

September 17, 2019

Assistant Attorney General Lee J. Lofthus
Justice Management Division and
Designated Agency Ethics Official
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Suite 4706
Washington, D.C. 20530-0001

Re: Recusal of Attorney General William P. Barr from Investigations into the Origins of the Russian Counterintelligence Investigation

Dear Mr. Lofthus:

To ensure the integrity of the Department of Justice and its continuing commitment to the rule of law, Attorney General William P. Barr should be advised to recuse from all Department of Justice (“DOJ”) investigations into the origins of the Federal Bureau of Investigation (“FBI”) counterintelligence investigation regarding the Russian government’s interference in the 2016 election. Those matters include any investigation into whether President Donald J. Trump as well as the President’s current and former associates, businesses, and campaign may have been the subject of Foreign Intelligence Surveillance Act (“FISA”) supervision for their connection to Russian operatives.

Citizens for Responsibility and Ethics in Washington (“CREW”) previously raised questions about the propriety of Attorney General Barr’s participation in Special Counsel Robert S. Mueller’s investigation into Russia’s interference in the 2016 election and possible obstruction of justice by President Trump (the “Special Counsel Investigation”) because he appeared to have prejudged it based on his prior involvement in the matter while in private practice, and because his decision to issue a four-page letter to Congress about Special Counsel Mueller’s report prior to its public release appeared to be an attempt to skew public opinion in favor of President Trump.¹ CREW also requested that you withdraw any ethics advice or authorization that Attorney General Barr may have been relying on to support his participation in the Special Counsel Investigation and related investigations.²

Attorney General Barr’s conduct since Special Counsel Mueller released his report³ continues to raise significant concerns that he is acting without the requisite impartiality necessary to oversee these matters, and has, once again, prejudged the outcome of any DOJ

¹ Letter from Noah Bookbinder to Attorney General William P. Barr, Apr. 11, 2019, *available at* <https://bit.ly/2IN1ZXe>.

² Letter from Noah Bookbinder to Assistant Attorney General Lee Lofthus, May 20, 2019, *available at* <https://bit.ly/2Mis3LH>.

³ Special Counsel Robert S. Mueller, Report On The Investigation Into Russian Interference In The 2016 Presidential Election (“Special Counsel Report” or “Mueller Report”), Mar. 2019, *available at* <https://www.justice.gov/storage/report.pdf>.

investigation into the origins of these counterintelligence and criminal investigations.⁴ Because of the appearance of impropriety caused by Attorney General Barr's statements regarding these investigations, and his continued involvement in these matters, you should advise him to recuse from all of them. Under these circumstances, the applicable standards of conduct, at 5 C.F.R. § 2635.502 and Justice Manual § 1-4.020, clearly require his recusal.

Factual Background

On April 15, 2019, days prior to the release of the Special Counsel's redacted report, President Donald J. Trump tweeted, "INVESTIGATE THE INVESTIGATORS."⁵ Following the tweet, and the release of the redacted Mueller Report, Attorney General Barr appointed John H. Durham, the United States attorney in Connecticut, to begin a counter investigation into the origins of the Russia investigation ("Counter Investigation").⁶ Attorney General Barr launched the investigation to review "why the FBI opened a counterintelligence investigation into the Trump campaign" and to determine whether "law enforcement officials abused their power."⁷ The investigation is also expected to take a "critical look" at the Central Intelligence Agency's and other intelligence agencies' work on Russia's election interference.⁸

Attorney General Barr Initiated the Counter Investigation Despite Similar Ongoing DOJ Investigations

Attorney General Barr initiated the Counter Investigation despite two ongoing investigations into substantially the same matter – one overseen by the Department of Justice Inspector General Michael E. Horowitz, and one by John W. Huber, the United States Attorney in Utah. The Counter Investigation therefore is unnecessary and duplicative.

On March 28, 2018, Inspector General Horowitz announced his investigation ("OIG Investigation") to examine whether DOJ and the FBI complied with applicable legal requirements, policies and procedures with respect to the FISA application for a "certain U.S. person"⁹ reported to be Carter Page.¹⁰ As part of his investigation, Inspector General Horowitz said he would review the FBI's and DOJ's relationship with a "confidential source,"¹¹ reported

⁴ Jan Crawford, William Barr interview: Read the full transcript, *CBS This Morning*, May 31, 2019 ("CBS News Interview"), available at <https://cbsn.ws/2XlyPIK>.

⁵ Donald J. Trump (@realDonaldTrump), Twitter, Apr. 15, 2019, 4:15 AM, available at <https://twitter.com/realDonaldTrump/status/1117748268820201472>.

⁶ Adam Goldman, Charlie Savage, and Michael S. Schmidt, Barr Assigns U.S. Attorney in Connecticut to Review Origins of Russia Inquiry, *New York Times*, May 13, 2019, available at <https://nyti.ms/2LlIMtf>; Matt Zapposky and Felicia Sonmez, Barr taps U.S. attorney in Connecticut to investigate origins of Russia probe, *Washington Post*, May 13, 2019, available at <https://wapo.st/2xGIPfj>.

⁷ Julian E. Barnes, Katie Benner, Adam Goldman, and Michael S. Schmidt, Justice Dept. Seeks to Question C.I.A. in Its Own Russia Investigation, *New York Times*, June 12, 2019, available at <https://nyti.ms/2IbDWzK>.

⁸ *Id.*

⁹ Office of the Inspector General U.S. Department of Justice, DOJ OIG Announces Initiation of Review, Mar. 28, 2018 ("DOJ OIG Announcement"), available at <https://oig.justice.gov/press/2018/2018-03-28b.pdf>.

¹⁰ Matt Zapposky, Justice Dept. inspector general to review surveillance of former Trump campaign adviser, *Washington Post*, Mar. 28, 2018, available at <https://wapo.st/2JzV1D0>.

¹¹ DOJ OIG Announcement.

to be Christopher Steele, the author of the “infamous dossier” that contained damaging allegations about President Trump.¹² The OIG Investigation was initiated at the request of then-Attorney General Jeff Sessions and members of Congress,¹³ and subsequently was expanded by DOJ to include “any impropriety or political motivation in how the FBI conducted its counterintelligence investigation of persons suspected of involvement with the Russian agents who interfered in the 2016 presidential election.”¹⁴

President Trump was publicly derisive of the OIG Investigation even before it was officially announced.¹⁵ In a February 2018 tweet, President Trump made clear that he had been seeking the appointment of a DOJ prosecutor to conduct a criminal investigation into “potentially massive FISA abuse.”¹⁶ Amongst his complaints about the prospect of a DOJ Inspector General investigation was that it “will take forever” and he “has no prosecutorial power.”¹⁷

On September 13, 2019, Inspector General Horowitz notified Congress that he had begun the process of finalizing the report of his investigation.¹⁸ A draft of the factual findings has been provided to DOJ and the FBI for classification determination, and after that process is completed, Inspector General Horowitz will prepare final public and classified versions of the report, including reviews for “accuracy and comment purposes.”¹⁹ According to *Fox News*, “Barr has received the draft report from Horowitz and will begin the process of reviewing it.”²⁰

Not long after President Trump accused DOJ of unprecedented “spy[ing]” on his campaign,²¹ demanding it too be investigated,²² then-Attorney General Sessions designated U.S.

¹² Zapotosky, *Washington Post*, Mar. 28, 2018.

¹³ DOJ OIG Announcement.

¹⁴ Adam Edelman, *DOJ seeks probe of FBI conduct in 2016 campaign after Trump ‘spy’ claim*, *NBC News*, May 21, 2018, available at <https://nbcnews.to/2rXT0g0>.

¹⁵ Donald J. Trump (@realDonaldTrump), Twitter, Feb. 28, 2018, 6:34 AM, available at <https://twitter.com/realdonaldtrump/status/968856971075051521?lang=en> (“Why is A.G. Jeff Sessions asking the Inspector General to investigate potentially massive FISA abuse. Will take forever, has no prosecutorial power and already late with reports on Comey etc. Isn’t the I.G. an Obama guy? Why not use Justice Department lawyers? DISGRACEFUL!”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Letter from Inspector General Michael E. Horowitz to Sen. Ron Johnson, Sen. Gary C. Peters, Sen. Lindsey Graham, Sen. Dianne Feinstein, Rep. Elijah E. Cummings, Rep. Jim Jordan, Rep. Jerrold Nadler, and Rep. Doug Collins, Sept. 13, 2019, available at <https://bit.ly/2kBcMJT>.

¹⁹ *Id.*

²⁰ Alex Pappas, Catherine Herridge, and Jake Gibson, *DOJ watchdog submits draft report on alleged FISA abuses to Barr*, *Fox News*, Sept. 13, 2019, available at <https://fxn.ws/2kKMnsX>.

²¹ Donald J. Trump (@realDonaldTrump), Twitter, May 18, 2018, 3:24 AM, available at <https://twitter.com/realdonaldtrump/status/997422764909912065> (“Apparently the DOJ put a Spy in the Trump Campaign. This has never been done before and by any means necessary, they are out to frame Donald Trump for crimes he didn’t commit.” Dave Asman @LouDobbs @GreggJarrett Really bad stuff!”).

²² Donald J. Trump (@realDonaldTrump), Twitter, May 20, 2018, 10:37 AM, available at <https://twitter.com/realdonaldtrump/status/998256454590193665> (“I hereby demand, and will do so officially tomorrow, that the Department of Justice look into whether or not the FBI/DOJ infiltrated or surveilled the Trump

Attorney Huber to investigate allegations of FBI abuse of power in cooperation with Inspector General Horowitz.²³ That investigation, which is currently “on standby,” examined many of the same issues that the OIG Investigation probed and that are within the scope of the Counter Investigation.²⁴

Notwithstanding these two Sessions-initiated investigations, President Trump continued to call for additional investigations. For example, President Trump tweeted in August 2018:

Jeff, . . . look into all of the corruption on the “other side” including deleted Emails, Comey lies & leaks, Mueller conflicts, McCabe Strzok, Page, Ohr . . . FISA abuse, Christopher Steele & his phony and corrupt Dossier, the Clinton Foundation, illegal surveillance of Trump Campaign, Russian collusion by Dems - and so much more. Open up the papers & documents without redaction? Come on Jeff, you can do it, the country is waiting!²⁵

In May 2019, shortly after his confirmation and despite the related ongoing OIG and Huber Investigations, Attorney General Barr appointed U.S. Attorney Durham to lead a third DOJ investigation “to examine the origins of the Russia investigation”²⁶ and look into whether the U.S. government’s “‘intelligence collection activities’ related to the Trump campaign were ‘lawful and appropriate.’”²⁷

Attorney General Barr’s Prejudicial Comments Undermine the Independence and Integrity of the Counter Investigation and Indicate He Has Prejudged Its Outcome and the OIG Investigation

Attorney General Barr’s comments regarding the Counter Investigation undermine its independence and integrity and indicate that he has prejudged its outcome. They similarly indicate he has prejudged the IG Investigation.

Campaign for Political Purposes - and if any such demands or requests were made by people within the Obama Administration!”)

²³ Letter from Attorney General Sessions to Sen. Charles E. Grassley, Rep. Robert W. Goodlatte, Rep. Trey Gowdy, Mar. 29, 2018, available at <https://bit.ly/2Z5Rjql>. Attorney General Sessions’ request for the Huber Investigation followed an earlier request he made to U.S. Attorney Huber to investigate various allegations related to the FBI’s handling of investigations involving former Secretary of State Hillary Clinton. Letter from Attorney General Sessions to U.S. Attorney John W. Huber, Nov. 22, 2017, available at <https://bit.ly/31J1Klq>.

²⁴ See, e.g., Jen Kirby, The investigations into the Russia investigations, explained, *Vox*, May 29, 2019, available at <https://bit.ly/2NcB74n>. According to Attorney General Barr, the Huber Investigation is “on standby” in the event the DOJ Inspector General made a criminal referral, but that it had not been “active” in recent months. *CBS News* Interview. Attorney General Barr reported that U.S. Attorney Durham would be “taking over” for U.S. Attorney Huber, while other matters relating to Hillary Clinton that Huber had been working on were “winding down.” *Id.*

²⁵ Donald J. Trump (@realDonaldTrump), Twitter, Aug. 24, 2018, 6:17 AM, available at <https://bit.ly/2PCJvJi>; Donald J. Trump, (@realDonaldTrump), Aug. 24, 2018, 6:28 AM, available at <https://bit.ly/2MKoA8F>.

²⁶ Goldman, Savage, and Schmidt, *New York Times*, May 13, 2019.

²⁷ Zapotosky and Sonmez, *Washington Post*, May 13, 2019.

In Attorney General Barr's interview with *CBS News* on May 31, 2019,²⁸ he made a number of statements about the focus of the Counter Investigation that would lead a reasonable person to believe that he had prejudged its outcome. Many of these points were similar to statements Attorney General Barr made in an earlier interview he gave to *Fox News* on May 28, 2019.²⁹ Together, these interviews and other public statements made by Attorney General Barr suggest he is actively engaged in a deliberate effort to influence the outcome of the Counter Investigation. These statements include:

- Attorney General Barr has already determined that the FBI's counterintelligence investigation was not properly initiated:
 - "People have to understand . . . that these efforts in 2016, these counter-intelligence activities that were directed at the Trump Campaign, were not done in the normal course and not through the normal procedures as far as I can tell."³⁰ Barr made a substantially similar statement in his *Fox News* Interview.³¹
- Attorney General Barr has already determined that the FISA process was used specifically against the Trump campaign, for political motivations, rather than against Russia:
 - "[T]he 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."³²
 - "The fact that today people just seem to brush aside the idea that it is okay to you know, to engage in these activities against a political campaign is stunning to me especially when the media doesn't seem to think that it's worth looking into."³³
- Attorney General Barr attributes blame to a "small group" of "top" officials:
 - "I think the activities were undertaken by a small group at the top which is one of the – probably one of the mistakes that has been made instead of running this as a normal bureau investigation or counterintelligence investigation. It was done by the executives at the senior level. Out of head

²⁸ See *CBS News* Interview.

²⁹ See Bill Hemmer, William Barr Interview, *Fox News*, May 18, 2019 (approximately 2:05) ("*Fox News* Interview"), available at <https://bit.ly/30srkdN>; see also Ian Schwartz, Barr: Democrats "Trying To Undermine My Credibility", *RealClearPolitics*, May 18, 2019, available at <https://bit.ly/30srkdN>.

³⁰ *CBS News* Interview.

³¹ *Fox News* Interview ("You know the thing that's interesting about this is that this was handled at a very senior level of these departments; it wasn't handled in the ordinary way that investigations or counterintelligence activities are conducted it was sort of an ad-hoc small group and most of these people are no longer with the FBI or the CIA or the other agencies involved.").

³² *CBS News* Interview.

³³ *Id.*

- quarters.”³⁴ Barr made a substantially similar statement in his *Fox News* Interview³⁵ as well as in congressional testimony.³⁶
- In his *CBS News* Interview, while Attorney General Barr declined to name the officials whose conduct he believes is at issue, he confirmed that he had “concerns” about how “some in the upper echelon,” including former FBI Director Comey and former acting FBI Director Andrew McCabe “conducted the investigation,” then weighed in on the “bias” that appeared to motivate their conduct: “[W]hen you’re dealing with official government contact, intent is frequently a murky issue. I’m not suggesting that people did what they did necessarily because of conscious, nefarious motives. Sometimes people can convince themselves that what they’re doing is in the higher interest, the better good. They don’t realize that what they’re doing is really antithetical to the democratic system that we have. They start viewing themselves as the guardians of the people that are more informed and insensitive than everybody else. They can – in their own mind, they can have those kinds of motives. And sometimes they can look at evidence and facts through a biased prism that they themselves don’t realize. That something objectively as applied as a neutral principle across the board really you know, shouldn’t be the standard used in the case but because they have a particular bias they don’t see that.”³⁷
 - In his *Fox News* Interview, Attorney General Barr appeared to confirm the identities of three persons under investigation by responding, when asked about the conduct of John Brennan, John Clapper and Jim Comey: “I’m not going to speculate about their motives” and whether they “had it in” for President Trump.³⁸
 - Attorney General Barr has prejudged some of the facts in question:
 - “Well it’s hard to read some of the texts with and not feel that there was gross bias at work and they’re appalling.”³⁹
 - “Those [texts] were appalling. And on their face they were very damning and I think if the shoe was on the other foot we could be hearing a lot about it.”⁴⁰
 - In his *Fox News* Interview, Attorney General Barr stated: “It’s a very unusual situation to have opposition research like [the Steele Dossier] especially one that on its face had a number of clear mistakes,” and “to use that to conduct

³⁴ *Id.*

³⁵ *Fox News* Interview. (“You know the thing that’s interesting about this is that this was handled at a very senior level of these departments; it wasn’t handled in the ordinary way that investigations or counterintelligence activities are conducted it was sort of an ad-hoc small group and most of these people are no longer with the FBI or the CIA or the other agencies involved.”).

³⁶ William Barr, Testimony before the Senate Judiciary Committee, May 31, 2019, *available at* <https://cs.pn/2lsAHLs> (“To the extent there was overreach what we have to be concerned about is a few people at the top getting it into their heads they know better than the American people.”).

³⁷ *CBS News* Interview. Attorney General Barr also declined, “as a legal matter,” to characterize their conduct as treasonous, which President Trump alleged in an earlier statement. Philip Bump, Trump, not understanding treason, names people he thinks committed the capital crime, *Washington Post*, May 23, 2019, *available at* <https://wapo.st/2k0DI5p>.

³⁸ *Fox News* Interview.

³⁹ *CBS News* Interview.

⁴⁰ *Id.*

- counterintelligence against” an “American political campaign,” adding that would be a “strange development.”⁴¹
- When asked in the *Fox News* Interview, if anyone in the government or in intelligence took “action to justify their decisions,” Attorney General Barr responded: “I think there were some very strange developments during that period . . . such as the handling of the [Trump Tower] meeting on January 6 between the intelligence Chiefs and the president and the leaking of information subsequent to that meeting.”⁴²
 - In July 2019, Attorney General Barr continued to make disparaging comments about the basis for the counterintelligence investigation into the Trump Campaign by asking about how the “bogus narrative” began that President Trump was “essentially in cahoots with Russia to interfere with the U.S. election?”⁴³

Attorney General Barr’s use of the term “spying” to describe the FBI’s conduct also indicates that he has prejudged any investigation into the origins of the counterintelligence investigation and is attempting to influence its outcome. Shortly before Attorney General Barr opened the Counter Investigation, he testified to Congress that “spying on a political campaign is a big deal” and that he believed “spying did occur.”⁴⁴ As a result, Attorney General Barr said he intended to find out whether the alleged spying was “adequately predicated.”⁴⁵

As shown by President Trump’s own tweets accusing DOJ and FBI of spying on his campaign and characterizing that activity as “really bad stuff,”⁴⁶ “bad!”,⁴⁷ “TREASON!”,⁴⁸ which demands “long jail sentences,”⁴⁹ the use of the term “spying” connotes nefarious and possibly illegal conduct. Underscoring the prejudicial import of the “spying” allegations, FBI Director Christopher Wray also said it would not be “right or appropriate” to share his personal views on whether the FBI “spied” on the 2016 presidential campaign operation while the OIG

⁴¹ *Fox News* Interview.

⁴² *Id.*

⁴³ Katie Benner, [Barr Says House Subpoenaed Mueller to Create ‘Public Spectacle’](https://www.nytimes.com/2019/07/08/us/politics/mueller-testify-william-barr.html), *New York Times*, July 8, 2019, available at <https://www.nytimes.com/2019/07/08/us/politics/mueller-testify-william-barr.html>.

⁴⁴ Nick Fandos and Adam Goldman, [Barr Asserts Intelligence Agencies Spied on the Trump Campaign](https://nyti.ms/2IroH6i), *New York Times*, Apr. 10, 2019, available at <https://nyti.ms/2IroH6i>.

⁴⁵ *Id.*

⁴⁶ Donald J. Trump (@realDonaldTrump), Twitter, May 18, 2018, 6:24 AM, available at <https://bit.ly/2ZWNxRB> (“‘Apparently the DOJ put a Spy in the Trump Campaign. This has never been done before and by any means necessary, they are out to frame Donald Trump for crimes he didn’t commit.’ David Asman @LouDobbs @GreggJarrett Really bad stuff!”).

⁴⁷ Donald J. Trump (@realDonaldTrump), Twitter, Jan. 15, 2019, 6:58 AM, available at <https://bit.ly/2yW1IdQ> (“The rank and file of the FBI are great people who are disgusted with what they are learning about Lyin’ James Comey and the so-called “leaders” of the FBI. Twelve have been fired or forced to leave. They got caught spying on my campaign and then called it an investigation. Bad!”).

⁴⁸ Donald J. Trump (@realDonaldTrump), Twitter, May 17, 2019, 7:11 AM, available at <https://bit.ly/2IZTy0y> (“My Campaign for President was conclusively spied on. Nothing like this has ever happened in American Politics. A really bad situation. TREASON means long jail sentences, and this was TREASON!”).

⁴⁹ *Id.*

Investigation is ongoing.⁵⁰ FBI Director Wray further noted that it is important to “respect the independence” of the OIG’s investigative process so as to ensure “full confidence in his review.”⁵¹

For many of the same reasons, Attorney General Barr’s comments and his use of the term “spying” indicates that he has prejudged the OIG Investigation. He has already determined that the FISA process was used specifically against the Trump campaign for political reasons and that the FBI’s counterintelligence investigation was not properly initiated, and he further believes “spying” has occurred. All of these are likely subjects of the OIG Investigation.

The Findings and Results of the Special Counsel Investigation Show that the FBI Counterintelligence Investigation was Fully Justified

Attorney General Barr initiated the Counter Investigation to examine the origins of the FBI counterintelligence investigation even though the findings and results of Special Counsel Mueller’s investigation show that the FBI counterintelligence investigation was amply justified.

The FBI counterintelligence investigation and Special Counsel Mueller’s investigation are inextricably intertwined. The FBI counterintelligence investigation “ultimately led” to Special Counsel Mueller’s appointment in May 2017, and the order authorizing him to investigate “‘the Russian government’s efforts to interfere in the 2016 presidential election,’ including any links or coordination between the Russian government and individuals associated with the Trump Campaign.”⁵² Like the Special Counsel Investigation, the FBI counterintelligence investigation focused on the Russian government’s efforts to interfere in the 2016 presidential election and included investigations of links between the Russian government and individuals associated with the Trump Campaign.⁵³

As a threshold matter, Special Counsel Mueller found that Russia interfered in the 2016 presidential election in a “sweeping and systematic fashion” by operating a social media campaign that favored presidential candidate Trump and by engaging in computer-hacking operations against the Clinton Campaign that led to the release of numerous stolen documents.⁵⁴

⁵⁰ Adam Edelman, FBI chief Wray refutes Barr, saying no ‘spying’ on Trump campaign, *NBC News*, May 7, 2019, available at <https://nbcnews.to/2H8MOG2>.

⁵¹ *Id.* (in accompanying video). FBI Director Wray also distanced himself from these prejudicial statements by stating “that’s not the term I would use” and denying “any evidence of that sort” when asked about the possibility that illegal surveillance had been used on the Trump Campaign or its associates. Devlin Barrett, FBI director tells Congress he has no evidence of ‘spying’ on Trump campaign, *Washington Post*, May 7, 2019, available at <https://wapo.st/32neAXV>.

⁵² Mueller Report, Vol. I, at 1.

⁵³ Mueller Report, Vol. I, at 8. On March 20, 2017, then-Director James Comey confirmed to Congress that the FBI was conducting a counterintelligence investigation into “the Russian government’s efforts to interfere in the 2016 presidential election, and that includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia’s efforts . As with any counterintelligence investigation, this will also include an assessment of whether any crimes were committed.” Full Transcript: FBI Director James Comey testifies on Russian interference in 2016 election, *Washington Post*, Mar. 20, 2017, available at <https://wapo.st/2n6C5BE>.

⁵⁴ Mueller Report, Vol. I, at 1.

Special Counsel Mueller found that those releases were “designed and timed to interfere” with the 2016 presidential election and “to damage a presidential candidate.”⁵⁵

Special Counsel Mueller’s investigation was also overwhelmingly successful as measured by the number of indictments, convictions, and plea agreements obtained against Russian nationals and entities and Trump Campaign officials or associates. As part of his investigation, Special Counsel Mueller brought criminal indictments against thirteen Russian nationals, three Russian entities and twelve Russian military intelligence officers for operations in support of the social media campaign and computer-hacking.⁵⁶

In addition to the Russian indictments, Special Counsel Mueller obtained plea agreements, convictions or indictments against several Trump Campaign officials or associates, including Michael Flynn, Richard Gates, Paul Manafort, and George Papadopoulos.⁵⁷ According to the Mueller Report, Mr. Papadopoulos’ conduct led the FBI to open an investigation into persons associated with the Trump Campaign who were coordinating with the Russian government as part of its interference activities.⁵⁸ Mr. Papadopoulos subsequently pleaded guilty to lying to investigators about “the nature and timing of his interactions with Joseph Mifsud, a professor who told Papadopoulos that the Russians had dirt on candidate Clinton in the form of thousands of emails.”⁵⁹

In addition to Mr. Papadopoulos, the investigation “established” that several other “individuals affiliated with the Trump Campaign lied to the Office, and to Congress, about their interactions with Russian-affiliated individuals and related matters” and “those lies materially impaired the investigation of Russian election interference.”⁶⁰ Mr. Flynn pleaded guilty to lying about his interactions with Russian Ambassador Sergey Kislyak; Mr. Cohen pleaded guilty to making false statements to Congress about a real estate project in Russia known as Trump Tower Moscow; and Mr. Manafort was found by a federal district judge the U.S. District Court for the District of Columbia to have lied to the Special Counsel’s Office and the grand jury “concerning his interactions and communications with Konstantin Kilimnik about Trump Campaign polling data and a peace plan for Ukraine.”⁶¹

Special Counsel Mueller also investigated and identified numerous links between the Trump campaign and individuals with ties to the Russian government.⁶² By one count, the Mueller Report revealed at least 140 contacts by President Trump or 18 of his associates with

⁵⁵ Full Transcript of Mueller’s Statement on Russia Investigation, *New York Times*, May 29, 2019, available at <https://nyti.ms/310zFq8>.

⁵⁶ Mueller Report, Vol. I, at 174-75.

⁵⁷ Mueller Report, Appendix D; Sharon LaFraniere, Paul Manafort, Trump’s Former Campaign Chairman, Guilty of 8 Counts, *New York Times*, Aug. 21, 2018, available at <https://nyti.ms/2N4RU6t>.

⁵⁸ Mueller Report, Vol. I, at 1.

⁵⁹ Mueller Report, Vol. I, at 9.

⁶⁰ Mueller Report, Vol. I, at 9.

⁶¹ Mueller Report, Vol. I, at 9-10.

⁶² Mueller Report, Vol. I, at 66.

Russian nationals and Wikileaks.⁶³ Although it did not establish that the Trump Campaign conspired or coordinated with the Russian government in the election interference activities,⁶⁴ the Special Counsel Investigation identified contacts made at the highest levels of the Trump Campaign. For example, these contacts included the June 9, 2016 Trump Tower meeting between a Russian attorney who previously worked for, and maintained close ties to, the Russian government and President Trump's campaign advisor and son Donald Trump Jr., campaign advisor and son-in-law Jared Kushner, and campaign chairman Paul Manafort.⁶⁵ The senior campaign advisors in attendance at the meeting were "expecting to receive derogatory information about Hillary Clinton from the Russian government."⁶⁶

Another notable example involves Mr. Manafort, who briefed his business colleague Konstantin Kilimnik on the state of the Trump Campaign and shared campaign messaging and internal polling data in an August 2016 meeting in New York City.⁶⁷ Mr. Manafort then instructed his deputy Rick Gates to share the Trump Campaign's sensitive internal polling data and other campaign updates with Kilimnik, with the understanding that Kilimnik, in turn, would share it with a Russian oligarch and Ukrainian oligarchs.⁶⁸ Gates proceeded to share this information over several months via Kilimnik who was believed by the FBI to have ties to Russian intelligence.⁶⁹

In addition, had Special Counsel Mueller not encountered obstacles in conducting the investigation, even more light might have been shed on the relevant events.⁷⁰

All of the above shows the FBI counterintelligence investigation, which was taken over by the appointment of Special Counsel Mueller, was fully justified and warranted.

Allegations that Carter Page Was Subjected to Spying Are Specious

To the extent that Attorney General Barr's allegation that "spying did occur" is based on the process by which the FBI collected information about Carter Page, that claim is specious at best. As a preliminary matter, that process reportedly is one of the matters under review by Inspector General Horowitz,⁷¹ making the Counter Investigation into this issue superfluous. With

⁶³ Karen Yourish and Larry Buchanan, Mueller Report Shows Depth of Connections Between Trump Campaign and Russians, *New York Times*, Apr. 19, 2019, available at <https://nyti.ms/2TfXRAF>.

⁶⁴ Mueller Report, Vol. I, at 1-2.

⁶⁵ Mueller Report, Vol. I, at 110.

⁶⁶ Mueller Report, Vol. I, at 110.

⁶⁷ Mueller Report, Vol. I, at 140.

⁶⁸ Mueller Report, Vol. I, at 129-31, 136.

⁶⁹ Mueller Report, Vol. I, at 6 and 129, 133.

⁷⁰ Mueller Report, Vol. I, at 10. Some individuals associated with the Trump Campaign deleted relevant communications or used encrypted applications to prevent their disclosure; some persons invoked their Fifth Amendment right against self-incrimination; and some witnesses provided "false or incomplete" information that led to false statements charges. *Id.* In addition, President Trump was unwilling to be interviewed by the Special Counsel on Russian-election interference and "generally" lacked truthfulness in his written answers. Mueller Report, Appendix C-1.

⁷¹ Mark Hosenball, Trump 'dossier' author grilled by Justice Department watchdogs: sources, *Reuters*, July 9, 2019, available at <https://reut.rs/2xK3gGV>.

regard to the substance of the allegation, the stringent legal process for obtaining a FISA warrant, the application of that process to the efforts to collect information about Mr. Page, and the factual conclusions about him reached by the Special Counsel Investigation debunk any allegation of improper “spying.”

The Mueller Report serves to highlight several important points about the FISA warrant process and ways in which it is designed to prevent the very type of “spying” Attorney General Barr is alleging occurred. The jurisdiction for granting a FISA warrant lies not with any individual employee of the FBI, DOJ, or other executive branch agency, but with a specially-designated federal judge.⁷² The FISA warrant process requires the government to file a detailed application approved at the highest levels of the government asking the Foreign Intelligence Surveillance Court to authorize electronic surveillance.⁷³ To obtain the warrant, the government must show probable cause to believe both that the proposed target is a foreign power or an agent of a foreign power and that the facility or place is or is about to be used by that target.⁷⁴

This demanding and thorough process was followed in the applications for FISA warrants for Mr. Page. And on four separate occasions, including twice after President Trump took office, four different federal judges found probable cause to believe that Mr. Page was an agent of a foreign power.⁷⁵

Special Counsel Mueller likewise found evidence that “Russian intelligence officials had formed relationships with Page in 2008 and 2013 and Russian officials may have focused on Page in 2016” because he worked for the Trump Campaign as a foreign policy advisor from January 2016 to September 2016.⁷⁶ Special Counsel Mueller also found that Mr. Page lived and worked in Russia between 2003 and 2007 and, after returning to the United States, “Page became acquainted with at least two Russian intelligence officers, one of whom was later charged in 2015 with conspiracy to act as an unregistered agent of Russia.”⁷⁷ With this background and contemporaneous evidence of Russian interference in the 2016 Presidential election,⁷⁸ any

⁷² 50 U.S.C. §§ 1803-04.

⁷³ 50 U.S.C. § 1805(a)(2)(A)

⁷⁴ *Id.* The probable-cause finding necessary to obtain a FISA warrant is a “different (and lower) standard” than evidence needed to prove a crime “beyond a reasonable doubt,” Mueller Report, Vol. I, at 183, n. 1282 (citation omitted) – the standard required by DOJ for its prosecutors to seek an indictment. Comment to Justice Manual § 9-27.300 (“At the outset, the attorney for the government should bear in mind that he/she will have to introduce at trial admissible evidence sufficient to obtain and sustain a conviction, or else the government will suffer a dismissal, or a reversal on appeal. For this reason, he/she should not include in an information, or recommend in an indictment, charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient and admissible evidence at trial.”).

⁷⁵ Mueller Report, Vol. I, at 183; Applications and Court Orders for FISA Warrants Against Carter Page, October 2016, January 2017, April 2017, and June 2017 (“FISA Applications and Court Orders”), available at <https://bit.ly/2C0ANQc>.

⁷⁶ Mueller Report, Vol. I, at 95.

⁷⁷ Mueller Report, Vol. I, at 6.

⁷⁸ See FISA Applications and Court Orders. See also David Kris, *What to Make of the Carter Page FISA Applications*, *Lawfare*, July 21, 2018, available at <https://bit.ly/2LDriZy>.

⁷⁸ Natasha Bertrand, *Trump dossier author Steele gets 16-hour DOJ grilling*, *Politico*, July 9, 2019, available at <https://politi.co/30qrvqe>.

argument that the FISA warrants against Mr. Page were not “adequately predicated” defies common sense and renders Attorney General Barr’s claims of “spying” meritless.

Legal Analysis

The government-wide Standards of Conduct require all executive branch employees to act impartially and to avoid any actions creating the appearance that they are violating the applicable ethical standards.⁷⁹ Furthermore, to ensure public trust in the federal prosecutorial system, DOJ places even greater demands on government employees who are selected to serve as federal prosecutors. That system relies on the “character, integrity, sensitivity, and competence” of those selected to “represent the public interest in the federal criminal justice process”⁸⁰ and requires federal prosecutors to “promote confidence that important prosecutorial decisions will be made rationally and objectively on the merits of each case.”⁸¹ Accordingly, DOJ’s standards of conduct make explicit the requirement that “an employee should contact his or her ethics official for advice or approval when the employee . . . is asked to participate in a matter that might cause a reasonable person to question his or her impartiality.”⁸²

DOJ also maintains a media policy that governs the protection and release of information obtained in the course of its work. The purpose of the policy is to balance due process and privacy interests, the government’s ability to administer justice and promote public safety, and the public’s right to access information about the Department of Justice.⁸³ Under this policy, “DOJ personnel shall not make any statement or disclose any information that reasonably could have a substantial likelihood of materially prejudicing an adjudicative proceeding.”⁸⁴ DOJ personnel also are required to refrain from disclosing observations about a party’s character and any opinion as to the defendant’s guilt.⁸⁵

Notwithstanding these ethical, due process, and privacy obligations, Attorney General Barr has made statements in media interviews and to Congress strongly indicating that he is

⁷⁹ 5 C.F.R. §§ 2635.101(b)(8), (14).

⁸⁰ Justice Manual § 9-27.001.

⁸¹ *Id.*

⁸² Justice Manual § 1-4.020. *See also* 5 C.F.R. §§ 2635.502(a)(2), (d); 5 C.F.R. § 2635.102(b) (“Where the conduct in issue is that of the agency head” any required “determination, approval or action” is to “be made or taken by the agency head in consultation with the designated agency ethics official.”).

⁸³ Justice Manual § 1-7.001.

⁸⁴ Justice Manual § 1-7.600.

⁸⁵ Justice Manual § 1-7.610. *See also* ABA Model Rules of Professional Conduct Rule 3.8(f) (“The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”); ABA Model Rules of Professional Conduct Rule 3.6 (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”).

acting without the requisite impartiality and has prejudged the outcome of any DOJ investigation into the origins of the FBI counterintelligence investigation regarding the Russian government's interference in the 2016 election. Attorney General Barr apparently has already concluded that the counterintelligence investigation was "not done in the normal course and not through the normal procedures," crossed a "serious red line," and was undertaken by a "small group" of "top" officials. Attorney General Barr also seemingly confirmed the identity of at least three of the individuals whose conduct is at issue as a result of their participation in a January 2017 Trump Tower meeting, possibly in violation of their due process and privacy protections under DOJ guidelines. In addition, he has apparently concluded that the FBI's conduct is properly characterized as "spying," despite the prejudicial connotations of that term.

The findings and results of the Special Counsel Investigation, however, show that the FBI counterintelligence investigation was fully justified and efforts to investigate the investigators are unwarranted. Given the extraordinary productivity of the Special Counsel Investigation – which resulted in multiple plea agreements, convictions, or indictments against Russian nationals, entities, and officials, as well as senior officials and associates of the Trump Campaign – Attorney General Barr's decision to open a Counter Investigation lacks a rational basis and appears retaliatory in nature. In addition, in view of the two related ongoing investigations, Attorney General Barr's decision to open a third investigation is unnecessary and duplicative. The OIG Investigation, supported by the Huber Investigation, is already considering the allegations at issue, including those of alleged "spying" against the Trump Campaign. Moreover, as indicated in the Mueller Report, the FISA warrant process in the case of Mr. Page was adequately predicated, resulting in warrants being authorized by four separate federal judges on four separate occasions, including on two occasions after President Trump was inaugurated, based on probable-cause findings that Mr. Page acted as an agent of a foreign government.

By initiating a third investigation under these circumstances, Attorney General Barr appears to have acted at the behest of President Trump, who called for this very action when he tweeted: "INVESTIGATE THE INVESTIGATORS!" Attorney General Barr's conduct throughout the process reveals that he lacks the requisite impartiality necessary to oversee the Counter Investigation. Furthermore, his comments are prejudicial and undermine the independence of the investigative process. On this basis, you should instruct Attorney General Barr to recuse from further participation in the Counter Investigation to protect the integrity of the investigative process, and from participation in any review of or follow up on the OIG Investigation. He should be further instructed to refrain from commentary about the ongoing investigation to avoid further depriving those involved of their due process and privacy protections.

Conclusion

By making prejudicial public comments related to the Counter Investigation, Attorney General Barr has undermined public confidence in the DOJ investigative process. His actions surrounding the Counter Investigation further reveal a disturbing pattern of conduct that strongly suggest his impartiality has been materially impaired in violation of his ethical, due process, and privacy obligations. His comments and actions similarly indicate he has prejudged the OIG

Assistant Attorney General Lee J. Lofthus

September 17, 2019

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Investigation. To avoid further harm to the integrity of the investigative process, CREW respectfully requests that you instruct Attorney General Barr to recuse from the Counter Investigation, the OIG Investigation, and all related investigations, and refrain from further public commentary about them.

Sincerely,



Noah Bookbinder
Executive Director



Virginia Canter
Chief Ethics Counsel

cc: Corey R. Amundson
Director and Chief Counsel, Office of Professional Responsibility