CREW

CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

April 13, 2022

Re: Upholding the Rule of Law in Investigations of the Former President

Dear Attorney General Garland,

I am writing to underscore the need for the Department of Justice (DOJ) to prosecute crimes committed by former President Donald Trump in cases where the facts and law support such action. As one of many keen observers of DOJ, I have been struck by the public commitments you have made in which you have underscored the importance of upholding the rule of law. You have been appropriately outspoken about the need for DOJ's independence and integrity to be reflected in its processes. But an undeniable truth about your tenure at DOJ is that it will and should be judged on the actions you take--especially the decisions that you confront with respect to former President Trump.

President Trump has been credibly accused of a staggering number of criminal offenses while running for office or serving as president. Given that record, it is critical for the future of our democracy and public faith in the rule of law that DOJ pursue meritorious criminal cases against the former president. That is the path DOJ chose when it faced a similar decision regarding President Nixon in the weeks before President Ford issued him a pardon. Choosing not to pursue cases where the facts and law support prosecution--especially out of a concern for the political ramifications of such a decision--would be a betrayal of the rule of law and would in fact be a political act itself. While such considerations might be appropriate for a president who is considering the virtues of executive clemency, they are not valid reasons for DOJ to stop pursuing equal justice under the law. DOJ has policies that dictate what its employees should consider in all charging decisions, and those are the considerations that should guide charging decisions involving President Trump.

[redacted]
CITIZENSFORETHICS.ORG
info@citizensforethics.org 202.408.5565

DOJ's Commitment to the Rule of Law

From your initial appearance as then President-elect Biden's selection to become the 86th Attorney General, you have been outspoken about DOJ's commitment to the rule of law. On January 7, 2021, the day after the failed insurrection at the United States Capitol, you explained that the rule of law "is the very foundation of our democracy."[1] You continued:

> The essence of the rule of law is that like cases are treated alike. That there not be one rule for Democrats, and another for Republicans, one rule for friends, another for foes, one rule for the powerful, another for the powerless, one rule for the rich and another for the poor, or different rules, depending upon one's race or ethnicity.[2]

In the days before the one year anniversary of the January 6 attacks, you returned to similar themes. You promised,

> [W]e at the Department of Justice will do everything in our power to defend the American people and American democracy. We will defend our democratic institutions from attack. We will protect those who serve the public from violence and threats of violence.[3]

You also promised that with respect to the January 6 attacks, DOJ would hold "all January 6th perpetrators, at any level, accountable under the law -- whether they were present that day or were otherwise criminally responsible for the assault on our democracy" and "follow the facts wherever they lead."[4] You explained that DOJ will work "as long as it takes and [do] whatever it takes for justice to be done — consistent with the facts and the law."[5]

Your public commitments to the rule of law represent a welcome return to the values that have defined DOJ at its proudest moments. It will be critical for the principles you have articulated to govern the biggest decision facing DOJ: how to handle investigations of a former president with a staggering record of uncharged criminal conduct.

---

[1] Joe Biden Introduces DOJ Nominees, Merrick Garland Transcript, *REV* (Jan. 7, 2021), *available at* https://www.rev.com/blog/transcripts/joe-biden-introduces-doj-nominees-merrick-garland-transcript.
[2] *Id.*
[3] Attorney General Merrick B. Garland Delivers Remarks on the First Anniversary of the Attack on the Capitol, *U.S. Department of Justice* (Jan. 5, 2022), available at https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol.
[4] *Id.*
[5] *Id.*

Former President Trump's Staggering Record of Uncharged Criminal Conduct

Despite no longer serving in office, former President Donald Trump is a singular threat to American democracy. He has been credibly accused of at least 49 criminal offenses while running for president or holding that high office.[6] Nine of those 49 offenses stem from his 2016 campaign for president; 13 of those offenses relate to his attempts to obstruct the Russia and Special Counsel investigation; and at least 22 of those offenses relate to Trump's criminal efforts to gain unlawful electoral advantages in the 2020 election or steal it outright after he lost. The vast majority of the alleged offenses are federal and therefore fall within the Department's jurisdiction to prosecute.

While it is unlikely that the facts and law support charges against the former president in all 49 instances, it is even more unlikely that the facts and the law prove insufficient to support criminal charges in every one of these 49 instances. DOJ's failure thus far to charge the former president, or apparently to even open criminal investigations into him even though it is clearly warranted, represents the greatest crisis the department has faced since Watergate. If Trump continues to avoid meaningful accountability--especially for his numerous criminal attempts to steal an election--the rule of law that you have eloquently heralded is a dead letter. Trump and future would-be authoritarians will have learned that our Constitution has no answer to a president who commits crimes in order to stay in office.

The American people are counting on you to uphold the rule of law. Unfortunately, that project cannot be one you pursue for "as long as it takes." As you well know, the default federal statute of limitations is five years, which means the statute of limitations has likely begun to run on the offenses Trump committed in 2015, 2016 and 2017. You have made clear that you intend for the Department to speak through its work; the corollary to that approach is that the Department speaks volumes through its inaction. Now that the statute of limitations appears to be running on some of Trump's criminal acts, each month that passes without an indictment (or reports of any process calculated to establish probable cause) amounts to a decision not to pursue accountability in circumstances where it appears to be merited.

[6] Conor Shaw, President Trump's staggering record of uncharged criminal misconduct, CREW (Mar. 1, 2022), *available at* https://www.citizensforethics.org/reports-investigations/crew-reports/president-trump-staggering-record-of-uncharged-criminal-misconduct/.

DOJ Must Pursue Meritorious Prosecutions of Political Figures to Uphold the Rule of Law

It is critical that DOJ pursue prosecutions of political figures, including former presidents, where charges are merited. The principal counterargument to DOJ bringing meritorious prosecutions against former President Trump is the idea that the case will inevitably appear to some to be politically motivated--not least because that is how President Trump and his political allies will try to frame any action against him, regardless of the strength of the case.[7] While the optics of a criminal prosecution are always a real and significant challenge that a prosecution must contend with, it would be a grave injustice to forgo any attempt to secure accountability on this basis. A DOJ that is unwilling to pursue prosecutions that could become politically charged is not a DOJ that can deliver equal justice under the law. If DOJ practices forbearance in cases where accusations of partisanship might be leveled, DOJ is applying one standard to political actors and another standard to ordinary Americans--a choice that is itself a political act.

Political figures who secure and then abuse public office--including by using their public office to try to undermine the American people's ability to choose their leaders--are among the most deserving targets of DOJ's prosecutorial power.

While the circumstances facing DOJ are unique, they are not without precedent. The day after President Nixon resigned his presidency, aides to Special Prosecutor Jaworsky penned a memorandum outlining the arguments in favor of and against prosecuting the former president.[8] Nixon had already been named an unindicted co-conspirator in charges returned by a federal grand jury earlier that year, and President Ford had yet to issue the pardon that eventually foreclosed any prosecution of the former president. The memorandum began with the "presumption . . . that Richard M. Nixon, like every citizen, is subject to the rule of law," and proceeded from the "premise that if there is sufficient evidence, Mr. Nixon should be indicted and prosecuted" unless other factors mandated against indictment.[9]

The memorandum acknowledged that prosecuting Nixon "might aggravate political divisions in the country;" that "the times call for conciliation rather than recrimination;" and

[7] *See, e.g.*, Alexander Bolton, Republicans warn Justice Department probe of Trump would trigger political war, *The Hill* (Mar. 7, 2022), *available at* https://thehill.com/homenews/senate/596955-republicans-warn-justice-department-probe-of-trump-would-trigger-political.
[8] Memorandum to Leon Jaworski from Carl B Feldbaum and Peter M. Kreindler, *Watergate Special Prosecution Force, U.S. Department of Justice* (August 9, 1974), *available at* https://www.archives.gov/education/lessons/watergate-constitution/memo-transcript.
[9] *Id.*

that "there would be considerable difficulty in achieving a fair trial because of massive pre-trial publicity." Nevertheless, the memorandum articulated persuasive counterveilling arguments, namely:

> 1. The principle of equal justice under law requires that every person, no matter what his past position or office, answer to the criminal justice system for his past offenses. This is a particularly weighty factor if Mr. Nixon's aides and associates, who acted upon his orders and what they conceived to be his interests, are to be prosecuted for the same offenses.
>
> 2. The country will be further divided by Mr. Nixon unless there is a final disposition of charges of criminality outstanding against him so as to forestall the belief that he was driven from his office by erosion of his political base. This final disposition may be necessary to preserve the integrity of the criminal justice system and the legislative process, which together marshalled the substantial evidence of Mr. Nixon's guilt.
>
> 3. Article I, Section 3, clause 7 of the Constitution provides that a person removed from office by impeachment and conviction "shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." The Framers contemplated that a person removed from office because of abuse of his public trust still would have to answer to the criminal justice system for criminal offenses.
>
> 4. It cannot be sufficient retribution for criminal offenses merely to surrender the public office and trust which has been demonstrably abused. A person should not be permitted to trade in the abused office in return for immunity.
>
> 5. The modern nature of the Presidency necessitates massive public exposure of the President's actions through the media. A bar to prosecution on the grounds of such publicity effectively would immunize all future Presidents for their actions, however criminal. Moreover, the courts may be the appropriate forum to resolve questions of pre-trial publicity in the context of an adversary proceeding.

These arguments apparently prevailed, and Special Prosecutor Jaworski was reportedly going to pursue an indictment of the former president if the decision were left to him. Ultimately, of course, the decision was taken out of DOJ's hands. Although President Ford infamously made the political decision to pardon Nixon a month after his resignation, DOJ was prepared to fulfill its duty to bring a reasoned prosecution against the former president based on the facts and the law.

Conclusion

DOJ faces enormous challenges, but they are not of its making. The former president bears responsibility for his conduct as a candidate for president and as a steward of the power the Constitution bestows on duly elected presidents. It is critical that DOJ meet this challenge in a manner that reaffirms the rule of law and the processes that guide DOJ in all cases--including the most sensitive ones.

Thank you for your service to the American people and for upholding the rule of law.

Sincerely,

Noah Bookbinder
President
Citizens for Responsibility and Ethics in Washington