/03/0c768b34-e52e-11e9-a331-2df12d56a80b\\_story.html](https://www.washingtonpost.com/business/economy/irs-whistleblower-said-to-report-treasury-political-appointee-might-have-tried-to-interfere-in-audit-of-trump-or-pence/2019/10/03/0c768b34-e52e-11e9-a331-2df12d56a80b_story.html).

<sup>1107</sup> Heather Vogell, *Trump Tax Documents Show Major Inconsistencies* (Oct. 16, 2019).

<sup>1108</sup> Scott R. Anderson, Charlotte Butash, Susan Hennessey, *Quinta Jurecic, Margaret Taylor, Benjamin Wittes, The Supreme Court Rules in the Trump Subpoena Cases*, LAWFARE BLOG (Jul. 9, 2020), <https://www.lawfareblog.com/supreme-court-rules-trump-subpoena-cases>

<sup>1109</sup> *Id.*

<sup>1110</sup> <https://meaww.com/jay-clayton-donald-trump-nominee-next-sdny-new-york-attorney-defended-deutsche-bank-corruption-case>

<sup>1111</sup> Elizabeth Wydra, Brianne Gorod, Brian Frazelle, Ashwin Phatak, *Trump v. Deutsche Bank AG & Capital One*, CONSTITUTIONAL ACCOUNTABILITY CENTER (Oct. 2019), <https://www.theconstitution.org/litigation/trump-v-deutsche-bank-ag-capital-one/>.

- After being appealed from the Second Circuit, the Supreme Court heard the appeal and held that while enforceable, the court below did not take adequate account of the separation of powers issues and vacated and remanded (*Trump v. Mazars*).<sup>1112</sup>
- However, the Court held that the President is not above the “common duty to produce evidence when called upon in a criminal proceeding.” The S.D.N.Y. subpoenas as such, must be complied with (*Trump v. Vance*).<sup>1113</sup>
- Deutsche Bank has a reputation for doing business with clients most other institutions will not touch. As a result, state prosecutors, and the FBI are investigating the bank—not just the House of Representatives.<sup>1114</sup>
  - It’s anticipated that the bank furnished Trump with connections to wealthy Russians interested in U.S. real estate.<sup>1115</sup>

## 6. Donald Trump Inaugural Committee Donations

- Inquiry as to whether foreign individuals and corporations illegally donated to the inaugural committee and a pro-Trump super PAC to purchase influence.<sup>1116</sup>
  - Against federal law for foreign contributions to be made to and accepted by campaigns, PACs, and inaugural funds.<sup>1117</sup>
  - Investigation focused on individuals from Qatar, Saudi Arabia, and the United Arab Emirates.<sup>1118</sup>
- Rebuilding America Now is the super PAC formed summer of 2016 by Thomas J. Barrack Jr., at the recommendation of Paul Manafort.<sup>1119</sup>
  - Barrack raised the money for both the PAC and inaugural fund and is a close friend of Trump’s.<sup>1120</sup>

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<sup>1112</sup> SCOTUSBlog, *Trump v. Deutsche Bank AG* (last updated Dec. 13, 2019), <https://www.scotusblog.com/case-files/cases/trump-v-deutsche-bank-ag/>.

<sup>1113</sup> Brent Kendall & Jess Bravin, *Supreme Court Paves the Way for N.Y. Prosecutor to View Trump Taxes*, WALL ST. J. (Jul. 9, 2020), <https://www.wsj.com/articles/supreme-court-rejects-trump-bid-to-block-new-york-subpoena-seeking-financial-tax-records-11594304520>.

<sup>1114</sup> David Enrich, *The Money Behind Trump’s Money*, N.Y. TIMES (Jun. 2, 2020), <https://www.nytimes.com/2020/02/04/magazine/deutsche-bank-trump.html>.

<sup>1115</sup> David Enrich, *The Money Behind Trump’s Money* (Jun. 2, 2020).

<sup>1116</sup> Sharon LaFraniere, Maggie Haberman, & Adam Goldman, *Trump Inaugural Fund and Super PAC Said to Be Scrutinized for Illegal Foreign Donations*, N. Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/politics/trump-inauguration-investigation.html>

<sup>1117</sup> *Id.*

<sup>1118</sup> *Id.*

<sup>1119</sup> *Id.*

<sup>1120</sup> *Id.*

- Barrack has said to investigators that Manafort saw the PAC as an “arm of the campaign.”<sup>1121</sup>
  - While federal election law requires 120 before campaign staff can join a PAC for the same candidate, Laurance Gay and Ken McKay, two friends of Manafort, left the campaign to run PAC operations.<sup>1122</sup>
- Filings with the Federal Election Commission put the amount raised by the PAC at \$23 million.<sup>1123</sup>
  - Most money came from several big donors like Linda McMahon, who donated \$6 million and was later appointed to head the Small Business Administration.<sup>1124</sup>
- Prosecutors from NY have looked into a Mediterranean cruise that Barrack and Manafort took following Manafort’s firing, asking why they were meeting with business partners in the Persian Gulf.<sup>1125</sup> These individuals included:
  - Hamad bin Jassim bin Jaber Al Thani, the former prime minister of Qatar and influential member of Qatar’s royal family.<sup>1126</sup>
  - Rashid Al Malik, an associate of Mr. Barrack’s who heads a private investment firm in the United Arab Emirates.<sup>1127</sup>
- Trump’s inaugural fund was led by chairman Thomas J. Barrack Jr., and his deputy Rick Gates (a business associate of Paul Manafort) and raised \$107 million.<sup>1128</sup>
  - Gates has since been charged with fraud for a scheme he undertook with Manafort and has testified to improper use of the fund.<sup>1129</sup>
  - Prosecutors from NY are reportedly investigating the fund following leads from Michael Cohen, who was charged with organizing cover up payments for Trump.<sup>1130</sup>

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<sup>1121</sup> *Id.*

<sup>1122</sup> *Id.*

<sup>1123</sup> *Id.*

<sup>1124</sup> *Id.*

<sup>1125</sup> *Id.*

<sup>1126</sup> *Id.*

<sup>1127</sup> *Id.*

<sup>1128</sup> *Id.*

<sup>1129</sup> *Id.*

<sup>1130</sup> *Id.*

- Prosecutors from NY reportedly investigating Franklin Haney, a Tennessee developer, in relation to a \$1 million donation made the inaugural committee.<sup>1131</sup>
  - Haney hired Michael Cohen to help him obtain a \$5 billion loan from the Energy Department. The prosecutor’s office has asked for documents related to this interaction as well as the donation.<sup>1132</sup>
- Prosecutors had found recorded conversations between Michael Cohen and Stephanie Winston Wolkoff, a former advisor of Melania Trump’s, when the FBI raided Cohen’s home.<sup>1133</sup>
  - Wolkoff was reportedly concerned about inaugural spending in the recording.<sup>1134</sup>
  - Wolkoff’s event production firm, formed 45 days before the inauguration, received the most money of all the inaugural vendors, at \$25.8 million.<sup>1135</sup>
- Republican lobbyists reportedly were selling tickets to foreigners for administration access.
  - Sam Pattern has pled guilty for arranging for foreigners to use Americans as straw purchasers for \$50,000 worth of inaugural events tickets.<sup>1136</sup>
  - Yuri Vanetik is being sued by Pavel Fuks for accepting \$200,000 to provide Fuks access to inaugural events. Fuks was not able to access any of the events and when he requested a refund, Vanetik threatened to use his connections to restrict Fuk’s travel to the U.S. Now Fuks has had his visa revoked and a five-year travel ban instituted against him.<sup>1137</sup>
- Imaad Zuberi pled guilty in California courts to separate charges related to a \$900,000 donation to Mr. Trump’s inaugural committee, which he has acknowledged was an attempt to access the administration, and earlier campaign

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<sup>1131</sup> *Rebecca Davis O’Brien, Rebecca Ballhaus and Aruna Viswanatha, Trump Inauguration Spending Under Criminal Investigation by Federal Prosecutors, THE WALL STREET JOURNAL (Dec. 13, 2018), <https://www.wsj.com/articles/trump-inauguration-spending-under-criminal-investigation-by-federal-prosecutors-11544736455>.*

<sup>1132</sup> *Id.*

<sup>1133</sup> *Id.*

<sup>1134</sup> *Id.*

<sup>1135</sup> *Id.*

<sup>1136</sup> *Sharon LaFraniere, Maggie Haberman, and Adam Goldman, Trump Inaugural Fund and Super PAC Said to Be Scrutinized for Illegal Foreign Donations, N. Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/politics/trump-inauguration-investigation.html>*

<sup>1137</sup> *Kenneth P. Vogel, A Foreigner Paid \$200,000 for Tickets to Trump’s Inaugural. Now He Says He Was Duped., N. Y. TIMES (Jun. 18, 2019), <https://www.nytimes.com/2019/06/18/us/politics/trump-inaugural-lawsuit-pavel-fuks.html>*

donations, as well as lobbying and tax violations and is expected to plead guilty to obstruction charges.<sup>1138</sup>

## 7. Halkbank

- S.D.N.Y. indicted Halkbank on six counts including fraud, money laundering and sanctions evasion.
  - “Halkbank (...) directly and indirectly used money service businesses and front companies in Iran, Turkey, the United Arab Emirates, and elsewhere to violate (...), evade and avoid prohibitions against Iran’s access to the U.S. financial system, restrictions on the use of proceeds of Iranian oil and gas sales, and restrictions on the supply of gold to the Government of Iran and to Iranian entities and persons. Halkbank knowingly facilitated the scheme, participated in the design of fraudulent transactions intended to deceive U.S. regulators and foreign banks, and lied to U.S. regulators about Halkbank’s involvement.”<sup>1139</sup>
- The FBI arrested Iranian-Turkish businessman, Reza Zarrab, in Miami National Airport in association with these charges.<sup>1140</sup>
  - Zarrab was represented by Rudy Giuliani, who advocated for him with both the U.S. and Turkish governments.<sup>1141 1142</sup>

## 8. Donald Trump’s Interference with the Halkbank Investigation

- Allegations from Bolton that the president sought to interfere in SDNY investigation into the state-owned Turkish bank, Halkbank, in an effort to cut deals with Turkish President Recep Tayyip Erdoğan.<sup>1143</sup>
  - In September, 2016, Erdoğan stated in a press conference that he discussed the investigation with Vice President Biden, in which he allegedly demanded that

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<sup>1138</sup> Kenneth P. Vogel and William K. Rashbaum, *Donor to Trump Inauguration Charged With Obstructing Investigation*, N. Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/us/politics/imaad-zuberi-trump-inauguration.html>

<sup>1139</sup> *Turkish Bank Charged In Manhattan Federal Court For Its Participation In A Multibillion-Dollar Iranian Sanctions Evasion Scheme*, U.S. ATTORNEY’S OFFICE SDNY (Oct. 15, 2019), <https://www.justice.gov/usao-sdny/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar>

<sup>1140</sup> Ryan Goodman and Danielle Schulkin, *Timeline: Trump, Barr, and the Halkbank Case on Iran Sanctions-Busting*, JUST SECURITY (Jul. 27, 2020), <https://www.justsecurity.org/71694/trump-barr-and-the-halkbank-case-timeline/>

<sup>1141</sup> Benjamin Weiser & Patrick Kingsley, *Why Giuliani Held a Secret Meeting With Turkey’s Leader*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/nyregion/rudy-giuliani-reza-zarrab-iran-sanctions-case.html>

<sup>1142</sup> <https://www.politico.com/magazine/story/2018/04/02/most-powerful-lobbyist-in-trump-washington-217759>.

<sup>1143</sup> Jennifer Rubin, *A Friday night massacre that backfired* (Jun. 21, 2020).

U.S. Attorney Preet Bharara be removed, and claimed that the U.S. Attorney and judge assigned to the case were both colluding with his political rival.<sup>1144</sup>

- During his campaign, Trump said he had “a little conflict of interest cause I have a major, major building in Istanbul.”<sup>1145</sup>
- Secretary of State Rex Tillerson reportedly considered the president’s effort to get the Justice Department to drop the Halkbank case an illegal interference in an ongoing investigation. He objected to the president’s effort in an Oval Office meeting and repeated his objections to Chief of Staff John Kelly.<sup>1146</sup>
  - Trump had asked Tillerson to help urge the DOJ to drop the charges.<sup>1147</sup>
- Turkey hires Ballard Partners, Inc. to consult on U.S.-Turkey relations. Ballard Partners is run by Brian Ballard, a close friend of Trump’s.<sup>1148</sup>
- U.S. District Court Judge Richard Berman stated that he was “stunned” by the degree to which Giuliani operated as a go-between for the U.S. and Turkish presidents to get rid of a federal criminal case.<sup>1149</sup>
- Trump reportedly “assigned” Barr and Mnuchin to deal with Erdogan’s repeated pleas.<sup>1150</sup>
  - Barr tells the Turkish Minister of Justice that Halkbank should reach a deal with the SDNY, or else it would go to trial. Barr suggested Turkey accept a deferred prosecution agreement (which comes with a fine and contractual agreement to improve operations to avoid further wrongdoing).<sup>1151</sup>
  - Reports that Barr lead effort to negotiate a settlement with Halkbank in order to avoid charges but Berman insisted on pursuing a criminal prosecution.<sup>1152</sup>

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<sup>1144</sup> Ryan Goodman and Danielle Schulkin, *Timeline: Trump, Barr, and the Halkbank Case on Iran Sanctions-Busting*, *JUST SECURITY* (Jul. 27, 2020), <https://www.justsecurity.org/71694/trump-barr-and-the-halkbank-case-timeline/>

<sup>1145</sup> *Id.*

<sup>1146</sup> *Id.*

<sup>1147</sup> Nick Wadhams, Saleha Mohsin, Stephanie Baker, & Jennifer Jacobs, *Trump Urged Top Aide to Help Giuliani Client Facing DOJ Charges*, *BLOOMBERG* (Oct. 9, 2019), <https://www.bloomberg.com/news/articles/2019-10-09/trump-urged-top-aide-to-help-giuliani-client-facing-doj-charges>

<sup>1148</sup> Adam Klasfeld, *Turkey’s Lobbyists Had Deep Access to Trump White House*, *COURTHOUSE NEWS SERVICE* (Oct. 22, 2019), <https://www.courthousenews.com/turkeys-lobbyists-had-deep-access-to-trump-white-house/>

<sup>1149</sup> Adam Klasfeld, *In the Age of Trump, Judge Reflects on D’Souza and the ‘New Rudy’*, *COURTHOUSE NEWS SERVICE* (Jun. 22, 2018), <https://www.courthousenews.com/on-the-bench-in-the-age-of-trump/>

<sup>1150</sup> Nick Wadhams, Jennifer Jacobs, & Saleha Mohsin, *Trump-Erdogan Call Led to Lengthy Quest to Avoid Halkbank Trial*, *BLOOMBERG* (Oct. 16, 2019), <https://www.bloomberg.com/news/articles/2019-10-16/trump-erdogan-call-led-to-lengthy-push-to-avoid-halkbank-trial>

<sup>1151</sup> *Id.*

<sup>1152</sup> Erica Orden and Kara Scannell, *Attorney general’s actions spark outrage and unease among US prosecutors*, *CNN* (Feb. 15, 2020), <https://www.cnn.com/2020/02/15/politics/william-barr-roger-stone-prosecutors-outrage/index.html>

## 9. Jeffrey Epstein Sex Trafficking Ring

- S.D.N.Y. charged Jeffrey Epstein with sex trafficking of minors.<sup>1153</sup>
  - Epstein faced sexual assault charges and some of the women also came forward to accuse Trump of assault. During the 2016 presidential election one of these lawsuits was dropped.<sup>1154</sup>
- Superseding indictment (fixing a typo in the perjury counts<sup>1155</sup>) filed against Ghislaine Maxwell on July 2, 2020, who was charged with six criminal counts for conspiring with Jeffrey Epstein to sexually abuse minors between the years 1994 and 1997.<sup>1156 1157 1158</sup>
  - Two counts of conspiracy.
  - Enticement of a minor to travel to engage in illegal sex acts.
  - Transportation of a minor with intent to engage in criminal sexual activity.
  - Two counts of perjury:
    - April 22, 2016. Not aware of scheme to recruit underage women.
    - July 22, 2016. Not aware of sexual relationship of Epstein with minors.
- Seeking cooperation from Prince Andrew, Duke of York to give an interview to federal authorities.<sup>1159</sup>

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<sup>1153</sup> Press Release, *Jeffrey Epstein Charged In Manhattan Federal Court With Sex Trafficking Of Minors*, U.S. ATT'YS OFFICE S.D.N.Y (Jul. 8, 2019), <https://www.justice.gov/usao-sdny/pr/jeffrey-epstein-charged-manhattan-federal-court-sex-trafficking-minors>

<sup>1154</sup> Carmen MacBeth, *The real connection between Donald Trump and Jeffrey Epstein*, FILM DAILY (Jul. 14, 2020), <https://filmdaily.co/news/trump-and-epstein/>.

<sup>1155</sup> Matthew Russell Lee, *SDNY Judge Nathan Wants No Ghislaine Maxwell Mail Week After She Denied Bail*, INNER CITY PRESS (Jul. 21, 2020), <http://www.innercitypress.com/gmax2nomailnobailcp072120.html>

<sup>1156</sup> Press Release, *Ghislaine Maxwell Charged In Manhattan Federal Court For Conspiring With Jeffrey Epstein To Sexually Abuse Minors*, UNITED STATES ATTORNEY'S OFFICE S.D.N.Y (Jul. 2, 2020), <https://www.justice.gov/usao-sdny/pr/ghislaine-maxwell-charged-manhattan-federal-court-conspiring-jeffrey-epstein-sexually>

<sup>1157</sup> REUTERS, *U.S. files superseding indictment against Ghislaine Maxwell* (Jul. 10, 2020), <https://www.reuters.com/article/us-people-ghislaine-maxwell-superseding/u-s-files-superseding-indictment-against-ghislaine-maxwell-idUSKBN24B2D7>.

<sup>1158</sup> *United States v. Ghislaine Maxwell*, 20 Cr. 330 (AJN) (2020), <https://www.justice.gov/usao-sdny/press-release/file/1291491/download>

<sup>1159</sup> Geoffrey S. Berman, *Statement Of U.S. Attorney Geoffrey S. Berman Responding To Statement Issued Today By Law Firm Representing Prince Andrew*, U.S. ATT'Y'S OFFICE S.D.N.Y (Jun. 8, 2020), <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-responding-statement-issued-today-law-firm>.

- Barr has been publicly supportive of the previous case against Epstein and current case against Maxwell.<sup>1160</sup>
  - While Barr recused himself from the probe into Alex Acosta, Trump’s Secretary of Labor and former U.S. attorney who was responsible for a shockingly lenient sentence for Epstein, Barr refused to recuse himself from the wider Epstein case.<sup>1161</sup>

#### 10. Natalia Veselnitskaya

- Russian Attorney Veselnitskaya, the lawyer who met with Trump, Jr., Kushner, and Manafort in Trump Tower, in June, 2016, after a business partner suggested that she could offer documents damaging to Hillary, was charged with obstruction of justice.<sup>1162</sup>  
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  - The indictment suggested she has close ties to the Russian government — something she denied in the special counsel's Russia investigation.<sup>1164</sup>
  - Berman issued a statement regarding the indictment accusing Veselnitskaya of fabricating evidence submitted to a federal judge to affect the outcome of pending litigation against her client, Prevezon Holdings.<sup>1165</sup>
  - Prosecutors allege the company received and laundered millions of dollars as part of a complex Russian tax refund scheme that more than \$200 million. The U.S. government was seeking to recover millions of dollars' worth of property, much of it tied up in New York real estate.<sup>1166</sup>

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<sup>1160</sup> Maegan Vazquez and Kevin Liptak, *Trump claims not to be following Maxwell case despite long ties to Epstein*, CNN (Jul. 23, 2020), <https://www.cnn.com/2020/07/23/politics/donald-trump-ghislaine-maxwell-jeffrey-epstein-history/index.html>.

<sup>1161</sup> *Id.*

<sup>1162</sup> Press Release, *Russian Attorney Natalya Veselnitskaya Charged With Obstruction Of Justice In Connection With Civil Money Laundering And Forfeiture Action*, U.S. ATTORNEY’S OFFICE SDNY (Jan. 8, 2019), <https://www.justice.gov/usao-sdny/pr/russian-attorney-natalya-veselnitskaya-charged-obstruction-justice-connection-civil>

<sup>1163</sup> Joshua Yaffa, *How the Charge Against Natalia Veselnitskaya Could Lead Back to the Trump Campaign*, THE N. YORKER (Jan. 9, 2019), <https://www.newyorker.com/news/news-desk/how-the-charge-against-natalia-veselnitskaya-could-lead-back-to-the-trump-campaign>

<sup>1164</sup> Ryan Lucas, *Russian Lawyer At Trump Tower Meeting Charged In Connection To Money Laundering Case*, NPR (Jan. 8, 2019), <https://www.npr.org/2019/01/08/683238650/russian-lawyer-at-trump-tower-meeting-charged-in-connection-to-money-laundering-> .

<sup>1165</sup> *Id.*

<sup>1166</sup> *Id.*

## APPENDIX F: Interview Invitations

*Editor's Note: Those individuals whose names appear in bold agreed to be interviewed by the committee. All others either declined or failed to respond to the invitation. Six others were interviewed but did not grant permission for their names to be listed on the report.*

1. **Perry Applebaum** - Staff Director and Chief Counsel for the House Committee on the Judiciary
2. Preet Bharara – former U.S. Attorney for the Southern District of New York
3. **James R. Clapper, Jr.** – Former Director of National Intelligence
4. **Norman L. Eisen** - Consultant to the United States House Committee on the Judiciary
5. Steven A. Engel – Assistant U.S. Attorney General
6. **David Greengrass** – Senior Counsel for the House Committee on the Judiciary
7. Andy Grewal – Professor of Law, University of Iowa
8. Rudolph W.L. Giuliani – personal attorney to President Donald Trump
9. **Aaron Hiller** - Senior Counsel for the House Committee on the Judiciary
10. **Neal Katyal** – former Acting Solicitor General
11. **David H. Laufman** – former Chief, Export Control Section in the national Security Division of the Department of Justice
12. **Robert S. Litt** – former General Counsel for the Director of National Intelligence
13. **Erica Newland** – former Attorney Adviser at the Office of Legal Counsel in the Department of Justice
14. Elizabeth Prelogar – former Assistant to the Solicitor General
15. **Jamin Ben “Jamie” Raskin** – U.S. Congressman, Member, House Committees on the Judiciary and Oversight and Reform
16. Thomas J. Ridge – former Director, Department of Homeland Security
17. Jeffrey A. Rosen – Deputy U.S. Attorney General
18. Heather Sawyer – Staff Director and Chief Counsel for the Senate Committee on the Judiciary
19. Jefferson B. “Jeff” Sessions – former U.S. Attorney General
20. Jonathan Turley – Professor Of Law, George Washington University
21. Jeffrey B. Wall – Acting Solicitor General
22. **Andrew A. Weissman** – former Assistant U.S. Attorney and member of Special Counsel Robert Mueller’s investigative team
23. Chad F. Wolf – Acting Secretary of Homeland Security

## APPENDIX G: Knight Letter

*Editor's Note: The appendix is the text of a letter drafted by an attorney representing Ms. Ellen Knight, the National Security Council official in charge of prepublication review of the Bolton book who would standardly be responsible for prepublication decisions in such a matter. Her attorney submitted this letter to the District Court for the District of Columbia on September 22, 2020. It is included as an appendix to this report because it carefully documents the factual background of prepublication review of Bolton's book.*

Dear Counsel:

We represent Ms. Ellen Knight, the former Senior Director for Records Access and Information Security Management at the National Security Council (NSC) who conducted the prepublication review of Ambassador John Bolton's book with her staff at the White House. We submit this letter at the request of Ms. Knight, who wishes to offer her assistance to these proceedings and to detail how that assistance may shed light on the relevant facts of this case.<sup>1167</sup>

A central question in this litigation is the soundness and thoroughness of the prepublication review of Ambassador Bolton's book and whether it overlooked passages that contained classified information whose disclosure would jeopardize our national security. Given Judge Lamberth's deep experience with classified information and national security matters, we know that he is very well equipped to make the national security assessment necessary to answer that central question.<sup>1168</sup>

Ms. Knight feels nonetheless compelled to submit this letter for the following reasons. First, Ms. Knight recognizes that her management of the prepublication review and her interaction with the Legal Office of the NSC (NSC Legal) position her as a central actor in this matter. She noted the Court's observation at the TRO hearing as to the absence of a declaration from her as well as the comments by Ambassador Bolton's attorney, Charles Cooper, about her important role in the litigation.

Second, Ms. Knight feels it important that she be heard, as this litigation revolves around the government's contention that the prepublication review conducted by her and her staff left substantial amounts of classified national security information in the Bolton manuscript. That contention directly challenges the quality of her team's work, and therefore calls for a response from Ms. Knight.

Third, as a career professional in the field of classified information management, Ms. Knight is very concerned about the politicization – or even the perceived politicization – of the prepublication review process. Once authors start perceiving that manuscripts are being reviewed

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<sup>1167</sup> We have not coordinated or communicated in any way with either party – the government or Ambassador Bolton's legal team – about the litigation or the substance of this letter

<sup>1168</sup> We also understand that the Court has already conducted an in camera review of the passages cited by the government in its Motion for a Temporary Restraining Order (TRO). In that context, the Court was largely limited to reviewing those selected passages and the unchallenged declarations of NSC official Michael Ellis and four presidentially-appointed intelligence officials who reviewed passages of the manuscript in isolation and opined that they contained classified information, without any insight into the multi-layered analysis and context that led Ms. Knight and her staff to determine that they did not.

for political considerations, they will lose confidence in the integrity of the process and find ways to publish or release their works without submitting them for review. This could result in unchecked disclosures of sensitive information and the potential for serious damage to our national security.

Finally and most importantly, Ms. Knight is concerned about the ongoing litigation over Ambassador Bolton's motion for discovery, especially as it relates to his request to explore whether the White House acted in good or bad faith in its handling of the prepublication review. She is specifically concerned that the government is positioning the litigation in a way that will prevent disclosure of information that might be at odds with the narrative it has propounded since the initiation of this litigation. In its opposition to Ambassador Bolton's motion, the government contends that it is legally irrelevant whether the White House dealt with Ambassador Bolton in good or bad faith, and that there should therefore be no exploration of that issue in discovery or in the litigation. If the government prevails with that discovery argument, the Court and, ultimately the public, will be denied a full understanding of how the prepublication review of Ambassador Bolton's book was conducted.<sup>1169</sup>

Ms. Knight recognizes that it is up to the Court to assess what is or is not legally relevant and up to the judicial process to assess whether White House personnel operated in good or bad faith. However, she wants to ensure that the parties are aware of her knowledge of what took place throughout this prepublication review.

For these reasons, Ms. Knight has asked us to submit this letter, which will summarize the relevant information that Ms. Knight can share.<sup>1170</sup> It will do so in four sections. The first section will introduce Ms. Knight and her experience in information security management. The second will explain the process of prepublication review and how that process differs from a classification review. The third will describe how she and her team of career officials conducted the prepublication review of the Bolton manuscript. And, the final section will lay out the extraordinary actions taken by NSC Legal and the Office of the White House Counsel after Ms. Knight notified them that her staff's review was complete and that the manuscript was ready for clearance.

### I. Ms. Knight's Professional Background

Ms. Knight has devoted her career to the field of classified information management, and she is an expert in government classification policy and practice as provided in Executive Order 13526 and its implementing regulations. She holds a Master's degree in Library Science from the University of Maryland School of Information Studies, one of the top universities in the nation for this field. After starting her career at the National Security Agency, she was hired by the

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<sup>1169</sup> According to this argument, the only relevant issue in the litigation is whether Bolton breached his contractual obligation to wait for and receive a formal clearance letter from the White House before sending his manuscript off for publication. Once that breach is demonstrated, the government argues, it is automatically entitled to Ambassador Bolton's book royalties, no matter whether the White House demonstrated bad faith in the exercise of its prepublication responsibilities.

<sup>1170</sup> This letter proffers facts that Ms. Knight would be expected to provide on issues of potential relevance to this matter and is not intended to waive, and does not constitute a waiver of, any applicable privileges or rights of Ms. Knight, including, but not limited to, the attorney-client privilege or the protections of the work product doctrine

National Archives and Records Administration (NARA) as a declassification review archivist at the Nixon Presidential Materials Project, where she was responsible for reviewing President Nixon's secretly-taped conversations and conducting research to determine which portions could be declassified.

In 2010, Ms. Knight was hired as a Program Analyst by the Information Security Oversight Office (ISOO), which is also located within NARA, and was later promoted to a Senior Program Analyst in the Classification Management Directorate, where she supported the Interagency Security Classification Appeals Panel (ISCAP) and the Public Interest Declassification Board<sup>1171</sup>, and participated in an oversight program to evaluate agency declassification decisions.

Ms. Knight has held a Top Secret security clearance, with access to Sensitive Compartmented Information and Q clearance Restricted Data information, since 2006. At the NSC, she was designated an original classification authority (OCA) and one of six officials with declassification authority, and exercised her OCA and declassification authority throughout the duration of her detail at the NSC. Throughout her career, she has reviewed thousands of records for classification, declassification, and prepublication review.<sup>1172</sup>

Between August 2018 and August 2020, Ms. Knight served on detail from NARA to the National Security Council at the White House. Ms. Knight first served as Director for Access Management, the unit that provides classification management expertise to the NSC and the Executive Office of the President more broadly. Among her duties as Director was supervising a group of five staff members specifically responsible for conducting prepublication reviews submitted to the NSC. In December 2019, National Security Advisor Robert O'Brien promoted her to the position of Senior Director for Records Access and Information Security Management, in which she supervised 14 records and access professionals and continued to manage the prepublication process. Over the course of her time at the NSC, her staff completed more than 135 prepublication review requests, totaling over 10,000 pages of reviewed manuscripts.<sup>1173</sup>

## II. The Prepublication Review Process

As a government classification expert, Ms. Knight is deeply experienced in the use of classification in government agencies and in the prepublication review process by which the government reviews the written work of private citizens writing about sensitive matters from

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<sup>1171</sup> Ms. Knight served as the Senior Staff Member for the Public Interest Declassification Board (PIDB), which is a statutorily-created panel of national security experts appointed by the President and Congress with the mandate to maximize public access to the documentary record of significant U.S. national security decisions and activities. Undersigned counsel (Ken Wainstein) has been a member of the PIDB and has worked with Ms. Knight in that capacity since 2013.

<sup>1172</sup> Ms. Knight has consistently performed at the Outstanding review rating while at NARA and the NSC. She has been recognized for her leadership in various capacities, including for her work on the Interagency Security Classification Appeals Panel. In 2020, she was recognized by the Office of the Director of National Intelligence's Office of Civil Liberties, Privacy, and Transparency for her outstanding work and is a recent recipient of the Archivist's Achievement Award. She is currently pursuing a second graduate degree at the University of Maryland School of Public Policy, where she is close to completing a Master's degree in Public Management.

<sup>1173</sup> Ms. Knight also chaired the Records Access and Information Policy Coordinating Committee, an interagency policymaking body that coordinates all federal security policy issues concerning records management, security classification, declassification, information handling and safeguarding, and national security clearance suitability, as well as policy matters involving application of the Executive Orders relating to classified information.

their time serving in national security positions in the U.S. government. The significant differences between a prepublication review and an ordinary government classification review are important to understand when considering the actions taken by Ms. Knight and her team and those taken by other White House officials in the review of the Bolton manuscript.

A classification review is simple and straightforward, and is part of the everyday routine in government agencies that produce classified documents.<sup>1174</sup> Its purpose is solely to identify and protect sensitive information in documents written by government employees and contractors working for the government. It entails reviewing a government employee's written work, identifying potentially sensitive topics or facts in the substance of that work, determining if that information is specified in a classification guide, applying the appropriate markings – i.e. Confidential, Secret and Top Secret –and then imposing the appropriate control, handling and dissemination limitations on that information. It is the expectation of an official conducting a classification review that the result will likely be a classified document, access to which will be restricted by the rules of the government's security classification system.

A prepublication review, by contrast, involves reviewing the written work of a private U. S. citizen.<sup>1175</sup> Its purpose is two-fold -- to ensure the protection of government information whose

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<sup>1174</sup> The standards for identifying classified information in government records follow those found in Section 1 of Executive Order 13526, "Classified National Security Information." Section 1.1 of the Order provides standards for classifying national security information. The following conditions must be met for information to be originally classified:

1. An Original Classification Authority is classifying the information,
2. The information is owned by, produced by or for, or is under the control of the United States Government,
3. The information falls within one or more of the categories of information listed in section 1.4 of the Order (such as military plans, weapon systems, or operations; intelligence activities (including covert action), foreign relations or foreign government information, etc.), and
4. The Original Classification Authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, and the Original Classification Authority is able to identify or describe the expected damage.

<sup>1175</sup> The NSC Prepublication review process is laid out in the internal guidance document "NSC Access Procedures: Prepublication Review," which explains the purpose of the review process, details who must submit materials for review and what materials must be submitted, and describes how NSC Access Management staff should conduct a prepublication review. For example, it explains that, "unlike the declassification review of U.S. Government records in which documents can be declassified in full, in part, or not at all, pre-publication review involves making recommendations to the author for changes to the text to ensure that classified information is not released. This may be done by suggesting that the author cite as a source of information a news article or other open source either in an in-text citation or footnote in place of a potentially classified source. In other cases, NSC Access may require that entire sentences or topics be removed." The NSC, as a component of the Executive Office of the President, does not have a federal regulation specific to its NSC prepublication review process like those that govern other agencies and departments. However, the NSC has traditionally based its practice, in part, on the guidance provided in the other agencies' regulations, such as 28 CFR 17.18, Prepublication review for the Department of Justice, Department of Defense Instruction sections 5230.09 and 5230.29, and the prepublication review regulations that apply to the agencies of the Intelligence Community. Those regulations lay out the principles upon which prepublication review is conducted across the government, including by the NSC Access Management staff (e.g. "Material submitted for prepublication review will be reviewed solely for the purpose of identifying and preventing the disclosure of Sensitive Compartmented Information and other classified information. This review will be conducted in an impartial manner without regard to whether the material is critical of or favorable to the Department. No effort will be made to delete embarrassing or critical statements that are unclassified," 28 CFR 17.18). Like the NSC guidance discussed above, these regulations similarly emphasize the need to work with the author to sanitize or obscure sufficient details to allow him or her to discuss a topic without disclosing specific secrets that will compromise

disclosure would damage national security while at the same time supporting that citizen's right to publish all First Amendment-protected information. It is therefore designed not to limit the transmission of information, but rather to facilitate the private citizen's ability to transmit his thoughts in a way that does not disclose government secrets. It is the expectation of an official conducting a prepublication review that the result will be the public release of a document free of any information that could damage national security.

The prepublication review process is, therefore, much more complex and time-consuming than a classification review. It entails reading the draft text to identify information that may be sensitive and then carefully researching the press and public record for any government releases, statements, reports, testimony or presidential tweets that may have officially disclosed that information, thereby meaning that it is no longer sensitive or classified in the context of prepublication review. It often happens that a prepublication reviewer flags what was at one time highly-protected sensitive information, only to learn that that information has been otherwise released through official channels and is now a matter of public knowledge.<sup>1176</sup> Once that research is completed and any remaining sensitive information is identified, the reviewer then works closely with the author to remove, sanitize, or otherwise obscure enough details or specifics that the author can discuss that information in a way that will not damage national security.

The above-described NSC prepublication review process is typically performed entirely within the NSC Access Management directorate, and the authority to issue a clearance letter approving publication of a reviewed manuscript lies with the Director for Access Management or the Senior Director for Records Access and Information Security Management. This was the case for every prepublication review in Ms. Knight's experience, with the exception of the Bolton manuscript.

### III. The Prepublication Review of the Bolton Manuscript

Ms. Knight can describe in detail how she and her staff conducted the prepublication review and explain the decisions they made as to every part of Ambassador Bolton's book that raised potential classification concerns. They noted classification concerns with literally hundreds of the passages in the book, and for each passage, they went through the above process with Ambassador Bolton and his attorney, maintaining thorough notes and records of their analysis.

The review started with Ambassador Bolton's submission of the manuscript on December 30, 2019. Upon the first reading, it was apparent to Ms. Knight that the manuscript contained voluminous amounts of classified information and that it would take a significant effort to put it into publishable shape. The ensuing review ultimately became the most intensive prepublication review process in recent memory at the NSC.

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national security (see, e.g., DoD 5230.29, which authorizes the reviewer to condition clearance of a manuscript on recommended corrections, deletions or additions that the reviewer feels are necessary to sufficiently obscure sensitive information).

<sup>1176</sup> The fact of that official release completely changes the equation for the prepublication review. Not only does it render the information unclassified, but the fact that there is a different public source for that information can help to obscure and thereby protect the intelligence processes (i.e. sources or methods) by which the author may have learned that information.

Commitment of Staff Effort and Attention: This review process involved a very significant investment of time and effort, with Ms. Knight and her colleague, the First Reviewer (a classified information expert with four years of experience as a reviewer for the NSC), spending hundreds of hours over the course of four months reviewing and researching information found in the over 500-page manuscript. They each spent weeks reading the first iteration of the manuscript, meticulously identifying information they deemed to be classified, meeting to consolidate their findings, and then conducting countless hours of research to determine what information was already publicly available. Besides re-reading every chapter numerous times with each round of edits, Ms. Knight and her colleague each read through the entirety of the manuscript a total of four times. As a last step in the process, Ms. Knight gave the manuscript to the Acting Director for Access Management, a 20+year classified information expert with Original Classification Authority who to that point had not been involved in the Bolton review. He carefully read the manuscript to confirm – and he did confirm – that it no longer contained any sensitive or classified information.

Interaction with Ambassador Bolton and his Attorney: This review also involved much more extensive interaction with the author than prepublication reviews typically require. Despite Mr. Cooper’s assurance in his submittal letter that “Ambassador Bolton has carefully sought to avoid any discussion in the manuscript of sensitive compartmented information (SCI) and other classified information,” it quickly became apparent that the manuscript was replete with concerning information, leading to a four-month process of regular, intensive and occasionally spirited consultation between Ambassador Bolton and Ms. Knight’s team.

In the course of this process, Ms. Knight provided Ambassador Bolton with extensive guidance and best practices for writing around classified information, held four in-person meetings with Ambassador Bolton lasting a total of 14 hours, and spoke with him in ten telephone conversations, two of which were hours-long conversations to discuss edits and changes. Ms. Knight also held three lengthy telephone calls with Mr. Cooper, and had extensive e-mail correspondence with the author, his attorney, and his assistant throughout this process.

Ms. Knight and the First Reviewer came to the end of their review process on April 27 when they received Ambassador Bolton’s response to their last set of necessary changes, most of which at this point in the revision simply entailed providing citations. At that point, Ms. Knight determined that all classification concerns had been addressed and that publication of the manuscript, as heavily revised, would disclose no information that would cause harm to our national security – which conclusion was confirmed by the final read-through of the manuscript by the Acting Director for Access Management. Ms. Knight then informed Ambassador Bolton that she had no more proposed changes, but that the process was still ongoing and that she would reach out to him as soon as she had more information about the issuance of a clearance letter.

Ms. Knight contacted NSC Legal on April 28, 2020 to convey her findings and coordinate the finalizing of the prepublication review process, which, as discussed above, was an unusual step for NSC prepublication reviews, which normally do not involve other NSC officials in the approval process. Given their level of interest in this particular review, Ms. Knight felt it necessary to advise NSC Legal that she was prepared to clear the manuscript. When she did so, the Deputy Legal Advisor Sue Bai instructed her to stand by and to take no further action.

Over the next nine days, Ambassador Bolton reached out approximately six times seeking an update on the anticipated clearance letter. On each occasion, Ms. Knight conferred with the Deputy Legal Advisor, only to be instructed that they were dealing with other issues and that she should tell Ambassador Bolton that the process was “ongoing.” On May 7, she responded to Ambassador Bolton’s last inquiry about the clearance letter by stating that “the process was ongoing,” per the direction from NSC Legal. She never heard from Ambassador Bolton or his attorney again after that date.

Interaction with NSC Legal: This review entailed an unprecedented amount of interaction between the political appointees in the NSC Legal staff and the career prepublication review staff. Unlike every other prepublication review, this review had Ms. Knight in regular – often daily – contact with the NSC Legal staff.

Ms. Knight first learned that Ambassador Bolton would be submitting a manuscript for review from the then-Deputy Legal Advisor, Michael Ellis. Soon thereafter, Mr. Cooper sent her the manuscript along with a letter describing his understanding of the process and asserting that his client did not believe the manuscript contained any classified information and that he was only submitting it for prepublication review out of an “abundance of caution.” After a cursory look at the manuscript, Ms. Knight contacted NSC Legal to inform Mr. Ellis about the outreach from Ambassador Bolton’s counsel and to relay her concerns about the amount of classified information she found in the manuscript.<sup>1177</sup>

NSC Legal requested a copy of the manuscript and the working case file on January 6, 2020, and then immediately started playing what was, in her experience, an outsize role in the review process, specifically by overseeing the correspondence with Mr. Cooper and Ambassador Bolton and dictating the timing of that correspondence. For example, on one occasion when Mr. Cooper requested that Ms. Knight’s staff prioritize the Ukraine chapter in the manuscript for prepublication review to make it publicly available during the impeachment trial, the then-Deputy NSC Legal Advisor Ellis instructed her to temporarily withhold any response.

Ms. Knight was also regularly instructed by Mr. Ellis and, later, by Deputy Legal Advisor Bai not to use e-mail in her communications with NSC Legal about her interactions with Mr. Cooper and Ambassador Bolton and instead to use the telephone. On several occasions, the political appointees in NSC Legal asked her to read draft correspondence over the telephone rather than sending the drafts over e-mail for their evaluation. On another occasion, the then Deputy NSC Legal Advisor Ellis expressed NSC Legal’s concern that others might be able to read the Bolton manuscript on the records management system and possibly leak its content, and he had her ascertain with the information technology staff whether they could monitor and identify anyone who accessed and printed the manuscript.

These interactions with NSC Legal in the course of a prepublication review were unprecedented in her experience. She had never previously been asked to take the abovedescribed measures, and

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<sup>1177</sup> She also passed on to NSC Legal her concern about the description of the process in Mr. Cooper’s letter and her observation that the manuscript was likely derived at least in part from notes Ambassador Bolton had in his possession. If correct, these notes would be considered classified Presidential records which belong to the U.S. government, and should have been returned to the NSC upon Ambassador Bolton’s departure in 2019. Ambassador Bolton later publicly asserted that he destroyed his notes.

she has never heard that predecessors in her position ever received such instructions in the course of their prepublication reviews.

#### IV. The White House Reaction to Ms. Knight's Approval of the Manuscript

Ms. Knight's extraordinary interaction with NSC Legal continued after she notified Deputy NSC Legal Advisor Bai on April 28, 2020 that she and her team had completed their review and that the manuscript was ready for clearance. That notification set off a chain of events that led to the filing of the instant litigation.

NSC Legal's Unwillingness to Admit the Real Reason for the Clearance Letter Delay: Soon after Ms. Knight notified NSC Legal that the review was complete, Ms. Bai called to request a copy of the reviewed manuscript, which Ms. Knight furnished to her. Over the following nine days, Ms. Knight received numerous requests from Ambassador Bolton for the clearance letter. Each time, Ms. Knight passed the request along to the NSC Legal staff, reminding them that the publication date for Ambassador Bolton's book was June 23 and warning them that Ambassador Bolton and Mr. Cooper may be planning toward that publication date. When Ms. Knight asked why there was a delay in NSC Legal issuing a clearance letter, Ms. Bai attributed the delay to their focus on the COVID pandemic crisis. At no time was Ms. Knight ever advised that the delay was due to any further review that was being conducted on the Bolton manuscript.

NSC Legal's Warning Letter to Ambassador Bolton and Mr. Cooper: On June 8, 2020 – six weeks after Ms. Knight had advised NSC Legal that the manuscript was ready for clearance – the NSC Legal Advisor, John Eisenberg, called Ms. Knight to his office in the West Wing and asked her to review a letter that he had drafted to Mr. Cooper. The letter noted recent press reports indicating that Ambassador Bolton intended to publish his manuscript without final written NSC authorization, and pointed out that the review process was still ongoing. The letter then asserted that “the current draft manuscript still contains classified material.”

That last assertion caught Ms. Knight by surprise, as nobody had ever said so much as one word about any remaining classification concerns since her April 28 request that NSC Legal authorize her to clear the manuscript. She told Mr. Eisenberg that she and her team were confident that the manuscript no longer contained classified information, and that she would say the same thing to anyone who asked her about that assertion in the draft letter. She then recommended that he amend that sentence. Mr. Eisenberg responded that her recommendation was “noted” and ended the meeting without any further explanation.

Classification Training for Michael Ellis: On June 9, Deputy NSC Legal Advisor Bai called Ms. Knight with an unexpected request — to arrange for Michael Ellis (by this point serving as NSC Senior Director for Intelligence Programs and no longer NSC Deputy Legal Advisor) to receive Original Classifying Authority (OCA) training, which is required for those serving in a position that is authorized to originally classify information. Ms. Bai gave no explanation for the training

request. The Acting Director for Access Management provided that training to Mr. Ellis on June 10.<sup>1178</sup>

Meetings with Justice Department Attorneys: On the evening of June 10, Deputy NSC Legal Advisor Bai called Ms. Knight and directed her to come into work to attend a meeting in the White House Situation Room. When Ms. Knight arrived at 5:30 p.m., she was greeted by Ms. Bai and four attorneys from the Justice Department. The group then presented her with a letter from Mr. Cooper, which was Mr. Cooper's response to Mr. Eisenberg's June 8 letter asserting that the manuscript still contained classified information and warning Ambassador Bolton and Mr. Cooper not to move forward with publication. In his response letter, Mr. Cooper claimed that Ms. Knight had de facto cleared the manuscript on April 27 when she indicated that there were only "some internal process considerations to work through" before issuance of the clearance letter. The attorneys from the Justice Department directed Ms. Knight to that language and instructed her to explain it to them.

Despite being caught off balance, Ms. Knight read Mr. Cooper's letter and calmly explained that she had never told Ambassador Bolton or Mr. Cooper that the prepublication process was over and that she had carefully followed NSC Legal's instructions to tell them that "the process was ongoing" whenever they asked for the clearance letter. Although she had discussed with Ambassador Bolton that a formal letter would be forthcoming at the conclusion of the process, she provided him no assurance as to the specific timing of its issuance.

The attorneys then asked Ms. Knight a series of questions which clearly indicated they were preparing for litigation. For example, they asked her how she had communicated with the political appointees in NSC Legal throughout the prepublication process, as they wanted to understand whether communications had been in person or by telephone, per NSC Legal's previous instructions.

They also asked questions suggesting that Ambassador Bolton had acted in bad faith during the prepublication review. To those questions, Ms. Knight explained that Ambassador Bolton had seemingly conducted himself in good faith overall and that she had never seen any indication during their work together that he was trying to circumvent the process. He had been gruff and demanding and expressed frustration at times during the process,<sup>1179</sup> but Ms. Knight always felt his intention was to cooperate with and complete the review.

Finally, they asked what Ambassador Bolton and Mr. Cooper knew about the reason for the delay in granting the clearance of the manuscript. This is the moment at which Ms. Knight first learned that the delay was not due to competing priorities brought about by the COVID crisis – which is the explanation she had been given whenever she asked NSC Legal about the timing of

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<sup>1178</sup> It is worth noting that this training took place after Ellis had already finished the classification review that Ms. Knight later learned he conducted between May 2 and June 9, 2020. In its amended complaint, the government conceded that sequencing – i.e. that Ellis had actually done his review before receiving the training on how to do the review – but suggested that it was immaterial because "[a]fter completing the training, Mr. Ellis reviewed his work and concluded that the information he received in training did not alter his decisions."

<sup>1179</sup> In addition, at the outset of the review process, his attorney made a number of public statements suggesting that Ms. Knight's team and their review were subject to political influence, which suggestions were completely unfounded.

finalizing the process. In the course of their conversation, the then-Assistant Attorney General of the Civil Division at the Justice Department – who made an effort throughout their meetings to treat Ms. Knight in a collegial and forthcoming manner – asked her whether Ambassador Bolton and Mr. Cooper knew that Michael Ellis had been conducting his own prepublication review of the manuscript. Surprised at that news, Ms. Knight responded that she very much doubted that they knew about that second review, especially given that she – the Senior Director for Records Access and Information Security Management at the NSC – knew nothing about it until that very moment.

She later learned how that second review came about. In reviewing the government’s filings in this litigation, she learned that National Security Advisor Robert O’Brien had reviewed the manuscript that Ms. Knight and her team determined was publishable on April 28 and concluded that that determination was wrong. He then instructed Michael Ellis, an NSC political appointee with no previous classification authority experience,<sup>1180</sup> to conduct another review. Between May 2 and June 9, Mr. Ellis reviewed the manuscript and flagged hundreds of passages that, in his opinion, were still classified. It was presumably that opinion that underlay the NSC Legal Advisor’s assertion in his June 8 letter to Ambassador Bolton that “the current draft manuscript still contains classified material.”

It is important to note that between April 28 and June 10, none of these political appointees – not Ambassador O’Brien, not Mr. Ellis and not Mr. Eisenberg – ever raised these classification concerns with Ms. Knight and her team or sought to learn about their analysis of the concerning passages. Had their concern been to produce a publishable manuscript without classified information, they presumably would have asked the experts who had devoted hundreds of person-hours to a painstaking review of every page of the manuscript.

At a subsequent meeting, the DOJ attorneys showed Ms. Knight the manuscript with Mr. Ellis’s hundreds of marked passages and asked her whether it was possible that she and her team had simply “missed this much classified information.” She firmly responded that that was not possible, and she proceeded to explain how Mr. Ellis’s re-review of the manuscript was fundamentally flawed.

The fundamental flaw was that Mr. Ellis had done a “classification review” rather than a “prepublication review.” Based on her review of the markings, she could tell that Mr. Ellis had simply looked for passages that may have been classifiable under the broad categories laid out in the relevant Executive Order (EO 13526) and deemed those passages classified and unpublishable, as though he were doing a classification review of a government record. However, this manuscript was not a government record; it was the First-Amendment protected writings of a private citizen.

It appeared that Mr. Ellis nonetheless never went beyond this basic classification analysis to do an actual prepublication review. For example, he flagged text involving conversations with

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<sup>1180</sup> Michael Ellis had served as a staffer on the Permanent Select Committee on Intelligence in the House of Representatives under then-Chairman Devin Nunes. In 2017, he took a politically-appointed position in the NSC Legal Office, where he served as Deputy Legal Advisor and Associate White House Council until March 2020, when he was appointed the NSC Senior Director for Intelligence Programs, replacing an incumbent who, like those who had traditionally served in that position, was a career official detailed from the Intelligence Community.

foreign heads of state without making any attempt to do what Ms. Knight and her team had spent months doing – carefully ensuring that any sensitive details were deleted or sufficiently obscured to permit the account of those conversations to be published without compromising national security. He also flagged passages that are clearly Ambassador Bolton’s analysis and/or opinion about his personal recollections of events he witnessed, violating the basic tenet of prepublication review that a private author is entitled to his or her perspective of an event, even if that perspective is slanted or factually incorrect.

Finally, it appeared that Mr. Ellis failed to analyze whether the information he marked as classified was still, in fact, classified and subject to redaction. In determining the publishability of information in the manuscript, Mr. Ellis apparently focused on whether that same information could be found in classified government records. If he saw information in the manuscript that was also reflected in a classified government record, he appeared to have automatically deemed that information classified. Ms. Knight and her team, by contrast, did what is required in a prepublication review and meticulously researched every potentially sensitive data point in the manuscript to determine whether the government had already put that data point into the public domain, thereby rendering it publishable regardless of its presence in a classified government document.<sup>1181</sup> With the benefit of this research and with careful efforts to obscure the sourcing and details in sensitive passages, Ms. Knight’s team was able to clear substantial amounts of text that Mr. Ellis later deemed unpublishable. In sum, Ms. Knight explained to the attorneys, Mr. Ellis had seemingly taken a flawed approach to his re-review, and it was that flawed approach – and not the failings of her team’s work – that accounted for the different results of their respective reviews.<sup>1182</sup>

Meeting with the Deputy White House Counsel: On Saturday, June 13, Ms. Knight was called into work for a meeting in the West Wing. When she arrived at the NSC Legal office, she was greeted by Mr. Eisenberg, Ms. Bai and Patrick Philbin, the Deputy Counsel to the President from the White House Counsel’s Office. Over the following four hours, Mr. Philbin questioned Ms. Knight about a series of issues. For the first hour or so, he walked her through the many passages

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<sup>1181</sup> This can best be illustrated by a hypothetical example of a presidential meeting with a foreign leader. The details of such meetings are typically recorded by staff and reduced to meeting memoranda, which are routinely classified at the Top Secret level. It is routine for such memoranda to recite both the general topics of discussion between the two leaders as well as the specifics of those discussions. It is also routine for the President’s press secretary to describe the general discussion topics of such meetings – but not the specifics – when he or she briefs the press about the President’s daily activities. Under the rules of prepublication review, as dutifully applied by Ms. Knight’s team, those general topics would be considered unclassified and publishable once they were disclosed by the press secretary, despite the fact that they may also be recited in a classified meeting memorandum. Of course, the specific details that were not publicly disclosed would only be publishable if they satisfy the standard prepublication analytical criteria (e.g. they do not reveal government secrets, are details that have already been officially disclosed, can be plausibly denied or otherwise obscured in the drafting, etc.). Under Mr. Ellis’s approach, by contrast, the classification level of the meeting memorandum would dictate that both the specific details and the general topics would remain classified and their disclosure a felony offense, regardless of any previous disclosure by the press secretary.

<sup>1182</sup> In explaining the deficiency of his re-review process, we do not deny that Ellis brought a new perspective to the manuscript review and may well have detected certain concerns with the text that warranted further analysis. However, this possibility could not explain the claim that hundreds of passages still contained classified information. Nor could it explain the extended delay in clearance of the manuscript, as any such concerns could have been addressed – probably in a matter of hours – with a simple call or meeting with Ms. Knight and a possible revision of the manuscript. No such call or meeting ever took place.

that were marked during Ellis's re-review and asked her to explain how she and her team could have cleared each passage. It was clear to Ms. Knight that they were trying to get her to admit that she and her team had missed something or made a mistake, which mistake could then be used to support their argument to block publication. To their consternation, Ms. Knight was able to explain the clear and objective reasoning behind her team's decision-making as to each of the challenged passages.

Having failed to find fault in her team's specific determinations, they pivoted to an attempt to have her concede that the whole prepublication process is simply a matter of opinion – i.e. that prepublication determinations are unmoored from objective criteria and that the classified nature of information is simply in the eye of the beholder. With that theory, they suggested that the differences between her team's determination that the manuscript was publishable and Mr. Ellis's determination that it was still full of classified information could be chalked up to a simple difference of opinion. Ms. Knight responded that this was not a difference of opinion, but was rather a difference between a prepublication review process conducted with the goal of producing a publishable manuscript and a classification review process conducted with the goal of blocking publication.

Effort to Force Ms. Knight to Sign a Declaration: Having failed to secure Ms. Knight's concession that this could all be chalked up to a difference between opinions, they changed tack and tried to persuade her to sign a declaration that purported to explain her role in the process.

Over the course of five days and a total of 18 hours of meetings, a rotating cast of Justice Department and White House attorneys tried to persuade Ms. Knight to sign a declaration they wanted to file with their lawsuit against Ambassador Bolton. They made their case for the declaration, while Ms. Knight voiced her reservations about it. Her reservations were primarily with the following points in the draft declaration:

- The contention that this was simply a disagreement between experts, when, as discussed above, Ms. Knight saw this as a contrast between an appropriate prepublication review and an inappropriate classification review of a private citizen's work;
- The suggestion -- without factual basis -- that her team's work was subpar, which is a necessary inference of the government's allegation that she and her team had failed to identify and redact substantial amounts of sensitive information that would irreparably harm the national security;
- The narrative in the declaration that glossed over the irregular aspects of the prepublication review – i.e. the secretive secondary re-review that (1) was initiated without the knowledge of or participation of the career staff, (2) was assigned to a political appointee with little or no relevant classification experience or training, (3) was not disclosed to Ms. Knight when NSC Legal attributed the clearance delay to the demands of the COVID-19 crisis, and (4) was ultimately used to justify the White House effort to block publication of the book;
- And finally, the ultimate conclusion that the manuscript was unpublishable, notwithstanding that Ms. Knight had addressed the classification concerns that the attorneys raised with her.

In addition to her substantive concerns with the draft declaration, Ms. Knight also voiced her concerns about the fairness and objectivity of the process being followed by the White House and Justice Department attorneys. She was particularly concerned about the following:

- Ms. Knight repeatedly asked the attorneys to explain their litigation strategy and how they intended to use her declaration. They refused to give her such information, and instead urged her to simply trust them and their assurances that they would not throw her and her team “under the bus.”
- Ms. Knight also repeatedly asked to see Mr. Ellis’s declaration and the government’s draft complaint to learn which specific passages Mr. Ellis and the government attorneys would argue were still classified. They refused to show her Mr. Ellis’s declaration, indicating to her that they had less interest in resolving the concerns cited in those documents and more interest in using them as a basis for blocking publication.<sup>1183</sup>
- Ms. Knight asked the attorneys how it could be appropriate that a designedly apolitical process had been commandeered by political appointees for a seemingly political purpose. She asked them to explain why they were so insistent on pursuing litigation rather than resolving the potential national security issues through engagement with Ambassador Bolton and her team. The attorneys had no answer for her challenges, aside from a rote recitation of the government’s legal position that Ambassador Bolton had violated his contractual obligations by failing to wait for written clearance. However, when Ms. Knight speculated that this litigation was happening “because the most powerful man in the world said that it needed to happen,” several registered their agreement with that diagnosis of the situation.
- Ms. Knight asked permission to call the NARA supervisor to whom she reported and have him join and support her throughout these meetings, most of which involved Ms. Knight being questioned by three to six White House and Justice Department attorneys at a time in a West Wing conference room. An official at the Information Security Oversight Office, her supervisor is a recognized expert in classification, declassification, and prepublication review, and had actually worked in that capacity in the NSC in the recent past. Despite these credentials, the NSC lawyers refused her request to have him attend the meeting and ordered her not to share any information with him.

After five days of meetings, in which the attorneys remained unwilling to address her concerns about the draft declaration and the process, Ms. Knight informed the NSC Legal Advisor that she would not sign the declaration. He and his Justice Department colleagues then proceeded with the litigation without any declaration from her. That was the last time Ms. Knight ever spoke with any member of the NSC Legal staff about the Bolton manuscript or litigation.

Ms. Knight’s Departure from her NSC Position: As explained above, Ms. Knight is a 16-year career federal employee who was detailed from NARA to the NSC staff in August 2018 for a two-year detail, and was promoted in December 2019 to the position of Senior Director for

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<sup>1183</sup> 7 It is worth noting that Ms. Knight was never informed of the government’s intent to secure the declarations of four presidentially-appointed intelligence officials for use in the TRO hearing. Ms. Knight learned of the existence of those declarations only when the Justice Department attorneys filed them with the TRO and used them to support their argument that the manuscript still contained classified information. Since the declarations were filed under seal, Ms. Knight has had no opportunity to review them.

Records Access and Information Security Management. Prior to Ms. Knight's promotion to Senior Director while detailed to NSC, it had been long-standing practice for that Senior Director to be a direct-hire career NSC employee who remained in place through transitions between presidential administrations to ensure continuity of operations among the White House, the NSC and NARA on all matters concerning information management.

After her promotion to Senior Director, Ms. Knight was given assurances from all of her relevant NSC supervisors that she would have the option to transition into that direct-hire position at the end of her two-year detail in August 2020. Both the NSC Executive Secretary and the Senior Director for Resource Management told her that they supported her transition to the direct-hire position at the conclusion of her detail. The NSC Legal Advisor gave her the same assurance, and promised to advocate for this transition with the NSC Chief of Staff, who had separately expressed strong support for her direct-hire and even assured her as recently as May 22 that he was working to "muscle some money around" to ensure her transition to the NSC permanent staff.

Following her refusal on June 16 to sign a declaration concerning the Bolton litigation, Ms. Knight's interaction with her leadership and NSC Legal all but ceased until June 22, when she received an automated e-mail advising her that her detail would end in 60 days. When she then asked the NSC Executive Secretary about the prospect of a direct hire he consulted with the NSC Chief of Staff and the NSC Legal Advisor, who informed him that that was no longer a possibility, and that "there is no path forward for [Ms. Knight] at the NSC." The Executive Secretary expressed his sympathy and also his surprise at the decision in light of his strong impression of Ms. Knight as a "professional [who] did everything by the book." However, he said, the decision was "not [his] to make," and had already been made by others. On August 20, Ms. Knight's detail expired and she returned to NARA.

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Ms. Knight has spent her career avoiding the spotlight and has no interest in the public attention that has accompanied this litigation. Given that reticence, she was initially happy to remain on the sidelines of the litigation. With the government's recent effort to prevent any discovery – which would have the effect of precluding scrutiny of the government's conduct and motives in the Bolton prepublication review process – she now feels an obligation to tell her account of that process and to help fill in the gaps that have been left in the public narrative to date. The foregoing provides a general summary of that account.

To be clear, Ms. Knight is not taking sides in the litigation. She does not take issue with all the actions of the government attorneys with whom she interacted; a number of them conducted themselves with absolute professionalism, were understanding of her concerns as a career public servant, and were obviously trying their best to operate under very challenging circumstances. In fact, it appeared to Ms. Knight that most, if not, all of them were being directed to implement a strategy with which they were not entirely comfortable. Nor does she align herself with Ambassador Bolton and his decision to write and publish such a book, aside from supporting his constitutional right to do so in accordance with the prepublication rules.

Her interest in this litigation is simply to set the record straight and to help ensure that the important process of prepublication review is not tainted by political concerns. To that end, she stands ready to provide her account of the Bolton prepublication review and to be of assistance to you and the Court in this important matter.

Sincerely,

Kenneth L. Wainstein