

Attorney General Merrick Garland
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

March 15, 2021

Attorney General Garland,

We, the undersigned organizations, are encouraged by the commitment you have expressed during your confirmation process to restoring the integrity and independence of the Department of Justice (“DOJ”).¹ As you recently said at your confirmation hearing, “it is a fitting time to reaffirm that the role of the Attorney General is to serve the rule of law and to ensure equal justice under the law.”² We could not agree more.

We are writing to ask you to take swift action to follow through on that commitment now that you have been confirmed as Attorney General. That work, which should all be done with a clear and transparent effort to avoid politicization and with significant deference to career officials, includes, but is not limited to:

- reviewing the policies, rules, and statutes that secure DOJ’s independence and integrity and supporting processes to amend them where they have proven insufficient;
- renewing DOJ’s commitment to transparency by undertaking a review of records withheld in response to congressional inquiries and Freedom of Information Act (“FOIA”) requests and by expanding the scope of DOJ’s proactive disclosures to the American people;
- undertaking a review of your predecessors’ decisions in key matters to ensure that political considerations did not improperly impact investigative and prosecutorial decisions;
- reviewing uncharged presidential misconduct and considering whether charges should be pursued now that the former president is no longer protected by DOJ’s policy of not indicting a sitting president; and
- coordinating with any congressional or independent investigations into the January 6, 2021 insurrection and its root causes.

Each of these tasks is crucial to restoring the rule of law and DOJ’s commitment to it. We describe each of these priorities in greater detail below, and we welcome the opportunity, where appropriate, to assist in your important work of restoring integrity and independence to the Department of Justice.

Reviewing and reforming DOJ policy, rules, and governing statutes

First, DOJ needs to conduct a wholesale review of the policies, rules, and statutes that secure the DOJ’s independence and integrity--especially with respect to politically-motivated

¹ Merrick Garland, Remarks on Selection as Attorney General, *C-SPAN*, Jan. 7, 2021, *available at* <https://www.c-span.org/video/?c4935258/merrick-garland-remarks-selection-attorney-general>.

² Attorney General Confirmation Hearing, Day 1, *C-SPAN*, Feb. 22, 2021, *available at* <https://www.c-span.org/video/?508877-1/attorney-general-confirmation-hearing-day-1>.

interference in DOJ operations from the White House.³ During the Trump Administration, investigations of the president and his associates were successfully obstructed by the president and his close associates. The former president attacked DOJ investigations with public broadsides, attempted to curtail the scope of investigations through private channels and threats, successfully pressured DOJ to be lenient in prosecutions of associates, and appointed an Attorney General who successfully prevented DOJ from explaining to the American people the extent of the former president's wrongdoing.

As part of this review, the DOJ should consider how future investigations that implicate the president, close associates, and other senior administration officials will be protected from political interference and obstruction. In particular, DOJ should consider whether the special counsel regulations provide sufficient protection and independence to investigators and prosecutors in such circumstances and whether future special counsels need additional authority to ensure that their investigatory findings are not manipulated for political ends. DOJ should likewise review its policy that a sitting president cannot be indicted, especially if DOJ cannot guarantee the release of information contained in documents like the Mueller report to the American people in a timely, complete, and unbiased manner.

Renewing DOJ's commitment to transparency

Second, DOJ should renew its commitment to transparency by conducting a review of all pending congressional records requests and Freedom of Information Act requests to maximize transparency regarding government misconduct over the last four years. That commitment should be public and backed by investment of department resources. In 1993, Attorney General Janet Reno issued a memorandum⁴ rescinding pre-existing guidance on defending FOIA cases and instructing DOJ attorneys to apply a presumption of disclosure in such matters. In 2009, Attorney General Eric Holder issued new FOIA guidance⁵ to federal agencies reaffirming DOJ's commitment to disclosure and articulating a new policy under which the DOJ would only defend the denial of FOIA requests if "(1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."⁶ We call on you to emulate the leadership of Attorneys General Reno and Holder, by issuing your own public statement on the importance of transparency to DOJ and the entire executive branch.

³ See, e.g., Center for Ethics and the Rule of Law and Citizens for Responsibility and Ethics in Washington, Report on the Department of Justice and the Rule of Law Under the Tenure of Attorney General William Barr, October 12, 2020, available at <https://www.law.upenn.edu/live/files/10900-report-on-the-doj-and-the-rule-of-law>; Jennifer Ahearn, Conor Shaw, Gabe Lezra, Mia Woodard, and Hajar Hammado, What Democracy Looks Like, *Citizens for Responsibility and Ethics in Washington*, December 2020, available at <https://www.citizensforethics.org/reports-investigations/crew-reports/democracy-reform-blueprint-accountable-inclusive-ethical-government/>; Norman Eisen, Virginia Canter, Claire Finkelstein, Joseph Foti, Richard Painter, Walter M. Shaub, Jr., and Anne Weismann, If it's Broke, Fix it: Restoring Federal Government Ethics and Rule of Law, *Brookings*, Feb. 24, 2021, available at <https://www.brookings.edu/research/if-its-broke-fix-it/>.

⁴ Attorney General Janet Reno, Memorandum for Heads of Departments and Agencies, October 4, 1993, available at <https://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum>.

⁵ Attorney General Eric Holder, Memorandum for Heads of Departments and Agencies, March 19, 2009, available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

⁶ *Id.* This "foreseeable harm" standard was later codified at 5 U.S.C. § 552(a)(8)(A).

DOJ also needs to act with urgency to fulfil Congressional records requests that the previous administration ignored. In some cases, federal agencies appear to have fast-tracked records requests from Republican members of Congress while denying requests from Democratic members.⁷ In November 2020, the House Oversight Committee sent dozens of letters to federal agencies instructing them to preserve records responsive to congressional subpoenas and investigations.⁸ DOJ should also review pending Congressional records requests to determine whether they can be fulfilled.

DOJ should also expand the scope of records that are subject to proactive disclosures by the agency. Among the records that merit such treatment are opinions issued by the Office of Legal Counsel (OLC) that are binding on federal agencies. In the words of its own directive, “OLC’s central function is to provide, pursuant to the Attorney General’s delegation, controlling legal advice to Executive Branch officials in furtherance of the President’s constitutional duties to preserve, protect, and defend the Constitution, and to ‘take Care that the Laws be faithfully executed.’”⁹ These opinions which set out legal decisions and policies for the executive branch that affect the lives of everyday citizens, should be disclosed to the American people.

Reviewing and, where necessary, reversing political interference in DOJ matters

Third, DOJ needs to engage in a more particularized review of potential political interference in critical investigations it conducted over the last four years. Whatever changes DOJ may make to rules, policies, and processes moving forward, those changes will not fully restore the American people’s faith in DOJ’s commitment to the rule of law without reassurance that Attorney General Barr and other senior officials did not interfere with cases involving the president, his associates, his family members, and similar matters. Those cases include, but are not limited to:

- Special Counsel Mueller’s investigation of Russian interference in the 2016 election and associated offenses, including President Trump’s attempts to obstruct justice;
- DOJ’s investigation and review, if any, of potential perjury or obstruction offenses associated with Congress’s investigation of Russian interference in the 2016 election;
- DOJ’s investigation and prosecutions of Paul Manafort, Roger Stone, and Michael Flynn;
- The investigation of campaign finance and other crimes associated with President Trump’s 2016 campaign for president conducted by the United States Attorney for the Southern District of New York;

⁷ See, e.g., Donald K. Sherman, State’s Selective Cooperation with Congress Raises Legal Questions that Demand Answers, *Just Security*, May 29, 2020, available at <https://www.justsecurity.org/70467/states-selective-cooperation-with-congress-raises-legal-questions-that-demand-answers/>.

⁸ House Committee on Oversight and Reform, House Committee Chairs Send Dozens of Letters Directing White House and Federal Agencies to Preserve Documents, Nov 10, 2020, available at <https://oversight.house.gov/news/press-releases/house-committee-chairs-send-dozens-of-letters-directing-white-house-and-federal>.

⁹ See Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), available at <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

- DOJ's investigation and review of potential criminal conduct associated with President Trump's efforts to get Ukraine to investigate a political rival in the summer of 2019.
- DOJ's investigation and review, if any, of potential criminal violations of the Hatch Act by White House or other officials in conjunction with President Trump's 2020 campaign for president;
- DOJ's investigation and review of potential criminal misconduct by cabinet and other senior administration officials, including matters referred by agency inspectors general;
- DOJ's investigation and review, if any, of potential federal tax, banking, insurance and other financial crimes committed by President Trump's businesses, family members, and business associates;
- DOJ's investigation and review, if any, of pardons or commutations issued by President Trump to potential witnesses against him or in exchange for things of value to any person;
- Special Counsel John Durham's investigation of the origins of the FBI investigation of Russian interference in the 2016 election and cooperation by the Trump campaign;¹⁰
- DOJ's criminal probe of former Deputy FBI Director Andrew McCabe; and
- Other undisclosed investigations conducted by DOJ that carried the potential for political interference by or at the behest of President Trump, Attorney General Barr, and others.

If a review of these matters suggests the possibility of improper considerations or interference in any investigative or prosecutorial decision in any of these matters, DOJ should permit career attorneys to reassess the matter and consider reversing a prior decision if doing so is justified by the facts, law, and Department policy. In addition, evidence of improper or unlawful conduct by political or career officials that is uncovered by this review should be referred to the DOJ Inspector General or to a special counsel for further investigation and, if warranted, prosecution.

Investigating uncharged presidential misconduct

Fourth, DOJ must initiate a review of any uncharged criminal conduct committed by the President to determine whether he should be prosecuted now that he is no longer in office. Special Counsel Mueller's Report specifically referenced DOJ's policy of not indicting a sitting president in its analysis of the president's obstruction of justice. In addition to a review of President Trump's conduct captured in the Mueller report, DOJ should consider additional efforts by Trump to obstruct or undermine the prosecutions of Michael Flynn and Roger Stone, the President's attempts to overturn the free and fair results of the 2020 election; and his incitement of violence on January 6, 2021.

Election to the highest office in our land cannot be a get-out-of-jail-free card. As long as the statute of limitations has not expired, there is no compelling reason for the former president to be absolved of criminal conduct committed when he was a private citizen. And while the president's political supporters will no doubt cry foul if DOJ pursues charges for the former president's conduct in office, it would be a grave mistake to let political calculations get in the

¹⁰ Pursuant to 28 C.F.R. § 600.7, Special Counsel Durham's investigation must comply with "the rules, regulations, procedures, practices and policies of the Department of Justice."

way of a prosecution of a former president if DOJ officials determine that one is supported by the law and the facts. DOJ should give consideration to the best ways to ensure public faith in the decisions made regarding investigation and prosecution of the former president, including ensuring a significant role for career prosecutors and considering whether a special counsel or any other departure from regular procedure is appropriate. Restoring integrity and independence to DOJ requires that the agency not waver from investigatory and prosecutorial actions simply because a potential target might respond with bad-faith accusations about the propriety of DOJ's decisions.

Cooperating with congressional and independent factfinders

Finally, DOJ should coordinate its efforts to pursue accountability with congressional and independent fact-finding bodies that are charged with establishing the truth about abuses of power and violations of law, overseeing components of the executive branch, and legislating reforms to better protect our republic from the threat of future would-be authoritarians. Truth and accountability need not be competing objectives. DOJ's efforts to pursue civil and criminal sanctions against individuals and entities must coexist with efforts to disclose the truth about abuses of power and other unlawful conduct that occurred during the last four years.

Signed,

Citizens for Responsibility and Ethics in Washington
Democracy 21
The Digital Democracy Project
Equal Justice Society
Free Speech For People
Government Accountability Project
Open The Government
Project On Government Oversight (POGO)
Protect Democracy
Public Citizen
Stand Up America