

October 7, 2019

Michael E. Horowitz  
Inspector General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

Re: Request for Investigation into Attorney General William P. Barr's Participation in Matters Related to President Trump's Request for Political Favors from a Foreign Government

Dear Mr. Horowitz:

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully requests that the Office of the Inspector General investigate Attorney General William P. Barr's participation in Department of Justice ("DOJ") matters related to allegations in a whistleblower complaint that President Donald J. Trump sought political favors from a foreign government for his political benefit.

The whistleblower complaint, based in part on President Trump's July 25, 2019 telephone conversation with President Volodymyr Zelensky of Ukraine and submitted to the Intelligence Community Inspector General ("ICIG") on August 12, 2019, directly implicated Attorney General Barr and identified him as being involved in that matter. As a result, he should not have participated in any matters related to the conversation and the complaint. DOJ has already taken several known actions related to the complaint, including issuing a legal opinion concluding that the ICIG did not have a statutory obligation to forward the complaint to the congressional intelligence committees and closing without investigation a review of whether the telephone conversation violated campaign finance law. Attorney General Barr, however, does not appear to have recused from these or other matters related to the whistleblower complaint. Failure to do so would violate 18 U.S.C. § 208 and other ethics laws and principles and taint DOJ's advice and actions resulting from the complaint.

Concerns about Attorney General Barr's conduct in this matter arise in the context of multiple other incidents in which his impartiality has been called into question. 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.<sup>1</sup> CREW also raised concerns about Attorney General Barr's lack of impartiality when he issued a four-page letter to Congress purporting to summarize Special Counsel Mueller's report prior to its public release in an apparent attempt to skew public opinion in favor of President Trump.<sup>2</sup> Subsequent statements made by Attorney General Barr

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<sup>1</sup> Letter from Noah Bookbinder to Attorney General William P. Barr, Apr. 11, 2019, available at <https://bit.ly/2IN1ZXe>; Letter from Noah Bookbinder to Assistant Attorney General Lee J. Lofthus, May 20, 2019, available at <https://bit.ly/2Mis3LH>.

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

further indicated that he prejudged the outcome of DOJ investigations into the origins of the Russia counterintelligence and criminal investigations.<sup>3</sup>

The possibility that Attorney General Barr has been involved in DOJ matters concerning the whistleblower complaint raise new and even more serious ethics concerns, including: Attorney General Barr's seemingly disqualifying financial interest under 18 U.S.C. § 208; his lack of impartiality in overseeing related DOJ matters; and his apparent misuse of public office for President Trump's personal political benefit in violation of the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards of Conduct"). Attorney General Barr's participation in DOJ matters involving the whistleblower complaint undermines DOJ's integrity and independence in enforcing the law.

### **Factual Background**

#### *The Whistleblower Complaint*

President Trump's deeply concerning conduct and Attorney General Barr's connections to it were exposed in a whistleblower complaint filed with the ICIG, Michael Atkinson, on August 12, 2019.<sup>4</sup> The whistleblower reported that President Trump was "using the power of his office to solicit interference from a foreign country in the 2020 election" by "pressuring a foreign country to investigate one of the President's main domestic political rivals."<sup>5</sup> President Trump's actions, the whistleblower stated, "pose risks to U.S. national security and undermine the U.S. Government's efforts to deter and counter foreign interference in U.S. elections."<sup>6</sup>

At the outset of the complaint, the whistleblower identified President Trump's personal lawyer, Rudolph Giuliani, "as a central figure in this effort," and reported that "Attorney General Barr appears to be involved as well."<sup>7</sup>

Specifically, the whistleblower alleged President Trump "sought to pressure" President Zelensky during the July 25 call into taking "actions to help the President's 2020 reelection bid." According to the complaint, President Trump pressured President Zelensky to:

- initiate or continue an investigation into the activities of former Vice President Joseph Biden and his son, Hunter Biden;
- assist in purportedly uncovering that allegations of Russian interference in the 2016 U.S. presidential election originated in Ukraine, with a specific request that the Ukrainian leader locate and turn over servers used by the Democratic National Committee (DNC) and examined by the U.S. cyber

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<sup>3</sup> Letter from Noah Bookbinder to Assistant Attorney General Lee J. Lofthus, Sept. 17, 2019, available at <https://bit.ly/2lh1KtB>.

<sup>4</sup> Letter to Senator Richard Burr and Rep. Adam Schiff from an unnamed whistleblower, Aug. 12, 2019 ("Whistleblower Complaint"), available at <https://bit.ly/2lXyus1>; Letter from ICIG Michael Atkinson to Acting DNI Joseph Maguire, Aug. 26, 2019 ("Atkinson Letter"), available at <https://bit.ly/2nWqjwW>.

<sup>5</sup> Whistleblower Complaint.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

- security firm CrowdStrike, which initially reported that Russian hackers had penetrated the DNC's networks in 2016; 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>8</sup>

The whistleblower further noted that the phone call took place in the context of a national security policy change made by President Trump that suspended U.S. aid to Ukraine on July 18.<sup>9</sup> It was subsequently reported that almost \$400 million in military and foreign aid was being withheld by President Trump.<sup>10</sup>

The whistleblower also alleged that “senior White House officials had intervened to ‘lock down’ all records of the phone call,” including the “official word-for-word transcript of the call.”<sup>11</sup> White House officials were “directed” by White House lawyers to “remove the electronic transcript” from the computer system and to load into “a separate electronic system that is otherwise used to store and handle classified information of an especially sensitive nature.”<sup>12</sup> This action was viewed by one White House official as “an abuse of this electronic system because the call did not contain anything remotely sensitive from a national security perspective.”<sup>13</sup> The whistleblower alleged in the appendix to the complaint that “this was ‘not the first time’ that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive -- rather than national security sensitive -- information.”<sup>14</sup>

*The White House Memorandum of the July 25, 2019 Telephone Call*

The allegations in the whistleblower complaint regarding both President Trump and Attorney General Barr are corroborated by a five-page memorandum (“Memorandum”) released by the White House that summarized the July 25 telephone conversation between President Trump and President Zelensky.<sup>15</sup> According to the Memorandum, after President Zelensky stated Ukraine was nearly ready to buy military weapons from the United States for defense purposes, President Trump immediately told him, “I would like you to do us a favor though.”<sup>16</sup> President Trump then asked President 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.<sup>17</sup>

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<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> Karoun Demirjian, Josh Dawsey, Ellen Nakashima, and Carol D. Leonnig, Trump ordered hold on military aid days before calling Ukrainian president, officials say, *Washington Post*, Sept. 23, 2019, available at <https://wapo.st/2kGmhY9>.

<sup>11</sup> Whistleblower Complaint.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, Appendix.

<sup>15</sup> Memorandum of Telephone Conversation, Telephone conversation with President Zelensky of Ukraine, Sept. 24, 2019 (“White House Transcript”), available at <https://bit.ly/2n4ZFBg>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Specifically, President Trump first told President Zelensky he would “like to have the Attorney General call you or his people and I would like you to get to the bottom” of “Crowdstrike”<sup>18</sup> – a “debunked conspiracy theory” challenging the U.S. intelligence community’s findings on Russia’s 2016 election interference.<sup>19</sup> President Trump then asked President Zelensky to speak with Attorney General Barr about Vice President Biden, telling him that he would like Mr. Giuliani “to call you along with the Attorney General” and 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>20</sup>

President Trump reiterated his requests that President Zelensky speak with Attorney General Barr about the investigations later during the call, telling him: “I will have Mr. Giuliani give you a call and I am also going to have Attorney General Barr call and we will get to the bottom of it.”<sup>21</sup> And after President Zelensky provided assurances that “we will be very serious about the [Biden] case and will work on the investigation,” President Trump closed the conversation by again saying “I will tell Rudy and Attorney General Barr to call.”<sup>22</sup> In all, President Trump indicated four times that he would be asking Attorney General Barr to call President Zelensky and then referenced him again a fifth time.

#### DOJ’s Actions Regarding the July 25, 2019 Call and the Whistleblower Complaint

After reviewing the whistleblower complaint, Inspector General Atkinson determined the complaint was credible and of “urgent concern,” and, in accordance with applicable law, forwarded the disclosure, accompanying materials, and his credibility determination to Acting Director of National Intelligence (“DNI”) Joseph Maguire.<sup>23</sup> Those actions triggered a mandatory transmittal requirement to congressional intelligence committees.<sup>24</sup>

Acting DNI Maguire, however, initially refused to transmit the whistleblower complaint to congressional intelligence committees.<sup>25</sup> Instead, after receiving the complaint, Mr. Maguire requested a legal opinion from the Department of Justice’s Office of Legal Counsel (“OLC”) on whether the DNI had a statutory obligation to forward the complaint to the congressional

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<sup>18</sup> *Id.*

<sup>19</sup> Mike Levine, Trump’s Crowdstrike mention on Ukraine call likely referred to debunked DNC server theory, *ABC News*, Sept. 25, 2019, available at <https://abcn.ws/2mOOsEJ>; Jane C. Timm, Trump promotes conspiracy theory: Clinton’s deleted emails are in Ukraine, *NBC News*, Sept. 25, 2019, available at <https://nbcnews.to/2n5Z1YU>; Kevin Poulsen, The Truth About Trump’s Insane Ukraine ‘Server’ Conspiracy, *Daily Beast*, Sept. 25, 2019, available at <https://bit.ly/2mTPNux>.

<sup>20</sup> White House Transcript.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Atkinson Letter.

<sup>24</sup> *Id.*

<sup>25</sup> Letter from ICIG Michael Atkinson to Rep. Adam Schiff and Rep. Devin Nunes, Sept. 9, 2019, available at <https://bit.ly/2n0is0Z>. Acting DNI Maguire subsequently transmitted it to Congress and made it publicly available. Devlin Barrett, Matt Zapotosky, Josh Dawsey, and Shane Harris, Whistleblower claimed that Trump abused his office and that White House officials tried to cover it up, *Washington Post*, Sept. 26, 2019, available at <https://wapo.st/2loSIQG>.

intelligence committees.<sup>26</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, and therefore did not trigger the reporting requirement to congressional intelligence committees.<sup>27</sup>

Yet, the complaint specifically alleges a pattern of misusing a computer system that was “managed directly by the National Security Council (“NSC”) Directorate for Intelligence Programs that were reserved for codeword-level intelligence information, such as covert action”<sup>28</sup> to hide politically damaging information, and DNI’s authority would be implicated if these systems were operated by employees detailed to NSC from the intelligence agencies, which fall under DNI’s authority.<sup>29</sup>

In addition to issuing the OLC opinion, DOJ took further action relating to the call and the whistleblower complaint. In its opinion, OLC advised that the ICIG letter and whistleblower complaint alleged a violation of a criminal law that should be referred to DOJ’s Criminal Division for appropriate review.<sup>30</sup> As a result, the Criminal Division reviewed the allegations as a possible campaign finance violation. The matter, however, was closed without investigation based on a review of only the “official record of the call.”<sup>31</sup> DOJ lawyers reportedly “determined that help with a government investigation could not be quantified as “a thing of value” under the law.”<sup>32</sup> According to DOJ, the final decision was made by Assistant Attorney General for the Criminal Division Brian Benczkowski, with input by career prosecutors from the public integrity section and other lawyers, and “all relevant components of the Department agreed with this legal conclusion.”<sup>33</sup> DOJ has indicated that Attorney General did not formally recuse from the whistleblower complaint,<sup>34</sup> and one report indicates that DOJ officials said he had only “minimal involvement” in the issue.<sup>35</sup>

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<sup>26</sup> Memorandum Opinion for the General Counsel of the Director of National Intelligence, “Urgent Concern” Determination by the Inspector General of the Intelligence Community, Sept. 24, 2019 (“OLC Opinion”), available at <https://bit.ly/2mmmlOI>.

<sup>27</sup> *Id.*

<sup>28</sup> Whistleblower Complaint, Appendix.

<sup>29</sup> See Deepak Gupta (@deepakguptalaw), Twitter (Sept. 26, 2019, 9:21 AM), available at <https://twitter.com/deepakguptalaw/status/1177211571321417728>; Deepak Gupta (@deepakguptalaw), Twitter (Sept. 26, 2019, 10:49 AM), available at <https://twitter.com/deepakguptalaw/status/1177233750624747520>.

<sup>30</sup> OLC Opinion.

<sup>31</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, available at <https://wapo.st/2mAVey7>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Josh Gerstein, Barr is thrust back in harsh glare as Ukraine scandal grows, *Politico*, Sept. 25, 2019, available at <https://politi.co/2lOi2dB>.

<sup>35</sup> Evan Perez and Katelyn Polantz, Trump’s attorney general has “minimal involvement” as Justice department whistleblower complaint referral, *CNN*, Sept. 25, 2019, available at <https://cnn.it/2pmECva>.

### **Potential Violations**

The criminal conflict of interest statute, 18 U.S.C. § 208, prohibits an executive branch employee from participating personally and substantially in any particular government matter that will have a direct and predictable effect on his known financial interests. The purpose of the statute is to prevent an employee from allowing personal interests to affect his or her official actions, and to protect governmental processes from actual or apparent conflicts of interest.<sup>36</sup> Any person who violates 18 U.S.C. § 208 may be subject to a civil penalty of not more than \$50,000 for each violation or the amount of compensation which the person received for the prohibited conduct, whichever is greater, and imprisonment for up to one year.<sup>37</sup>

Federal employees are obligated “to place loyalty to the Constitution, laws and ethical principles above private gain.”<sup>38</sup> Because “public service is a public trust,” federal employees’ decisions and actions must be made in the “best interests of the American people.”<sup>39</sup> For this reason, 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.<sup>40</sup>

Because Attorney General Barr is implicated as a possible subject in the whistleblower complaint, his participation in DOJ matters related to it raises questions about possible violations of the financial conflicts of interest statute, a lack of impartiality in overseeing related DOJ matters, and a misuse of public office for President Trump’s personal political benefit in violation of the Standards of Conduct.

#### **Conflict of Interest – 18 U.S.C. § 208**

Attorney General Barr may have violated the conflict of interest statute. DOJ’s consideration of the whistleblower complaint was a particular matter that directly and predictably affected his financial interests, and he appears to have participated in this matter. Because the whistleblower complaint alleges President Trump abused his power by soliciting foreign government interference in the election and implicates both Mr. Giuliani and Attorney General Barr in this conduct, there is no question that it was a particular matter involving specific parties when it was referred to DOJ, where it was reviewed by OLC and the Criminal Division.<sup>41</sup> At issue is only whether this particular matter directly and predictably affected Attorney General Barr’s financial interests and whether he participated personally and substantially in it.

As a result of being named as a possible subject in the whistleblower complaint, Attorney General Barr had a disqualifying financial interest that this particular matter affected directly and

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<sup>36</sup> 5 C.F.R. § 2640.101.

<sup>37</sup> 18 U.S.C. § 216(a)-(b).

<sup>38</sup> 5 C.F.R. § 2635.101(a), (b)(1).

<sup>39</sup> Justice Manual § 1-4.010.

<sup>40</sup> 5 C.F.R. §§ 2635.101(b)(8), (14).

<sup>41</sup> 5 C.F.R. § 2635.402(b)(3) (“The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.”).



predictably.<sup>42</sup> Had DOJ's Criminal Division opened an investigation, he would have needed to answer questions about his role in the underlying matter. The decision not to investigate allowed him to avoid incurring legal fees during the investigation, as well as the risk of civil or criminal liability as a result of the investigation. In addition, a finding by OLC that the whistleblower complaint was an "urgent concern" would have triggered an immediate referral by Acting DNI Maguire to the congressional intelligence committees. This referral would have likely resulted in an immediate congressional investigation that also would likely have required Attorney General Barr to obtain outside legal counsel to advise him through the process.

As discussed above, DOJ admitted that Attorney General Barr did not formally recuse, and was at least "minimally involved" in the Criminal Division's review of the complaint, raising a question as to whether he participated personally and substantially in that review.<sup>43</sup> Even if he had minimal involvement, as one report indicates, he appears to have participated "personally" because the term means to participate directly.<sup>44</sup> For purposes of the statute, participation is considered "substantial" when the employee's involvement is of significance to the matter.<sup>45</sup> The Office of Government Ethics has emphasized that "many other degrees of participation short of primary responsibility or final approval could require recusal" and that "supervision of subordinates working on a matter also amounts to personal and substantial participation."<sup>46</sup>

Even if he was only "minimally involved" in the Criminal Division matter, Attorney General Barr's involvement in the Criminal Division's decision not to open an investigation likely meets this threshold for substantiality. In one analogous case, OGE explained that, given the power of agency heads to "direct action as they saw fit with respect to specific party matters brought to their attention," it would be a "strong indication of personal and substantial participation" if an agency head "was briefed" on the status of a party matter.<sup>47</sup> As the Attorney General, he retained ultimate decision-making authority over whether or not to investigate. Therefore, even minimal involvement by Attorney General Barr – such as receiving a briefing on the Criminal Division's review of the whistleblower complaint and its decision not to investigate is a "strong indication" of his personal and substantial participation.<sup>48</sup>

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<sup>42</sup> 5 C.F.R. § 2635.402(b)(1) (A particular matter will have a "direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest," but it does not have to occur immediately. A particular matter will have a "predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest.").

<sup>43</sup> Perez and Polantz, *CNN*, Sept. 25, 2019.

<sup>44</sup> 5 C.F.R. § 2635.402(b)(4).

<sup>45</sup> *Id.*

<sup>46</sup> Office of Gov't Ethics, Inf. Adv. Op. 99 x 8 at 4 (1998) ("Employees should understand that many other degrees of participation short of primary responsibility or final approval could require recusal."), available at <https://bit.ly/2ozVPkg>; Office of Gov't Ethics, DO-04-013, at 2 (2004) ("Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter also amounts to personal and substantial participation."), available at <https://bit.ly/2mVlqzX>.

<sup>47</sup> Office of Gov't Ethics, Inf. Adv. Op. 99 x 21, at 7-8 (1999) ("If, for example, an employee was responsible for [Program] matters and was briefed on the status of an application of a specific party, that briefing would be a strong indication of personal and substantial participation by that employee. As supervising officials, [the former official] and [the former agency head] would have been in a position to direct action as they saw fit with respect to specific party matters brought to their attention."), available at <https://bit.ly/2mVDEoP>.

<sup>48</sup> 5 C.F.R. § 2635.402(b)(4) (A "single act of approving or participating in a critical step may be substantial.").

Although CREW is not aware of any news reports discussing whether Attorney General Barr participated in OLC's review of the whistleblower complaint, it is possible that he participated in that aspect of the particular matter given his position and the serious nature of the allegations. Therefore, it would be appropriate for your office to investigate and determine whether he also participated in that matter.

Standards of Conduct and Justice Department Guidelines

The 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.<sup>49</sup> Similarly, the core principles of federal prosecution require federal prosecutors to promote confidence that "important prosecutorial decisions will be made rationally and objectively on the merits of each case."<sup>50</sup> The success of the federal prosecutorial system "must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process."<sup>51</sup>

An executive branch employee who is aware of circumstances that would raise a question regarding his impartiality is expected to consult with the agency ethics official to determine whether to participate in a particular matter.<sup>52</sup> DOJ's standards of conduct further make explicit the requirement that "an employee should contact his or her agency 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."<sup>53</sup> An employee may not participate, without authorization, in a particular matter having specific parties that could affect the financial interests of members of her household or where a household member is a party or represents a party.<sup>54</sup>

In addition to the impartiality regulation, 28 C.F.R. § 45.2 prohibits a DOJ employee, without written authorization, from participating in a criminal investigation or prosecution if he has a personal or political relationship with any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution, or any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

Since Attorney General Barr was personally named in the whistleblower complaint, it made him a potential subject and clearly barred him from participating in related DOJ matters without seeking authorization from agency ethics officials. We have seen no evidence that he received such an authorization, and it would have been inappropriate for agency ethics officials to grant one because his participation would have tainted the credibility of DOJ's determination regarding the whistleblower complaint. In fact, Attorney General Barr's apparent failure to recuse has tainted the

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<sup>49</sup> 5 C.F.R. §§ 2635.101(b)(8), (14).

<sup>50</sup> Justice Manual § 9-27.001.

<sup>51</sup> *Id.*

<sup>52</sup> 5 C.F.R. §§ 2635.502(a)(2), (d).

<sup>53</sup> Justice Manual § 1-4.020. *See also* 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.").

<sup>54</sup> 28 C.F.R. § 45.2(b).



Criminal Division's decision-making process and undermined its investigation and enforcement process. It has now resulted in an impeachment inquiry by the U.S. House of Representatives in which Attorney General Barr is likely to be a key witness.

Accordingly, any role Attorney General Barr took in the Criminal Division's determination not to launch an investigation gave rise to substantial appearance concerns that he improperly used his public office and the resources of the DOJ to protect President Trump's personal political interests in violation of the Standards of Conduct.<sup>55</sup> His participation, if any, in OLC's review of the whistleblower complaint would give rise to the same issues and should be similarly investigated.

### **Conclusion**

All of the above gives the clear impression that Attorney General Barr continues to place his loyalty to President Trump's personal political interests above his responsibilities to the American people to uphold the Constitution, the law, and ethical principles.

Under these circumstances, it is imperative that your office investigate Attorney General Barr's involvement in the whistleblower complaint and related DOJ matters to determine whether Attorney General Barr participated in a particular matter that affected his financial interests in violation of 18 U.S.C. § 208, obtained authorization from agency ethics officials to participate in those matters, and used his public office for President Trump's personal political benefit in violation of the applicable standards of conduct.

Sincerely,



Noah Bookbinder  
Executive Director



Virginia Canter  
Chief Ethics Counsel

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<sup>55</sup> 5 C.F.R. § 2635.702.