

OVERSIGHT OF THE DEPARTMENT OF JUSTICE: POLITICAL INTERFERENCE AND THREATS TO PROSECUTORIAL INDEPENDENCE

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY U.S. HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS SECOND SESSION

WEDNESDAY, JUNE 24, 2020

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OVERSIGHT OF THE DEPARTMENT OF JUSTICE: POLITICAL INTERFERENCE AND THREATS TO PROSECUTORIAL INDEPENDENCE

Wednesday, June 24, 2020

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to call, at 12:14 p.m., in Room CVC-200, Congressional Auditorium, Hon. Jerrold Nadler [Chair of the committee] presiding.

Present: Representatives Nadler, Lofgren, Jackson Lee, Cohen, Johnson of Georgia, Deutch, Richmond, Jeffries, Cicilline, Swalwell, Lieu, Raskin, Jayapal, Correa, Scanlon, Garcia, Neguse, McBath, Stanton, Dean, Murcarsel-Powell, Escobar, Jordan, Chabot, Gohmert, Collins, Buck, Gaetz, Johnson of Louisiana, Biggs, McClintock, Lesko, Reschenthaler, Cline, and Armstrong.

Staff present: Aaron Hiller, Deputy Chief Counsel; Amy Rutkin, Chief of Staff; Arya Hariharan, Deputy Chief Oversight Counsel; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Priyanka Mara, Professional Staff Member/Legislative Aide; Jordan Dashow, Professional Staff Member; Anthony Valdez, Staff Assistant; John Williams, Parliamentarian; Chris Hixon, Minority Staff Director; Stephen Castor, Minority General Counsel; Katy Rother, Minority General Counsel and Parliamentarian; Ella Yates, Minority Director of Member Services and Coalitions; Caroline Nabity, Minority Counsel; Kyle Smithwick, Minority Counsel; Anudeep Buddharaju, Minority Counsel; Michael Koren, Minority Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Chair NADLER. The Committee on the Judiciary will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this afternoon's hearing on "Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence." Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send

them to the email that has been previously distributed to your offices, and we will circulate the materials to Members and staff as quickly as we can.

I would also remind all Members that guidance from the Office of Attending Physician states that face coverings are required for all meetings in an enclosed space, such as Committee hearings. Everybody attending this hearing is required to follow this guidance. This is for the health and safety of all of us in this room, including our staff and for the loved ones we will return to at the end of the day. I expect all Members on both sides of the aisle to wear a mask except when you are speaking.

I will now recognize myself for an opening statement.

Mr. JOHNSON of Louisiana. Mr. Chair, point of parliamentary inquiry.

Chair NADLER. Last Friday without explanation, Attorney General William Barr announced that Geoffrey Berman, the United States Attorney for the Southern District of New York, was “stepping down.” This was, of course, untrue. Mr. Berman had not resigned. In his statement, Mr. Berman made clear that he had no intention of resigning and every intention of moving forward with his work without delay or interruption. He emphasized that point. He wanted to stay on the job to ensure that his work would continue unimpeded.

To understand the stakes in this standoff, it is important to note that the work of Mr. Berman’s office has included a number of criminal investigations aimed at investigations close to President Trump. Among them, the President’s attorney, Michael Cohen, the President’s Inaugural Committee, and Rudy Giuliani, the President’s current counsel, campaign advisor, and direct line to Kiev. On Saturday, Mr. Barr attempted to fire Mr. Berman directly. Even then, Mr. Berman resisted. Only when he was certain that his deputy, a qualified career prosecutor, would take his place as Acting U.S. Attorney, did he relent and step aside.

So, what are we to make of these events? If this had been an isolated incident, if the Attorney General had simply misjudged the situation and thought that Mr. Berman would go quietly, then we might chalk up this episode to simple miscommunication and incompetence. Make no mistake, this was not an isolated incident. The effort to remove Mr. Berman is part of a clear and dangerous pattern of conduct that began when Mr. Barr took office and continues to this day. Mr. Barr’s action made clear that in his Department of Justice, the President’s allies get special treatment, the President’s enemies, real and imagined, are targeted for extra scrutiny, and the needs of the American people and the needs of justice are generally ignored.

Mr. Barr’s practice of using the Department to shield the President and his allies goes back to the beginning of his tenure at the DOJ. Last year, when the Special Counsel had completed his investigation, when Mr. Barr had the report in hand, but before the public could read it, the Attorney General blatantly mischaracterized the Special Counsel’s findings, and he did so on the President’s behalf. Among other deceptions, Mr. Barr pretended that compelling evidence of obstruction of justice, including evidence that the President may have lied directly to the Special Counsel, simply did not

exist. Mr. Barr's deception seems blatant, but don't take my word for it. The Special Counsel wrote to Mr. Barr directly to complain about the inaccuracies which lingered uncorrected for weeks. A Federal judge later said that Mr. Barr's inconsistencies were so distorted and misleading, that he questioned Mr. Barr's credibility and, in turn, could not trust the Department's assurances to the Court about the contents of the Mueller Report. Mr. Barr has also worked to undermine the criminal cases stemming from the Special Counsel's report.

Early this year, after the President's associate, Roger Stone, was convicted of obstructing justice, Mr. Barr overruled his career prosecutors and recommended a lighter sentence for President Trump's friend. One of those prosecutors, Mr. Zelinsky, will testify today about that experience. We should be clear about the timeline in the Stone case. If nothing else, it helps explain why Mr. Berman refused to go quietly over the weekend.

In January, Mr. Barr removed the U.S. Attorney for the District of Columbia and replaced her with his long-time aide. In February, President Trump tweeted his feelings about Stone's ongoing criminal case. The President was outraged that Mr. Stone, his friend, might be punished for obstructing justice. Quickly thereafter, Mr. Barr reached into the case, overruled his prosecutors, and submitted a wildly lenient sentencing recommendation for Mr. Stone. All four prosecutors involved in the case, including Mr. Zelinsky, immediately withdrew. The next day, President Trump tweeted his congratulations to Mr. Barr.

The Stone case wasn't an isolated incident either. In May, Mr. Barr abruptly reversed course in the prosecution of Michael Flynn, the President's former national security advisor, who pled guilty to lying to the FBI about his conversations with the Russian ambassador. Once again, the President tweeted his feelings about the case. Once again, Mr. Barr reached into the proceedings, overruled his career prosecutors, misrepresented statements by Department officials, and asked the Court to dismiss the charges against Mr. Flynn, and once again, the President tweeted his delight at the outcome.

Former Federal Judge John Gleason, appointed by the Court to account for Mr. Barr's unprecedented motion to dismiss the case against Mr. Flynn, argued that, "The facts surrounding the filing of the Government's motion constitute clear evidence of gross prosecutorial abuse. They reveal an unconvincing effort to disguise as legitimate a decision to dismiss that is based solely on the fact that Flynn is a political ally of President Trump." Judge Gleason was not alone. Days after Mr. Barr insisted on dropping charges against Mr. Flynn, almost 2,000 former FBI agents and Department of Justice officials wrote an open letter calling for the Attorney General's resignation.

Now, my Republican colleagues may try to explain these incidents away. They may tell you that Barr's attempts to fire Berman were harmless, that Flynn and Stone should be excused for their crimes, and that Mr. Barr's extraordinary attempts to protect the President from criminal liability are necessary to correct for a vast conspiracy at the Justice Department. Those excuses ring hollow. There is injustice at the Justice Department, ladies, and gentle-

men, as there is extensive injustice in our justice system nationwide.

We have rightly focused on one major aspect of that injustice in recent weeks since the murder of George Floyd at the hands of law enforcement officers. As we prepare to address that injustice on the House floor in the single largest and most sweeping package of police reforms in our country's history, I cannot help but notice that the Members who tend to shout loudest about hoaxes and witch hunts also stand in opposition to these commonsense reforms. Ask yourselves, what are you saying to the American people when your commitment to justice means that you will stand up for Flynn, Stone, and Barr, but go no further?

No, Mr. Barr's work at the Department of Justice has nothing to do with correcting injustice. He is the President's fixer. He has shown us that there is one set of rules for the President's friends and another set of rules for the rest of us. To be clear, there are plenty of reasons to be angry with Attorney General Barr. It is unacceptable that he would order the Antitrust Division to initiate pretextual investigations into industries that he and the President do not like simply because they do not like them. Mr. Elias will testify to that abuse today. It is dangerous and misguided for him to threaten frivolous litigation against State and local officials doing their best to contain the COVID-19 epidemic in their communities. It is simply irresponsible for him to do so in the total absence of guidance from the White House or leadership from the President.

It is outrageous that Mr. Barr occupied this city with a Federal police force outfitted in paramilitary gear, and then turned that force on peaceful protestors in Lafayette Square, spraying them with teargas and physically knocking them back, all to arrange for an awkward photo op for President Trump. The images from that day are so disturbing that we cannot blame Mr. Barr for trying to avoid responsibility for his role in the event in the days since. Please understand that these are merely the symptoms of an underlying disease. The sickness that we must address is Mr. Barr's use of the Department of Justice as a weapon to serve the President's petty private interests. The cancer that we must root out is his decision to place the President's interests above the interests of the American people.

Our witnesses today will speak to the extremes to which Mr. Barr has reached to carry out the President's bidding. I am especially grateful to Mr. Elias and Mr. Zelinsky, who are current Department employees, for their bravery in appearing before the committee. This Administration has a record of witness intimidation, and I have no doubt that they will try to exact a price for your testimony. You are patriots, and you have done your duty here today. It gives me hope for what may come at the Department of Justice when Bill Barr is finally removed. I thank the witnesses for being here today, and I look forward to your testimony.

I now recognize the Ranking Member of the Judiciary Committee, the gentleman from Ohio, Mr. Jordan, for his opening statement.

Mr. JORDAN. Thank you, Mr. Chair. The Barr Justice Department is about correcting injustice. You almost have to laugh at this. The very day you have a hearing going after the Barr Justice

Department and alleging that there are politics involved there, the very day we get the order from the United States Court of Appeals dismissing the Flynn case. “The District Court is directed to grant the government’s motion to dismiss the District Court’s order. Appointing amicus is hereby vacated.” I mean, they are not political. They are just right. Again, you would almost have to laugh if it wasn’t so serious.

Attorney General Holder said he was Obama’s wing man. The Obama-Biden Justice Department attacked investigative journalists. Here is what one of them said. Here is what one of them said. James Risen with the *New York Times* said this: “If a President throws a whistleblower in jail for trying to talk to a reporter or gets the FBI to spy on a journalist, he will have one man to thank for bequeathing him such expansive power: Barack Obama.” That is not me talking. That is James Risen of the *New York Times* when the Justice Department, the Obama-Holder-Biden Justice Department, went after him.

Of course, we know about Fast and Furious. We know about Operation Choke Point. Even though Chair always doesn’t want to talk about this, we know how political the Justice Department was in the whole Russia hoax, the whole Trump-Russia investigation. Remember this: The Obama-Biden Department of Justice spied on four American citizens. That is the big thing you guys have with Bill Barr, too. The first time he testified in front of the Senate, he used the word “spying,” and everyone went crazy, but he used the word “spying” because that is exactly what happened. They spied on four American citizens associated with the Presidential campaign, an investigation we now know was completely bogus because Rick Burnell released all the transcripts from all the people who were involved in the intelligence community in the previous Administrations, and they all said there was nothing there.

The Obama-Biden Justice Department, to spy on those Americans, what did they do? They lied to the FISA Court 17 times. They used the now-famous dossier, the dossier that Jim Comey—not Jim Jordan—Jim Comey said was salacious and unverified. They didn’t tell the Court the guy who wrote it was “desperate to stop Trump.” They didn’t tell the Court the guy who wrote it was being paid by the Clinton Campaign to put it together. They used that to get a warrant to spy on one of our fellow citizens, and you guys think that is no big deal.

Bill Barr understands that is a big deal, and that is why John Durham is doing his investigation. Of course, do you know who else thought it was a big deal? The inspector general of the Justice Department, Michael Horowitz, who wrote a 400-page report talking about those 17 lies, talking about all the abuses that took place in the Comey-Biden-Obama Justice Department. But guess what? This committee, the Judiciary Committee, didn’t even get a chance to ask questions of Mr. Horowitz about that report because Chair won’t bring him in to testify.

I don’t know if I have ever seen anything like that. A 400-page report written by the inspector of the Justice Department, scathing report about the FISA Court, and the Chair of the Judiciary Committee, with the storied history this Committee has in protecting people’s liberties, won’t even let him come in and testify. Well, here

is what U.S. District Judge and FISA Presiding Judge Rosemary Collier said about the findings in Mr. Horowitz's report: "the frequency with which representations made by FBI personnel turned out to be unsupported." Think about that. Representations made by FBI personnel turned out to be unsupported. Do you know what that is? That is a nice way of saying they lied, "or contradicted by information in their possession and with which they withheld information detrimental to their case." "Withheld information detrimental to their case" is another way of saying they lied. "Calls into question whether information contained in other FBI applications is reliable."

You put that all in simple English, what Judge Collier was saying is you guys lied to us so many darn times, how are we supposed to believe anything you bring in front of the Court? That was all in that 400-page report from the inspector general, but Chair Nadler won't even let Inspector General Horowitz come in and answer our questions and go into detail about that report. Yet today, the day we get the ruling from the Court of Appeals, Chair says it is the Trump DOJ, it is the Barr DOJ that is political.

Guess what else happened in the final days of the Obama Administration? Guess what else happened? Thirty-eight different people unmasked Michael Flynn's name 49 times. Forty-nine times. Clapper, Comey, Brennan, Biden unmasked Michael Flynn. Six people at the Treasury Department. Holy cow, everyone. This is between Election Day and Inauguration Day, and Bill Barr just simply wants to get to the bottom of all this, and somehow that is political when, in fact, the politics was in the previous Administration, and he is trying to stop it.

Here is what these people said. Here is how we know this was all a joke. Clapper: "I never saw any direct evidence that the Trump Campaign or someone was conspiring with the Russians." Jim Clapper said that, and yet we had a 2-year investigation by the Mueller team. Susan Rice: "I don't recall intelligence that I would consider evidence." Ben Rhodes said the same. Sally Yates: "I don't believe anybody had reached a conclusion yet as to whether Russians were conspiring." They had nothing, yet they go through this entire investigation. Samantha Power, same thing.

All these key people who were unmasking Michael Flynn's name all knew there was no predicate for the investigation, and it happened, and somehow the Barr Justice Department is political? Like I said, they are not political, they are just right, and we saw that with the decision today.

Finally, let me just say this. I have been saying this for I don't know how long, but it is the truth. I have never seen an agency where this happened. The top people, the very people Bill Barr, and that same testimony he gave where he talked about spying, he also said this. He said there was a failure of leadership at the upper echelon of the FBI in the previous Administration. That may be the understatement of the year. Jim Comey fired, leaked memos. Leaked memos to get the Special Counsel to put our country through what we went through the past few years. Andy McCabe, deputy director, fired, referred by that same IG for prosecution. Jim Baker, FBI counsel, investigated by the U.S. Attorney in Connecticut, took information from the DNC lawyer. Of course,

now-famous Peter Strzok and Lisa Page, the individuals who ran the Clinton investigation, the midyear exam, ran Crossfire Hurricane, Crossfire Razor, the Trump-Russia investigations. They were both kicked off Mueller's team. Peter Strzok was fired. We all know the bias they had against President Trump. We saw it in hundreds of text messages that we are all now too familiar with.

The politics was in the previous Administration. Bill Barr is doing the Lord's work trying to clean it up so that it doesn't happen again. We have said this before, and I will say in closing, Emmet Flood's statement a little over a year ago where he said this: We would all do well to remember, if they can do it to a President, they can lie to a FISA Court to get a warrant to go after a President, to go after a major party's political campaign, if they can do it to a President, imagine what they can do to you or I. Imagine what they can do to the folks we get the privilege of representing back home. That is why this is important. That is why the work Bill Barr is doing is important. You guys can continue to play your political games. Bill Barr is going to get to the truth. I yield back.

Mr. CHABOT. Mr. Chair, I have a parliamentary inquiry.

Chair NADLER. Thank you, Mr. Jordan. Without objection, all other opening statements will be included in the record.

Without objection, three letters from Bradley Weinsheimer, the Associate Deputy Attorney General, will be admitted into the record.

[The information follows:]

CHAIR NADLER FOR THE RECORD



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

June 18, 2020

David Z. Seide
Government Accountability Project
1612 K Street NW
Washington, D.C. 20006
By email: davids@whistleblower.org

Dear Mr. Seide:

The Department of Justice (Department) understands that you represent John Elias, a trial attorney in the criminal section of the Department's Antitrust Division, in connection with a subpoena for documents and his testimony before the Committee on the Judiciary of the U.S. House of Representatives (Committee). The Department understands that Mr. Elias has received a subpoena to appear before the Committee on June 24, 2020. I write to inform you of Department policies and to reiterate certain obligations of Mr. Elias concerning such an appearance.

The Department has significant confidentiality interests when it comes to congressional oversight of law enforcement matters, including civil investigative matters. "Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984); see *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32–33 (1982) (opinion of Attorney General Smith). Accordingly, while the Department's leaders may explain to a congressional committee the reasons underlying many of the Department's public decisions, the Department generally does not make available to Congress, or to the public at large, documents or other information involving internal deliberations about particular investigations or enforcement actions.

In particular, the Department has a long-standing policy in protecting its line attorneys against appearances before Congress to testify about investigative matters. Such appearances in politicized congressional hearings or staff interviews compromise the independence of the Department's investigative and enforcement functions and threaten to inhibit other line attorneys in their exercise of those functions. As we explained in 2000, "[t]he Department . . . has a strong

institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions.” Letter for Rep. John Linder, Chairman, Subcommittee on Rules and Organization, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs at 6 (Jan. 27, 2000). Years earlier, Attorney General Reno explained that “[p]ermitt[ing] Congressional examination of line prosecutors carries substantial danger of chilling the objective exercise of [prosecutorial] discretion and of generating the appearance of political influence on prosecutorial decisions.” Letter for Sen. Orrin Hatch from Janet Reno, Attorney General at 1 (Jan. 5, 1994). The same is true for line attorneys like Mr. Elias who investigate and enforce potential civil or criminal violations. Where congressional committees have expressed interest in the testimony of the Department’s line attorneys, the Department has historically been able to accommodate their legitimate interests by providing testimony or briefings from supervisory personnel or answering questions in writing, and only in rare and exceptional cases has made those attorneys available to provide factual information in non-public interviews or briefings outside the politicized arena of a congressional hearing. The Department here has made offers to accommodate the Committee’s legitimate interests in oversight of the Department, and remains willing to have those discussions, but the Committee so far has rejected these overtures.

Should Mr. Elias appear before the Committee, we expect that he will abide by his obligations under the law, the rules of professional responsibility, and Department policy to refrain from disclosing information relating to sensitive law enforcement information and confidential matters relating to his representation of the United States. Those matters include classified information, sources and methods, grand-jury information protected by Federal Rule of Criminal Procedure 6(e), and the deliberative processes that underlie investigative and enforcement decisions. The information subject to executive privilege in this context most likely will consist of attorney work product, deliberative process information, and information in law enforcement and civil investigative files. See, e.g., *Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 10 (2008) (opinion of Attorney General Mukasey) (“The President may invoke executive privilege to preserve the integrity and independence of criminal investigations and prosecutions.”); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Reno) (discussing the deliberative process, attorney-client, and attorney work product components of executive privilege).

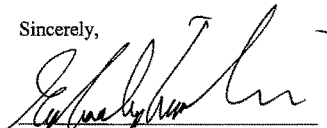
Although Mr. Elias has not advised the Department of the subjects of his intended testimony, Committee staff have apparently advised the press that the Committee will ask Mr. Elias about matters related to the Department’s effort to block a merger between AT&T and Time Warner and a separate investigation into a deal between automakers and the State of California concerning fuel efficiency and emissions standards. The deliberations related to those matters, as well as other associated non-public attorney communications or work product, are likely covered by one or more components of executive privilege and would implicate the rules

of professional responsibility. Disclosing non-public information about investigative and enforcement deliberations without authorization would compromise the confidentiality and integrity of the law enforcement process and would have a chilling effect on Department attorneys going forward.

Absent authorization, an individual attorney such as Mr. Elias lacks authority to reveal confidential deliberative information or attorney work product related to investigative and enforcement matters in response to a congressional subpoena. The balancing of a congressional committee's need for information and the Executive Branch's need for confidentiality occurs through the constitutionally mandated accommodation process between authorized representatives of the Executive Branch and Congress. Accordingly, consistent with appropriate governmental privileges, the Department expects that Mr. Elias will decline to respond to questions seeking such information and advise the Committee to contact the Department's Office of Legislative Affairs should it seek information that he is unable to provide.

Finally, Mr. Elias is not authorized to disclose any records of the Department to Congress with respect to the Committee's request for Mr. Elias to produce documents and communications referring or relating to any documents he produced to the Department's Office of Inspector General, the United States Office of Special Counsel, or a Member of Congress. Such records constitute property of the Department and are subject to restrictions on the unauthorized disclosure of information, including information protected by executive privilege. Department policy requires that the production of such records be coordinated through the Office of Legislative Affairs. *See* Justice Manual §§ 1-8.200, 1-8.210. The Committee's interest in documents relevant to investigations pending with the Office of the Inspector General or the Office of Special Counsel raises concerns of political interference in the autonomy of those investigations. To the extent the Committee has a legitimate interest in seeking such information, its requests should be directed to those offices.

Sincerely,



Bradley Weinsheimer
Associate Deputy Attorney General



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

June 22, 2020

Robert S. Litt
Morrison Foerster
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006
By email: rlitt@mofo.com

Dear Mr. Litt:

I write in response to your June 19, 2020 letter concerning the written statement that your client, Aaron Zelinsky, an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Maryland, proposes to submit in connection with his appearance before the Committee on the Judiciary of the U.S. House of Representatives (Committee) on June 24, 2020.

As explained in my June 18, 2020 letter, the Department of Justice (Department) has a strong and long-standing interest in protecting the confidentiality of prosecutorial deliberations. Your letter does not challenge the legitimacy of that interest, but offers several reasons why you believe that neither those confidentiality interests nor the deliberative process privilege precludes the testimony your client wishes to present in his written statement.

The Department disagrees with your suggestion that none of the internal discussions addressed in AUSA Zelinsky's draft statement are pre-decisional under the deliberative process privilege. Your client's testimony includes deliberations within the U.S. Attorney's Office concerning the initial decision to file a sentencing memorandum in the *Stone* case and the subsequent decision to file a second filing in the *Stone* case. Those discussions are pre-decisional and covered by privilege.

The Department also disagrees with the suggestion that the deliberative process privilege does not apply merely because someone describes what he or she views to be "political influence" in a matter. That is not the law, and the Department does not waive its important confidentiality interests in prosecutorial deliberations simply because someone alleges that a particular decision was political in nature. Given the frequency in which such allegations are made during congressional oversight, accepting that proposition would destroy the Department's confidentiality interests and threaten itself to politicize the criminal-justice process by inviting congressional intrusion into prosecutorial deliberations in many, if not virtually all, high-profile investigations and prosecutions.

That said, the Department does not object to your client submitting the proposed statement and to providing oral testimony that does not go beyond the scope of the statement. Much of what is contained in the statement constitutes your client's opinions of actions that were

taken in *Stone*. The opinions he holds on these matters (as opposed to how he may have expressed his opinions to others during his Office's deliberations) are not privileged, and he is free to express them, limited only by the rules of professional responsibility. As for deliberative information, the two sentencing memoranda in *Stone* are a matter of public record, and the Attorney General has publicly disclosed general information concerning the Department's deliberations. As drafted, the proposed statement is similarly limited to a high level of generality about the deliberations. The statement does not reveal the content of specific deliberative communications, and we do not authorize your client to reveal that kind of specific information in the statement or his oral testimony. Accordingly, consistent with the guidance in my June 18 letter, the Department expects that AUSA Zelinsky will decline to respond at the hearing to questions seeking such information and will advise the Committee to contact the Department's Office of Legislative Affairs should it seek information that he is unable to provide.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley Weinsheimer', written over a horizontal line.

Bradley Weinsheimer
Associate Deputy Attorney General



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

June 23, 2020

David Z. Seide
Government Accountability Project
1612 K Street NW
Washington, D.C. 20006
By email: davids@whistleblower.org

Dear Mr. Seide:

I write in response to your June 22, 2020 letter concerning the testimony your client, John Elias, a trial attorney in the criminal section of the Department's Antitrust Division, plans to provide in connection with a subpoena he received to appear before the Committee on the Judiciary of the U.S. House of Representatives (Committee).

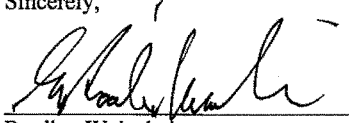
In your letter, you offer conclusory claims about Mr. Elias's expected testimony but do not furnish any specific information about its content. Lacking such information, the Department is unable to evaluate the nature of his claims or his assertion that he has knowledge of "abuses of authority and other wrongdoing." Mr. Elias should understand, however, that he does not have the Department's authorization to testify about privileged matters.

In addition, it is incorrect as a matter of law to suggest that your client has no responsibility to honor the deliberative process privilege because he believes himself to be a witness to unidentified government misconduct. Although you cite the D.C. Circuit's decision in *In re Sealed Case*, that decision made clear that with respect to the relevant privileges, "*courts* must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking evidence." 121 F.3d 729, 746 (D.C. Cir. 1997) (emphasis added). Your client does not have the authority to perform such a balancing of interests on his own.

As I indicated previously, absent authorization, an individual attorney such as Mr. Elias lacks authority to reveal confidential deliberative information or attorney work product related to investigative and enforcement matters in response to a congressional subpoena. The balancing of a congressional committee's need for information and the Executive Branch's need for confidentiality occurs through the constitutionally mandated accommodation process between authorized representatives of the Executive Branch and Congress. Accordingly, consistent with appropriate governmental privileges, the Department expects that Mr. Elias will decline to respond to questions seeking such information and advise the Committee to contact the

Department's Office of Legislative Affairs should it seek information that he is unable to provide.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley Weinsheimer', written over a horizontal line.

Bradley Weinsheimer
Associate Deputy Attorney General

Chair NADLER. I will now introduce to the—

Mr. JOHNSON of Louisiana. Mr. Chair, parliamentary inquiry.

Mr. CHABOT. Point of order.

Chair NADLER. The gentleman will State his parliamentary inquiry.

Mr. JOHNSON of Louisiana. What provision of the Democrats' new House Rules allows for a duly-subpoenaed witness to appear and provide testimony by video?

Chair NADLER. The Rules so provide. I will now introduce today's—

Mr. JOHNSON of Louisiana. Mr. Chair? Mr. Chair, the copy of the subpoena that we have that was issued to Mr. Aaron Zelinsky—

Chair NADLER. The gentleman—

Mr. JOHNSON of Louisiana. —does not allow for that.

Chair NADLER. The gentleman has not stated a—

Mr. JOHNSON of Louisiana. The Chair has not answered the inquiry.

Chair NADLER. Section 4(f)(1)—

Mr. JOHNSON of Louisiana. I appeal the ruling.

Chair NADLER. —allows committees to issue subpoenas—

Mr. JOHNSON of Louisiana. I appeal the ruling of the Chair. The witnesses are not allowed to attend by video under the subpoena that Chair issued.

Chair NADLER. Section 4(f)(1) of the Rules of the House allows—
VOICE. House Resolution 965.

Chair NADLER. House Resolution 965 allows committees to issue subpoenas for return by remote participation.

Mr. JOHNSON of Louisiana. The subpoena reads, "You are commanded to be and appear before the"—

Chair NADLER. The gentleman will suspend. I will now introduce today's witnesses.

Mr. JOHNSON of Louisiana. I appeal the ruling of Chair, Mr. Chair.

Chair NADLER. I will now introduce today's witnesses. Donald Ayer served as the Deputy Attorney General under President George H.W. Bush. He joined the Department—

Mr. COLLINS. Mr. Chair, you cannot simply go over a point of order when an individual appeals the ruling of the Chair, and I am speaking to you, you gavel me down, but this is—

Mr. GOHMERT. Rules don't matter in here apparently.

Mr. COLLINS. —18 months. He has appealed the ruling of the Chair. At least honor the parliamentary procedure.

Chair NADLER. There was a ruling. It was not—

Mr. COLLINS. Point of order. I challenge the subpoena being issued that he can appear remotely. I make a point of order.

Mr. CICILLINE. The Chair—

Chair NADLER. It is not a cognizable point of order.

Mr. COLLINS. I challenge the ruling of the Chair.

Chair NADLER. You cannot appeal a non—

Mr. COLLINS. You just denied my point of order. I challenge the ruling of the Chair.

Chair NADLER. Donald Ayer served as Deputy Attorney General in the—

Mr. COLLINS. Here we go again. I appealed the ruling of the Chair on a point of order. You cannot overlook that.

Mr. CICILLINE. Mr. Collins, you can't interrupt these proceedings, and the American people deserve to know the truth.

Chair NADLER. There was no—

Mr. COLLINS. This has nothing to do with the truth. This has to do with the ruling of the committee.

Chair NADLER. There was no ruling of the Chair—

Mr. COLLINS. I made a point of order. You ruled. That is a ruling.

Chair NADLER. The point was not cognizable.

Mr. COLLINS. Then I appeal the ruling of the Chair on not recognizing the point of order.

Chair NADLER. There is not ruling of the Chair to appeal. Donald Ayer served as deputy—

Mr. JOHNSON of Louisiana. Mr. Chair, could I—

Mr. COLLINS. Nothing changes around here.

Chair NADLER. Donald Ayer—

Mr. JOHNSON of Louisiana. Mr. Chair, could I just—

Chair NADLER. —served as Deputy Attorney General under President George H.W. Bush. He joined the Department as an assistant U.S. attorney and held a number of other positions, including U.S. States Attorney in the Eastern District of California, and principal deputy solicitor general under President Reagan. Previously, Mr. Ayer clerked for Justice William Rehnquist and Judge Malcolm Wilkey of the D.C. Circuit. After his career in public service, he was in private practice and has also taught extensively at law schools around the country. Mr. Ayer received his B.A. from Stanford University and his M.A. and J.D. from Harvard University.

Aaron Zelinsky is an Assistant U.S. Attorney for the District of Maryland. Previously, Mr. Zelinsky served as a special Assistant United States Attorney in the District of Columbia, as an Assistant Special Counsel in Special Counsel Robert Mueller's Office, and a Special Assistant to the legal advisor in the State Department. Previously, Mr. Zelinsky clerked for Justice Kennedy before his retirement from the Supreme Court, and for Justice John Paul Stevens after his retirement, and as well as for Judge Thomas Griffith on the D.C. Circuit. Mr. Zelinsky received his J.D. and B.A. from Yale University. I note for the record that pursuant to section 4(c)(6) of House Resolution 965, Mr. Zelinsky's personal counsel is participating in this hearing on the WebEx software platform.

John Elias is a trial attorney in the Antitrust Division of the Department of Justice. Since joining the Department in 2006, he has served in a variety of roles, including acting Chief of Staff of the Antitrust Division. In 2015, following a detail to the White House's Presidential Personnel Office, he joined the Office of the Associate Attorney General, where he served in various periods as Counsel, Chief of Staff, and Deputy Associate Attorney General. Mr. Elias received his J.D. from Stanford Law School and his B.A. from Yale University.

The Honorable Michael Mukasey served as the United States Attorney General from November 2007 to January 2009 under President George W. Bush. Prior to his service as Attorney General, he served as a judge in the Southern District of New York, becoming

chief judge in 2000. Previously, he served as an Assistant U.S. Attorney for the Southern District of New York. He is currently in private practice. Judge Mukasey received his law degree from Yale University and his B.A. from Columbia College.

We welcome all our distinguished witnesses, and we thank them for their participation. Now, if you would please rise, I will begin by swearing you in.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

[A chorus of ayes.]

Chair NADLER. Let the record show the witnesses answered in the affirmative. Thank you, and please be seated. Let me extend a special welcome to Judge Mukasey, who I well remember from my—

Mr. COLLINS. Mr. Chair, could we get a vocal from Mr. Zelinsky? All we could see was his hand up.

Chair NADLER. —well remember from our dinners—

Mr. COLLINS. I guess not.

Chair NADLER. Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, for those witnesses testifying in person, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired. For Mr. Zelinsky, there is a timer on your screen to help you keep track of time.

Mr. Ayer, you may begin. Your mike.

TESTIMONY OF DONALD AYER

Mr. AYER. Good afternoon, Chair Nadler, Ranking Member Jordan, and Members of the committee. Thank you very much for inviting me to appear today.

I was privileged to serve in the Department of Justice under two Republican and one Democratic President, and I am here because I believe that William Barr poses the greatest threat in my lifetime to our rule of law and to public trust in it. That is because he does not believe in its core principle, that no person is above the law. Instead, since taking office, he has worked to advance his lifelong conviction that the President should hold virtually autocratic powers. That includes immunity from nearly all checks and balances and being able to accord special treatment to himself and his friends.

The system that Barr is working to tear down was put in place in the aftermath of the Watergate scandals, which involved extensive government corruption and caused a widespread loss of trust. After Nixon resigned, President Ford's Attorney General, Edward Levi, acted swiftly to restore trust by supporting reforms to prevent such abuses. These included statutes, like FISA, the first Inspector General Act, expansion of FOIA, and the Whistleblower Protection Act.

Levi knew that public trust ultimately depended on people believing that ours is a government of laws and not men, in which

no person is above the law. That had special significance for the Department of Justice whose work he saw imbued with a judicial nature. Its awesome powers demanded transparent and orderly decision-making processes subject to review at multiple levels and free from improper personal considerations or political interference. Levi emphasized the critical role of a dedicated professional staff who would bring zeal and determination and a great concern for fairness and impartiality. This vision has been an inspiration to generations of Department lawyers.

Bill Barr's service since last February has been a root and branch attack on Edward Levi's vision and reforms; indeed, on the very idea that no person is above the law. Barr has sought to give the President nearly unlimited powers by negating or overriding many independent processes that operate as important checks on executive branch action. Here are some of the things that he has done.

He has worked to defeat any meaningful oversight, either by Congress or by review in the courts, through litigation, legal opinions, and his own speeches. He has himself refused multiple times to show up in response to requests to appear before Congress. He has worked to undermine Congress' appropriation power by litigating the President's right to divert funds to pay for his border wall, which Congress refused repeatedly to fund. He has regularly undermined the authority of independent decision-making processes and career professionals, whose disinterested integrity Levi saw as a key element justifying public trust. He has done this by his own statements, such as last March when he publicly whitewashed the Mueller Report's extensive findings on obstruction of justice, and last December when he publicly contradicted key conclusions reached by Inspector General Horowitz and his FBI election interference probe. Both times, Barr's intervention vocally reaffirmed positions advanced regularly in presidential tweets.

He has also done it by enlisting various political cronies to review and reverse decisions of experienced career attorneys, or by simply replacing them in handling matters of personal interest to the President. This is how he accomplished the reversals of long-held Department positions in the cases of Trump associates Roger Stone and Michael Flynn, urging a much lighter sentence in one case and outright dismissal in the other.

In a number of other matters, such as the intake of information from Rudy Giuliani and investigation of unmasking requests during the Obama Administration, Barr has set aside certain subject matter to be handled by people in his political inner circle rather than by career officials who would deal with them in ordinary course. Finally, Barr has willingly supported removal of officials when their attention to duty proves politically inconvenient to the President. The treatment of U.S. Attorneys Jessie Liu here in the District of Columbia and of Geoffrey Berman in New York last Friday are two blatant examples. So is his standing by and voicing support as Trump, during April and May of this year, has removed five inspectors general who had long served as an important check on executive branch corruption.

To an ever-greater and quite shocking extent, this spring Barr has used the great powers of the Department of Justice to advance

the President's narrow political interests and gravely undermined constitutional rights and the functioning of our democracy. Consider his apparent role in overseeing law enforcement action on June 1 to deny the right of peaceful protests in Lafayette Park, or the plainly frivolous motion filed last Friday, and denied one day later, to enjoin publication of John Bolton's book for disclosing facts embarrassing to the President, or worst of all, I think, are his flamboyant media discussions of the facts supposedly unearthed by the specially-commissioned investigation he is personally conducting with the help of U.S. Attorney John Durham. Repeatedly, Barr has echoed the President's tweets and conclusively characterized the FBI investigation of Russian interference as an effort to spy on the Trump Campaign, and, as he put it, "one of the greatest travesties in American history," and he has hinted repeatedly that indictments are likely.

This conduct is a textbook violation of Justice Manual Rule 1-7.400, which bars public comment on criminal investigations before charges are filed. Here, though, the wrong is much worse as Barr is using a criminal investigation to produce fodder for the President's campaign propaganda mill, which can have its effect even though it is false. If this conduct, in particular, gives cause for great concern about what Barr may do next—just another 30 seconds.

In closing, it needs to be said that Bill Barr does regularly lie in ways that impact official action. Along with his continuing media project to make Americans believe that the FBI conspired against Donald Trump, his statements about the Mueller Report, Geoffrey Berman's supposed resignation, and Barr's own role in the events in Lafayette Park come quickly to mind. So, does his practice of regularly shrouding himself in the rhetoric and trappings of the rule of law, even as he desecrates and undermines the institutions that make it possible? To me, Barr's crowning dishonesty—

Mr. JOHNSON of Louisiana. The gentleman's time has expired.

Mr. AYER. —is the portrait of Edward Levi that a recent *New York Times* article showed hanging on the wall of his conference room as though the current incumbent—

Chair NADLER. Regular order. The witness will conclude.

Mr. GOHMERT. We are way beyond regular order.

Chair NADLER. The witness will continue.

Mr. AYER. Can I have one more sentence?

Chair NADLER. By all means.

Mr. AYER. Okay. To me, Barr's crowning dishonesty is the portrait of Edward Levi that a recent—

Mr. JOHNSON of Georgia. Mr. Chair, I would ask that the Sergeant-At-Arms—

Chair NADLER. The witness will conclude.

Mr. JOHNSON of Georgia. —be called upon to stop the disruption of this meeting. I can't hear this witness. This is a very important witness.

Mr. GOHMERT. Yeah. Well, he is way beyond—

Mr. JOHNSON of Georgia. The Chair has the—

Mr. GOHMERT. If there are no rules about when people can talk—

Mr. JOHNSON of Georgia. The Chair has the authority—

Mr. GOHMERT. There are no rules about when you can make noise.

Chair NADLER. That is a good point, and the Chair will enforce the 5-minute rule. The witness will proceed.

Mr. CHABOT. The Chair is not enforcing the 5-minute rule.

Chair NADLER. The witness will conclude.

Mr. GOHMERT. Mr. Chair, this is outrageous. Do you have no respect for the rules whatsoever?

Chair NADLER. The witness will conclude.

Mr. GOHMERT. He is 2 minutes beyond concluding, and you don't let us have that kind of time. You gavel down immediately. You are being grossly unfair.

Chair NADLER. The witness will conclude.

Mr. GOHMERT. This man had a written statement, and he knew to cut it to 5 minutes. He couldn't do it. Either we have rules, or we don't.

Chair NADLER. The gentleman will suspend. The witness will conclude.

Mr. AYER. Thank you.

Mr. GOHMERT. Then we can keep making noise.

Mr. AYER. In closing, it needs to be said that Bill Barr does regularly lie in ways that impact official actions.

Ms. JACKSON LEE. Mr. Chair, there is not order in the room. There is a banging, and it is disrespectful.

Mr. GOHMERT. No, there is certainly not.

Mr. COHEN. Mr. Chair, will you have Jean Cooper removed?

Chair NADLER. The witness will conclude.

Mr. GOHMERT. That is what you said a while ago, and he didn't conclude.

Chair NADLER. The gentleman will suspend. The witness will conclude.

Mr. AYER. So, I guess the last thing I want to sum up with. I have said all the rest of this, but the last point I would like to make is that I think his crowning dishonesty in the face of what he is doing to the Justice Department is the picture that I saw in the *New York Times* a few weeks ago, a portrait of Edward Levi on the wall of his conference room as though the current incumbent has anything but disdain for the beliefs and achievements of his predecessor. Thank you, Your Honor.

[The statement of Mr. Ayer follows:]

Statement of Donald B. Ayer
Former Deputy Attorney General under George H.W. Bush
Adjunct Professor of Law
Georgetown University Law School
Before the House Committee on the Judiciary
June 24, 2020

Good morning. Thank you very much for inviting me to appear before you today to address the current administration of the Department of Justice and its effect on the rule of law in this country. As I will explain, I believe that Attorney General Barr is a major threat to our legal system and to public trust in it. That is because he does not believe in its central tenet – that no person is above the law. For the past sixteen months, he has been working hard to free the president from accountability under a broad range of checks and balances that have played a critical role in our system for many decades. He has also grossly misused his powers as Attorney General to advance the president’s personal and political interests, and to protect his friends. Based on events that have occurred over the last several months, I think that even more disturbing actions may lie ahead.

I am here today in part because I happened to be in law school while the Watergate scandal was unfolding. In the summer of 1973, while in Washington for the summer working at a law firm, I spent many hours in a steamy apartment watching the hearings on Capitol Hill. I had been an active supporter of Richard Nixon, and was appalled to learn of the ways that his administration had violated the public trust. Today Watergate is mostly remembered – by those who think about it at all – as a bungled burglary of democratic national headquarters by a group of bumbling, followed by elaborate efforts to cover it up. The lesson that people now mostly draw from it is that when bad things are done, there may be more peril in efforts to cover up the consequences than in facing up to the acts themselves. But much more than a bungled burglary and a failed cover-up were at issue.

While Richard Nixon did not invent the practice of misusing the powers of the Executive Branch to advance his own political fortunes, he did it on a broad scale and provided us with ample evidence and even a sound track demonstrating how the levers of power could be pulled to punish one’s enemies and advance one’s own political cause. Today we remember the clandestine group of “plumbers” who operated out of the White House Executive Office

Building, with the aid of a slush fund misdirected from campaign donations, and under the aegis of the president's closest aides – including a former Attorney General.

But the official channels of government, including the FBI, the CIA, and the IRS, were also brought to bear to conduct bogus investigations of political opponents and people viewed with suspicion. These agencies of the United States engaged for political reasons in covert and unlawful spying, illegal wire-tapping, and improper use of tax information and the tax audit process. And the Department of Justice itself was severely compromised by political pressure from the White House, including but not limited to the Saturday night massacre that resulted in the firing of Independent Counsel Archibald Cox. In all, the Watergate investigation resulted in convictions of 48 people, including two former Attorney Generals. And it led to a great loss of public trust in a government and legal system that most people had assumed was doing the public's business in an upright manner.

The Watergate Reforms

Nixon's successor, Gerald Ford, chose as his Attorney General Edward Levi, a distinguished legal scholar and professor who was then president of the University of Chicago. As Attorney General Levi's special assistant at the time, Jack Fuller, has said, "Levi took restoring faith in the legitimacy of government and adherence to the rule of law as his very highest priority."¹ Doing so demanded, again in Levi's words, that ours be "a government of laws and not men,"² and that people believe in their guts that no person is above the law. Given the extensive abuses that had been perpetrated, a great deal of attention was focused on the creation of mechanisms by which corrupt uses of executive power could be prevented while leaving the institutions in a position to function for the common good. This was a difficult challenge, and demanded both complex institutional reforms, and a new spirit, committed to doing everything necessary to restore public trust. That would only be possible, Levi stated, through the efforts of "dedicated men and women [working] to accomplish this through their zeal and determination, and also their concern for fairness and impartiality."³

¹ <https://today.law.harvard.edu/restoring-justice-the-legacy-of-edward-levi/> (comments of Jack Fuller).

² <https://www.amacad.org/news/restoring-justice-legacy-edward-h-levi> (comments of Mark Wolf).

³ <https://www.amacad.org/news/restoring-justice-legacy-edward-h-levi> (comments of Jack Fuller).

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

For the Justice Department itself, Levi's leadership was transformative. He created guidelines to limit the FBI's use of intrusive investigative tactics. He also created new institutions, including a DOJ Office of Professional Responsibility focused on the proper ethical conduct of those within the Department itself, and a Public Integrity Section within the Department's Criminal Division, whose entire job was to police criminal conduct by government officials at all levels. But most of all, he inspired the men and women of the Department of Justice, at that time and for decades to come, to a new ideal of service.

Levi recognized that given the Department's extraordinary powers to affect lives, and often to do so long before any case goes to court, its actions should be viewed as having a "judicial nature,"⁴ and extraordinary efforts were necessary to protect against errant judgments and the injection of improper personal or political influences. His concept of "government by discussion" saw the making of important decisions as a collective endeavor in which the best thinking of multiple people is brought to bear, and decisions at one level must stand up to the scrutiny of both colleagues and higher-ups.⁵ He also recognized that the handling of sensitive matters such as criminal prosecutions must be scrupulously insulated from political or personal influence. Presidents since then, up until the current one, have respected the need for this separation, which consistently has been implemented through written policies guiding and

⁴ <https://www.amacad.org/news/restoring-justice-legacy-edward-h-levi> (comments of Virginia Seitz).

⁵ Restoring Justice: The Speeches of Attorney General Edward H. Levi (Jack Fuller, Ed. 2013) Ch. 3

limiting the nature of any contacts that take place between the White House and the Department.⁶

Ultimately, Levi recognized that the trustworthiness and integrity of the Department of Justice depended on the hearts and minds of the people who work there. Pursuing truth and fairness and equal justice under law is no easy thing, but the first steps are believing it is an essential goal and inspiring dedication to the hard work of achieving it. The pursuit of Edward Levi's goal of a legal system in which these are the goals and everyone knows that no person is above the law, has inspired the lives of thousands of Department of Justice lawyers during the intervening decades. It also restored public trust in our system of justice.

This Watergate settlement – by which I mean the way we settled the national angst that resulted from the scandals of Watergate – has dominated our legal system for my entire professional life. For me it was an inspiration and a career-shaping force. It inspired me to become a prosecutor – and not just any prosecutor but an Assistant United States Attorney in the Department of Justice. I chose that goal because, as I have said to many people at the time and since, I could go to work every day and just strive to do what is right. For most of the next dozen plus years, during the administrations of Jimmy Carter, Ronald Reagan, and George H.W. Bush, I was privileged to hold a series of very satisfying jobs in the Department, and while things got more complicated the higher I rose, my basic goal always remained the same. In the end, my decision to leave my position as deputy attorney general was as easy as had been my decision to go to the Department in the first place. In May of 1990, I was directed by the Attorney General to take an action that I believed was wrong, and, in the face of that, I decided to resign rather than to comply.⁷

Barr's Beliefs Concerning Executive Power

Clearly, Bill Barr experienced Watergate and its resolution differently than I did. By sometime in the 1980s, if not well before, he had formulated a concept of the presidency that would have cheered Nixon in his heyday. Discounting Levi's Watergate lesson that public trust depends on having a system of "laws and not men" in which no person is above the law, it is

⁶ <https://www.lawfareblog.com/importance-limiting-white-house-doj-contacts-its-not-just-about-obstruction>

⁷ <https://www.latimes.com/archives/la-xpm-1990-05-20-mn-162-story.html>

apparent from his advocacy and action when in government that Barr has long believed that the president's power should be virtually unchecked.

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

For many years, Barr has also argued much more broadly against the very idea that the president's prerogative to exercise unchecked discretion can be restricted in any way – including by the concept that some powers are “shared” by multiple branches, or through the mechanisms of congressional oversight and judicial review. As head of the Office of Legal Counsel in 1989 and 1990, Barr wrote opinions advancing his views on many of these topics, including one well-known memo, in which he sought to rally the heads of the Executive Branch departments to resist what he viewed as myriad incursions by congress upon their freedom to act.⁸ Happily, though, President George H.W. Bush had no aspirations to autocracy, and Barr's intellectual gambits did not at that time result in the radical expansions of presidential power that were his goal. Less happily, that fact allowed Bill Barr to emerge from his fourteen months as Attorney General with a totally unjustified reputation as an institutionalist who could be counted on to restrain another president's more extreme impulses.

So today we find ourselves in a difficult spot, completely unique in our history. We have a president who openly aspires – indeed expressly claims that his “Article II” gives him the right

⁸<https://www.justice.gov/file/24286/download>

– to “do anything he wants to.”⁹ And we have an Attorney General who has told him he is so entitled under the Constitution, and is working overtime to make real Nixon’s misconception that “when the president does it, that means it is not illegal.”

Don’t take my word for this. Just listen to what Barr has said and look at what he has been doing. In particular, he is emphatic that it is simply not possible for legal rules adopted by either congress or internally within the executive branch to restrain in any way the power of the president to make any and all Executive Branch decisions. As Barr said in the unsolicited 19-page memorandum that he submitted in June 2018¹⁰ addressing the impropriety of the Mueller investigation then under way, the president “alone *is* the Executive Branch” (all italics are his), and “the Constitution vests” in him personally all powers that belong to that branch. Barr made explicit that this necessarily includes “*all Federal law enforcement power*, and hence prosecutorial discretion.” Accordingly, there is no constitutional way that the law can foreclose the president even from “[exercising] supervisory authority over cases in which his own conduct might be at issue.”

How Attorney General Barr Has Worked To Create An Authoritarian President

It is thus no surprise that Barr’s current service as Attorney General has been filled with flagrant personal interventions carefully crafted to neuter the Watergate reforms and attendant institutions that have made the Department of Justice a trustworthy steward of a rule of law which no one, not even the president, can subvert.

Undermining the work of independent factfinders

Within a few weeks of taking office, Barr began leveling repeated accusations that the FBI investigation of Russian interference in our 2016 election involved improper “spying” on the Trump campaign, which he has said he regards as a “big deal.”¹¹ From that initial attack on the work of his own agency, he entered upon a pattern of conduct involving outright contradiction and active subversion of independent fact finders who had been given the job of exploring and examining the evidence relating to those issues. Last March, Barr’s written and verbal

⁹ <https://www.c-span.org/video/?c4809509/user-clip-trump-constitution-i-president>

¹⁰ [https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-](https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf)

[mue/b4c05e39318dd2d136b3/optimized/full.pdf](https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf)

¹¹ <https://www.cnn.com/2019/04/10/politics/barr-doj-investigation-fbi-russia/index.html>

whitewashing of the report by Special Counsel Mueller, and especially its findings relating to obstruction of justice, was the first really rude shock that showed us where Barr was coming from.¹² But he quickly confirmed our worst fears, when in May, rather than rely on the long-underway DOJ Inspector General inquiry about the FBI investigation into Russian interference and possible Trump campaign involvement, Barr initiated a substantially redundant investigation of his own.¹³ When Barr's separate investigation was later denominated as criminal,¹⁴ and Barr was seen to be flying overseas apparently to question witnesses personally, his complete distrust of truly independent factual inquiries by unbiased professional investigators became even clearer. Then, in December, when Inspector General Horowitz announced his findings,¹⁵ including stating that there was ample factual basis for the initiation of the FBI investigation and that no evidence was found of bias in the FBI's oversight function, Barr and U.S. Attorney John Durham, who he had enlisted to run his investigation, each publicly announced their disagreement with that finding.¹⁶

Ignoring the Appropriation Clause

Beyond these direct personal intrusions by Barr to denigrate and subvert the legitimacy of independent fact finding processes of his own department, from the very start of his service, Barr has actively used the resources of the Department of Justice, and his own rhetorical megaphone, to negate the traditional checks and balances that have long constrained the president. Take for example the constitutional power of the legislature to appropriate (or withhold) funds for particular purposes. On February 15, 2019, the day after Barr was confirmed, the President issued an emergency declaration to justify the diversion of funds from other purposes to build the border wall.¹⁷ Congress had repeatedly refused to appropriate money for that purpose, and the President had personally confirmed that he "didn't need to do

¹² <https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html>; <https://www.washingtonpost.com/politics/2019/04/19/what-attorney-general-barr-said-vs-what-mueller-report-said/>

¹³ <https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html>

¹⁴ <https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html>

¹⁵ <https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html>

¹⁶ <https://www.nytimes.com/2019/12/09/us/politics/barr-durham-ig-report-russia-investigation.html>

¹⁷ https://en.wikipedia.org/wiki/National_Emergency_Concerning_the_Southern_Border_of_the_United_States

this, . . . [but] just wanted to get it done faster, that's all."¹⁸ But never mind. Barr's DOJ has actively litigated the president's right to divert the funds and thus frustrate this explicit constitutional check on his power.

Stonewalling congressional oversight and state criminal subpoenas

More generally, Trump's total stone-walling of congress's traditional oversight power, normally exercised through subpoenaing documents and calling witnesses, has only been possible with the complicity of the Department of Justice, in the form of multiple Office of Legal Counsel opinions, and vigorous litigation in the courts. Barr's prior opinions as the head of the Office of Legal Counsel have played a prominent role in providing "authority" for new opinions issued by Barr's OLC to support many of his current initiatives.¹⁹

These outrageous assertions include the idea that executive branch officials need not raise a specific claim of executive privilege with regard to particular information, but rather can simply assert a sweeping prophylactic absolute immunity which excuses their need even to appear or raise any specific objection.²⁰ The Department has also stone-walled, so far successfully, the House Ways and Means Committee's request to the Treasury Department to turn over the President's tax returns, despite a statute that requires the Treasury to do so.²¹ And in a case now pending before the Supreme Court, this claim of immunity from any obligation of transparency is asserted to include a sweeping absolute immunity from process issued by State grand juries to investigate crimes under their laws, for records in the hands of a third party reflecting the President's personal affairs.²² Thus, as the Department's lawyer memorably argued in court, such State investigative efforts should be flatly barred even if the President shot someone in the middle of Fifth Avenue.²³

Undermining the inspectors general

In recent months, a severe conflict has developed between the administration's autocratic aspirations, and many elements of the Inspector General community whose basic job

¹⁸ <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>

¹⁹ See <https://prospect.org/power/40-year-war-bill-barr-oversight/>

²⁰ <https://assets.documentcloud.org/documents/6018928/OLC-McGahn-Opinion.pdf>

²¹ <https://www.lawfareblog.com/olc-opinion-treasurys-refusal-provide-trump-tax-returns>

²² <https://www.scotusblog.com/case-files/cases/trump-v-vance/>

²³ <https://www.usatoday.com/story/news/politics/2019/10/23/president-donald-trump-could-shoot-someone-without-prosecution/4073405002/>

is to review for propriety the conduct of affairs within agencies of the Executive Branch. During April and May, a total of five IG's were fired.²⁴ As the chief legal officer of the government, Barr is very likely to have at least been consulted in connection with all of these. But our lack of information about what goes on behind closed doors makes it impossible to say for sure what precise role he played in most of them. We do know that in September 2019, OLC issued an opinion directing the Inspector General for the Intelligence Community that the whistleblower complaint relating to the June 2019 phone call with the president of Ukraine was not a matter of urgent concern that was required by statute to be referred to the House Intelligence Committee.²⁵ That implausible conclusion was met by a letter of stern rebuke from the entire Federal inspector general community.²⁶ We also know that when Trump fired that same IG in April of this year, apparently just for doing his job, Barr spoke up publicly to endorse the action as justified.²⁷

Curtailling judicial review of the executive branch

The Department has also asserted the position – which Barr made a centerpiece of the November 2019 speech that he gave to the Federalist Society²⁸ – that courts have no jurisdiction to consider suits by congress to compel compliance with oversight subpoenas. Barr in that speech actually went beyond this extreme position to argue that the courts should have no role at all in constitutional disputes between the other two branches. Further, according to him, courts should never sit in review of executive action based on the exercise of “prudential judgment,” in areas of law that “cannot be reduced to tidy evidentiary standards and specific quantum of proof,” or that would involve any inquiry into the “motivation behind government action.” Such radically constrained judicial review would leave the President free, as he asserts he is, to do pretty much anything he wants to.

Barr's many abuses of authority, perhaps coupled with his explicit assertions that court's have no business inquiring about them, have even caused some Judge's to speak out. As U.S.

²⁴ https://en.wikipedia.org/wiki/2020_dismissal_of_inspectors_general

²⁵ <https://www.justice.gov/olc/opinion/urgent-concern-determination-inspector-general-intelligence-community>

²⁶ <https://www.documentcloud.org/documents/6523365-CIGIE-Letter-to-OLC-Whistleblower-Disclosure.html>

²⁷ <https://www.nytimes.com/2020/04/10/us/politics/barr-inspector-general-firing.html>

²⁸ <https://www.youtube.com/watch?reload=9&v=MeMwdtbPR6g;>

<https://www.americanrhetoric.com/speeches/williambarrfederalistsociety.htm>

District Judge Reggie Walton noted in March of this year, reflecting on the incongruities between Barr's comments on the Mueller report, and the report itself as it finally was released some weeks later, Barr's conduct had "cause[d] the Court to seriously question whether Attorney General Barr made a calculated attempt to influence public discourse" in favor of President Trump contrary to the actual content of the report.

Using political cronies to review or decide issues of special interest to the President

Perhaps not coincidentally, Judge Walton's comments came as Barr this Spring has taken a number of steps to dismantle and defy the principles of the Watergate reforms that Levi put in place. One key step is that he has now settled into a well-developed, scalable process for systematically subverting the independent decision making processes of the Department, which were central to Levi's reforms to secure evenhanded treatment of cases. He does it by using a cadre of ambitious conservative lawyers to second-guess or completely take over decision making from experienced career attorneys. By playing ball with Barr, these aspiring lawyers can look forward to the rewards of career advancement, including greater responsibilities, higher positions, and in more than a few cases to eventually receiving the reward of a life-tenured federal judgeship. While there is no way to know the full extent of this abuse, it clearly has been instrumental in the Roger Stone and Michael Flynn cases. It is also admittedly being used to receive information from Rudy Giuliani relating to the Ukraine situation,²⁹ to evaluate possible investigations of presidential candidates or campaigns,³⁰ and to inquire into "unmasking" requests during the latter part of the Obama administration.³¹

Reversing the government's position in the Stone and Flynn cases

To achieve the 180-degree reversal of the government's position in the cases of Trump loyalists, Roger Stone and Michael Flynn, Barr had to go to the extreme length of engineering the removal and replacement of Trump appointee District of Columbia United States Attorney Jesse Liu, who had been vigorously pursuing those cases, and who also ended the investigation of Andrew McCabe in January of this year based on insufficient evidence. The machiavellian

²⁹ https://www.washingtonpost.com/national-security/barr-acknowledges-justice-dept-has-created-intake-process-to-vet-giulianis-information-on-bidens/2020/02/10/0fba553a-4c1e-11ea-bf44-f5043eb3918a_story.html

³⁰ <https://www.nytimes.com/2020/02/05/us/politics/barr-2020-investigations.html>

³¹ <https://www.wsj.com/articles/barr-names-prosecutor-to-investigate-unmasking-11590674190>; <https://www.cnn.com/2020/05/27/politics/william-barr-unmasking-investigation/index.html>

path of her removal involved the President first nominating her to a Treasury Undersecretary position in December, having her move, apparently voluntarily, to Treasury to await confirmation, and then withdrawing the Treasury nomination in February. Meanwhile, her departure as U.S. Attorney had cleared the way for Barr to make an interim appointment of Tim Shea, who Fox News described as “Barr’s right-hand man.”³²

In the instance of the Roger Stone sentencing, the government undertook to reverse the position it had reached through a routine, unbiased and thoroughly-reviewed sentencing recommendation process. While this botched effort gave rise to such overwhelming uproar that the government was obliged to actually withdraw its reduced sentencing recommendation,³³ Barr was not deterred – in the face of presidential tweeting – from again reversing course in the Flynn case. This time, following review of the case by Missouri U.S. Attorney Jeffrey Jensen, the government filed a motion to dismiss the case, on which Shea’s name and signature appears as the only government attorney. After two guilty pleas, and many months during which Liu’s U.S. Attorney’s Office argued vigorously that Flynn is guilty of a crime with serious implications for the national interest, the government now advances the position that the prosecution is unfair and also not one that it would be able to prove in court. Meanwhile, as that litigation proceeds, Shea has left the scene, having been promoted to the position of head of the Drug Enforcement Administration.³⁴

How Barr Is Using The Department of Justice As A Tool Of The President’s Election Campaign

Even more alarming than this institutionalization of a process to achieve political outcomes in sensitive cases, is the fact that Barr has now clearly signed on as an active participant in the Trump campaign. I mean that in the usual sense – that he is serving as a spokesman and advocate for campaign positions being advanced by the President. It is troubling in general that the nation’s chief law enforcement officer would attempt to double as a campaign spokesman. But here it is far more pernicious, since Barr is also using the Department’s litigation and other tools to advance the President’s narrow political interests.

³² <https://www.foxnews.com/politics/william-barr-timothy-shea-top-prosecutor-dc>

³³ <https://talkingpointsmemo.com/muckraker/read-doi-files-new-watered-down-sentencing-memo-for-roger-stone>

³⁴ <https://www.providencejournal.com/news/20200520/timothy-shea-fall-river-native-named-to-head-drug-enforcement-administration>

Trying to add a citizenship question to the census

One of the first and still the among the most egregious instances of such abuse involved DOJ handling of the lawsuit about the proposed citizenship question to be added to the 2020 census. Plaintiffs had complained that doing so would discourage responses and result in an undercount and underrepresentation in apportionment of areas where many Hispanics live.³⁵ The government denied any such political purpose, and claimed that it was acting in order to comply with Voting Rights Act. Chief Justice Roberts June 2019 opinion for the Court ruled for the plaintiffs, saying that the “evidence showed that [Secretary Wilbur Ross] was determined to reinstate a citizenship question from the time he entered office,” and that the supposed Voting Rights Act rationale was a “contrived” “pretext.”³⁶

Undeterred that the only justification ever offered by the government had been found by the Supreme Court to be an invalid, made-up reason, Barr stated publicly a few weeks later that he still saw a way that the question could be added, and proceeded to replace the original litigation team.³⁷ He also continued to stonewall the House’s demands for documents showing what in fact occurred, and on July 17, the House held Barr and Ross in contempt.³⁸ Evidence continued to accumulate for the rest of the year, and ultimately made it quite clear that Department lawyers had been complicit in helping Commerce concoct the phony rationale in response to Commerce’s explicit request to come up with a legal justification. The stench of these events appears to have resulted in abandonment of the effort to include the question.

Interfering with state decisions concerning reopening the country

Recently Barr has made repeated statements in support of Trump’s urgent priority to get the economy reopened. Conduct limitations to protect the public safety in a health crisis are uniquely within the province of state and municipal government, and the choices here are highly local and tragically difficult. But that has not stopped Barr from using his powers as Attorney General to actively meddle. Back in April, when virtually the entire country was under

³⁵ <https://slate.com/news-and-politics/2019/11/hofeller-document-census-citizenship-question-supreme-court-consequences.html>

³⁶ https://www.supremecourt.gov/opinions/18pdf/18-966_bq7c.pdf

³⁷ <https://www.cbsnews.com/news/barr-census-citizenship-question-sees-legal-way-to-add-it/>

³⁸ <https://www.nytimes.com/2019/07/17/us/politics/barr-ross-contempt-vote.html>

orders to shelter in place, Barr went on Hugh Hewitt's radio show³⁹ to say that "the idea that you have to stay in your house is disturbingly close to house arrest. . . . We're looking carefully at a number of these rules that are being put into place." He said that if they saw rules in place which "we think . . . go too far," DOJ would "jawbone the governors" or side in court with any plaintiffs complaining that these emergency measures violate their constitutional rights. The Department actually intervened in some cases where churches brought claims challenging the limitations.⁴⁰ It is unclear whether they are still considering such actions, following a ruling by the Supreme Court rejecting one such challenge at the end of May.⁴¹

Disputing the utility of mail-in voting

Another sensitive area where Barr has seen fit to weigh in publicly concerns voting by mail, which could be an important way that more Americans can be afforded a realistic opportunity to vote, especially in these Coronavirus times when standing in line at the polls can present a very real risk of exposure. While voting by mail is already used to some degree in virtually every state, and is the way everyone votes in five states, Barr nonetheless has seen fit recently to express his own unsupported view that voting by mail is susceptible to fraud and manipulation by foreign governments. In doing so, he echoed a recent unsubstantiated tweets issued by the President.⁴²

Clearing peaceful protestors from Lafayette Park

Probably the abuse of Barr's powers in support of Trump's campaign efforts that has most shocked the public conscience up to now has been his role in directing law enforcement forces on June 1 to violate the First Amendment rights of peaceful protestors by forcibly clearing them out of Lafayette Park and making way to stage a media event with the President

³⁹ <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/840262570/barr-open-to-legal-action-if-governors-restrictions-go-too-far>

⁴⁰ https://www.washingtonpost.com/local/legal-issues/doj-claims-virginia-governor-is-violating-religious-freedom-with-pandemic-order/2020/05/04/2c083b18-8e35-11ea-9e23-6914ee410a5f_story.html; <https://www.usatoday.com/story/news/politics/2020/04/14/coronavirus-doj-sides-miss-church-amid-coronavirus-restrictions/2990975001/>

⁴¹ <https://www.npr.org/sections/coronavirus-live-updates/2020/05/30/866097231/supreme-court-rejects-churchs-challenge-of-california-s-coronavirus-rules>

⁴² <https://lawandcrime.com/high-profile/ag-barr-casually-floated-new-mail-in-ballot-fraud-conspiracy-theory-that-experts-say-just-couldnt-happen/>

holding a Bible for pictures in front of St. John's Church.⁴³ Barr did this by amalgamating a collection of enforcement officers from various agencies, including some that wore unmarked uniforms so that their identity was not discernible. The officers on hand included many from components of the Department of Justice – including the FBI, the Bureau of Prisons, the Bureau of Alcohol Tobacco and Firearms, and the Drug Enforcement Administration.⁴⁴ The disturbing events of that evening unleashed a wave of outraged responses from the likes of James Mattis, John Kelly, Colin Powell, and others. Barr has disputed the evidence that demonstrators conduct that night was peaceful, and echoed the President's unsupported assertions blaming "Antifa" for violent behavior while making no mention of the presence of violent right-wing groups. He also denied that he ordered the enforcement action in order to facilitate a photo opportunity – even though it occurred just minutes before the President walked across the square – and quibbled about the difference between pepper balls and tear gas, at least the first of which was undeniably used by police.⁴⁵

Suing to keep John Bolton's information secret and firing Geoffrey Berman

Just last Friday, the Department went to court with a facially meritless motion seeking a prior restraint on the publication of John Bolton's book. Such action would be a clear violation of the First Amendment, and would deny the public information central to their role as citizens. Thus the motion was denied the next day.⁴⁶ And also last Friday, apparently following a meeting with SDNY U.S. Attorney Geoffrey Berman, who has been actively pursuing investigations and prosecutions embarrassing to the President, Barr took action to have Berman removed.⁴⁷ In both respects, Barr used his powers as Attorney General in an effort to prevent information politically detrimental to the President and his campaign from coming to light.

⁴³ <https://www.nbcnews.com/politics/white-house/memo-front-lines-different-america-n1222066>

⁴⁴ By the June 1, the head of DEA was Barr's "right-hand man" Timothy Shea, and by executive order, the agency had been given a broad array of extraordinary powers not conferred by statute, including the right to conduct "covert surveillance" in connection with the demonstrations.

⁴⁵ <https://www.documentcloud.org/documents/6935297-LEOPOLD-DEA-Memo-George-Floyd-Protests.html>

⁴⁶ <https://www.washingtonpost.com/politics/2020/06/08/attorney-general-barrs-dishonest-defense-clearing-lafayette-square/>

⁴⁷ https://www.washingtonpost.com/local/legal-issues/us-judge-declines-to-block-release-of-book-by-former-national-security-adviser-john-bolton/2020/06/20/e14842f2-b301-11ea-8758-bfd1d045525a_story.html

⁴⁸ <https://www.nytimes.com/2020/06/19/nyregion/us-attorney-manhattan-trump.html>

Misusing the Durham investigation to support the President's deep-state campaign narrative

Even more disturbing than these misuses of power to keep the American people in the dark, is the role that Barr has assumed this Spring as the primary spokesman advancing Trump's conspiratorial vision of the FBI investigation that uncovered clear Russian interference in our 2016 election. Barr has been headed down this road since shortly after he took office, with his repeated assertions of "spying" on the President's campaign. But in recent weeks, those allegations have become a frequent, high-profile drumbeat, no doubt intended to give substance to the President's tweeted "Obamagate" narrative, and to expressly foreshadow retribution ahead for unnamed wrongdoers. Barr seems totally obsessed with the need to get the attention of the American people focused on Trump's allegations that he was done a grave wrong by the 2016 investigation, and he is doing it through grossly inappropriate claims that an on-going DOJ investigation has so concluded.

In an early-April interview with Fox News's Laura Ingraham, Barr called the Russian-interference investigation "one of the greatest travesties in American history," and said that it was undertaken "without any basis" by investigators who were trying "to sabotage the presidency."⁴⁸ "We're not dealing with just mistakes or sloppiness. There is something far more troubling here, and we're going to get to the bottom of it." Over the next several weeks, Barr spoke on the same subjects with the radio host Hugh Hewitt⁴⁹ and CBS's Catherine Herridge,⁵⁰ including noting that there would be no limitation on bringing charges to avoid influencing the election, since he did not envision indicting any candidate.⁵¹ On June 8, in an extended

⁴⁸ https://www.realclearpolitics.com/video/2020/04/09/ag_bill_barr_media_on_a_jihad_to_discredit_trump_and_hydroxychloroquine.html

⁴⁹ <https://www.hughhewitt.com/attorney-general-william-barr-on-the-crisis/>

⁵⁰ <https://www.cbsnews.com/news/attorney-general-william-barr-on-michael-flynn-obamacare-and-coronavirus-restrictions-transcript/>

⁵¹ On May 18, 2020, a day on which he made headlines by stating he did not anticipate investigating either President Obama or Vice President Biden, <https://www.cnn.com/2020/05/18/politics/william-barr-obama-biden-investigation-durham/index.html>. Barr also stated that "what happened to the president, and I've said this many times, . . . in the 2016 election and throughout the first two years of his administration was abhorrent. It was a grave injustice and it was unprecedented in American history. . . . The proper investigative and prosecutive standards of the department of justice were abused, in my view, in order to reach a particular result. We saw two different standards of justice emerge, one that applied to President Trump and his associates and the other that applied to everybody else. We can't allow this ever to happen again." <https://kerrypicket.com/william-barr-obama-admin-actions-against-trump-were-unprecedented-and-abhorrent/>

interview with Fox News' Bret Baier,⁵² he expanded further: ""For the first time in American history, police organizations and the national security organizations were used to spy on a campaign, and there was no basis for it. . . . We can't discuss future charges. . . . But people should not draw from the fact that no action has been taken yet, that that means that people are going to get away with wrongdoing." Indeed, he said that they are "looking at" some people whose names some may find familiar, though, he noted, they don't include President Obama or Vice President Biden.

Then again, just last Sunday, June 21, talking with Fox's Maria Bartiromo, Barr quite amazingly complained that not enough people seem to be paying attention to his efforts to alarm them.⁵³ "So that has been surprising to me, that people aren't concerned about civil liberties and the integrity of our governmental process in terms of the future of Durham's investigation. You know, he's pressing ahead as hard as he can. And I expect that, you know, we will have some developments hopefully before the end of the summer."

So much for not discussing future charges, or adhering to established rules about the confidentiality of on-going investigations. Here, the basis for all of Barr's claims is acknowledged to be the ongoing criminal probe into the Russian-interference investigation, which he is personally overseeing with the help of U.S. Attorney John Durham. Thus his entire public discussion including the flamboyant innuendos of still-uncharged wrongdoing plainly violates Rule 1-7.400 of the *Justice Manual*, which prohibits comment on "the existence of an ongoing [criminal] investigation" or on "its nature or progress before charges are publicly filed." In pursuing this running narrative to reinforce Trump's tweeted claim of a conspiracy against him, Barr is in blatant violation of not just time-honored norms of political detachment and evenhandedness, but of an explicit, long-standing Department rule. Clearly he wants us all to believe that between now and the election, charges will be filed "bringing to justice people who were engaged in abuses." Whether that will actually happen, or rather is simply a PR bluff advanced at the President's insistence for campaign effect, it is plainly one more gross abuse of

⁵² <https://www.foxnews.com/politics/barr-says-familiar-names-among-those-doj-is-investigating-in-durham-probe>

⁵³ <https://www.foxnews.com/politics/barr-durham-probe-should-have-some-developments-this-summer>

the broad powers that the Attorney General is able to exercise long before his actions ever come before a court of law for judicial review.⁵⁴

Conclusion

Barr's current behavior brings to mind the speech that then-Attorney General Robert H. Jackson gave in 1940 to the assembled United States Attorneys:⁵⁵

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.

. . .

With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. . . . [T]he real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

It was precisely to avoid fears of such abusive conduct that Edward Levi in the wake of Watergate put in place a broad array of reforms and thus restore public trust in the justice system and inspire several generations of Department lawyers to an ideal of evenhanded justice. It is now entirely clear that Bill Barr is Edward Levi's polar opposite, and is working diligently to dismantle what Levi and his successors put in place. Levi's overriding concern was to create a government of laws that apply equally to everyone, and to make clear to all that no person, not even the president, is above the law. Barr's central goal is the opposite – to systematically dismantle the system of checks and balances that stand between this President and unchecked power.

Where Levi insisted on orderly deliberative processes and respect for the integrity of a dedicated professional staff working within a clear oversight framework, Barr has relied without hesitation on irregular processes and ad hoc decision making by his personal confidantes.

⁵⁴ I learned after this testimony was finalized that Barr brought up the subject again with Fox's Maria Bartiromo on June 21.

⁵⁵ <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>

Where Levi emphasized the need for clear detachment of sensitive matters – especially those of a criminal nature – from political and personal influence, Barr has repeatedly allowed just such influence to be brought to bear, and in the most flagrant cases of personal associates of the President. Where Levi emphasized transparency and accountability for one's views as necessary to be deserving of trust, Barr's long record of opaque, conclusory pronouncements, and assertions that do not to square with the facts as they become known, have justly made him a figure of widespread distrust.

In addition to quite a number of statements related to official action that seem contrary to the facts, Bill Barr regularly shrouds himself in the rhetoric and trappings of the rule of law, even as he desecrates and undermines the institutions that make it possible. But to me, his crowning deception to date is the portrait of Edward Levi that a June 1, 2020 New York Times article showed hanging on the wall of Barr's conference room, as though the current incumbent had anything but disdain for the great achievements of his predecessor.⁵⁶

⁵⁶ <https://www.nytimes.com/2020/06/01/magazine/william-barr-attorney-general.html>

Chair NADLER. Thank you.

Mr. JOHNSON of Georgia. Mr. Chair, I have a parliamentary inquiry.

Chair NADLER. The gentleman will State his parliamentary inquiry.

Mr. JOHNSON of Georgia. Is it not appropriating for the Chair to exercise discretion in extending the 5-minute Rule as the Chair sees fit?

Chair NADLER. It certainly is appropriate.

Mr. JOHNSON of Georgia. Is it authorized under the rules of this committee?

Chair NADLER. It certainly is authorized under the rules of this committee.

Mr. JOHNSON of Georgia. Well, then can not the Chair call in the Sergeant-at-Arms to maintain order when a member of this panel is out of order and disrupts the meeting?

Chair NADLER. We will move on to the next witness.

Mr. COLLINS. Parliamentary inquiry, Mr. Chair.

Chair NADLER. Mr. Elias.

Mr. COLLINS. Parliamentary inquiry, Mr. Chair.

Chair NADLER. Mr. Elias.

Mr. COLLINS. Parliamentary inquiry, Mr. Chair.

Chair NADLER. Mr. Elias.

Mr. COLLINS. Point of order, Mr. Chair.

Chair NADLER. There is no point of order.

Mr. COLLINS. How do you know? I've not said one. Here we go again.

Ms. JACKSON LEE. The gentleman is completely out of order, Mr. Chair.

Chair NADLER. The gentleman will State his point of order.

Mr. COLLINS. The point of order is, is according to the House Rules, a House Chair cannot capriciously determine the 5-minute Rule at the whim of what he wants. It has to be fairly and impartially applied. That is the according to the House Rules, and that is not what has happened.

Chair NADLER. We are applying the 5-minute Rule as provided by the House Rules.

Mr. COLLINS. So, you are ruling on my point of order?

Chair NADLER. The gentleman has not stated a point of order.

Mr. COLLINS. I did State a point of order. I stated the point of order is the rules are being violated by a capricious Chair who is not following the Rules of the House by arbitrarily deciding when the 5-minute Rule will be applied and when it will not be applied.

Chair NADLER. You have not stated a cognizable point of order. The Chair has discretion—

Mr. COLLINS. Mr. Chair, you have not stated a recognizable way of running the Committee in 18 months. So, I mean, that is—

Chair NADLER. The gentleman will suspend. The gentleman has not stated a cognizable point of order. Mr. Elias?

Mr. COLLINS. I did earlier, and you blew over it.

Chair NADLER. The gentleman will suspend. Mr. Elias?

TESTIMONY OF JOHN W. ELIAS

Mr. ELIAS. Good afternoon, Mr. Chair, Ranking Member Jordan, and Members of the committee. My name is John Elias, and I am a career attorney with the Department of Justice. I joined the Department in 2006, and over the past 14 years, I have served under six Attorneys General and three Presidents. I have spent my entire legal career at the Department. Although I am a current Department attorney, my testimony is personal and does not represent the views of the Department.

Throughout my career in Federal service, I have been taught to do the right thing for the right reasons in the right way. That is why earlier this year I asked the DOJ inspector general to examine whether multiple antitrust investigations launched under Attorney General Barr were abuses of authority or other misconduct. The first matter that I referred to the IG concerned 10 investigations that the Antitrust Division launched into merger activity in the marijuana, or cannabis, industry. These mergers were not even close to meeting established criteria for these kinds of investigations, and yet these cannabis investigations accounted for a full 29 percent of the Division's full review investigations last fiscal year.

For context, these kinds of investigations are rare. On average, only 1 to 2 percent of the thousands of transactions that come before the Division each year get a full review. In the first of the cannabis investigations, the merger of MedMen and PharmaCann, career attorneys examined the proposed deal and determined that the transaction called for no further antitrust review. Staff reached this conclusion using the criteria under the horizontal merger guidelines that have guided the Division for decades. However, on March 5th, 2019, Attorney General Barr called the Antitrust Division leadership to his office and ordered the Division to proceed with a full investigation. The Division staff complied, issuing burdensome 15-page subpoenas that compelled production of 1.3 million documents from 40 personnel, all at great expense to the companies. Although the Division ultimately found no evidence of antitrust problems, the companies abandoned the merger, citing delays in regulatory approval.

The Antitrust Division went on to conduct similar investigations of nine other mergers in the cannabis industry. Division staff continued to document at the outset the lack of any bona fide antitrust issues. In some cases, the companies operated in completely different geographies and did not compete at all. Nonetheless, the Division continued to issue subpoenas and compel productions of millions of documents from these businesses. At one point, the office handling agriculture became so overwhelmed with cannabis investigations that it had to pull in attorneys from the Telecommunications, Media, and Technology offices. In response to staff concerns about these investigations, the head of the Antitrust Division, Assistant Attorney General Delrahim acknowledged at an all-staff meeting that the cannabis industry is "unpopular on the fifth floor," referring to AG Barr's offices at DOJ headquarters. Personal dislike of an industry is not a valid basis upon which to ground an antitrust investigation.

The next investigation that I reported to the IG concerns an arrangement announced in July 2019 between California and four

automakers to limit fuel emissions. After news reports indicating that the President was enraged by the arrangement and wanted to retaliate, President Trump criticized the deal on Twitter. The day after the tweets, Antitrust Division political leadership instructed staff to initiate an investigation that very day. Ordinarily, decisions of import—here an investigation of a \$630-billion automobile market—would take time and care to evaluate, especially when the action would face defenses. In the hurried investigation paperwork, staff acknowledged that it had only partially examined public information.

Members of the committee, I have undertaken whistleblower activity, and I'm here today because I recognize the imperative for law enforcers to operate even handedly and in good faith. I reported these matters to the IG because they were evidence that our Nation's antitrust laws were being misused. These laws have protected American markets and consumers for more than a century. The hundreds of career staff at the Antitrust Division take this mission seriously and expect DOJ's political leadership to as well.

I thank you for examining these issues and will be happy to answer your questions.

[The statement of Mr. Elias follows:]

Testimony of John W. Elias
U.S. House Committee on the Judiciary
June 24, 2020

Chairman Nadler, Ranking Member Jordan, and Members of the Committee, thank you for the opportunity to testify today.

I am a career employee at the Department of Justice. Based on what I have seen, and what my colleagues saw and described to me, I was concerned enough to report certain antitrust investigations launched under Attorney General Barr to the Department of Justice Inspector General. I asked him to investigate whether these matters constituted an abuse of authority, a gross waste of funds, and gross mismanagement. I am appearing here today under subpoena to describe these matters to the Committee. Although I am a current DOJ attorney, my testimony is personal and does not represent the views of the Department.

Introduction

I joined the Department in 2006, and over the past 14 years I have served under six Attorneys General and three Presidents. I held leadership positions both in the Trump Administration, where I acted as Chief of Staff in the Antitrust Division from January 2017 to October 2018, and in the Obama Administration, where I served as a Deputy Associate Attorney General and Chief of Staff in the Office of the Associate Attorney General. Currently, as an Antitrust Division prosecutor, my casework includes prosecuting price-fixing conspiracies in the pharmaceutical industry.

Today, I will describe two forms of investigations undertaken over the objections of the career staff. First, at the direction of Attorney General Barr, the Antitrust Division launched ten full-scale reviews of merger activity taking place in the marijuana, or cannabis, industry. These mergers involve companies with low market shares in a fragmented industry; they do not meet established criteria for antitrust investigations. Second, I will detail an investigation – initiated the day after tweets by President Trump – of an arrangement between the State of California and four automakers on fuel emissions.

I have undertaken whistleblower activity, and am here today, because I recognize the imperative for law enforcers to operate even-handedly and in good faith. During my career at DOJ, I have been taught to do the right thing, for the right reasons, in the right way.

Cannabis Merger Investigations

Since March 2019, the Antitrust Division has conducted ten investigations of mergers in the cannabis industry. While these were nominally antitrust investigations, and used antitrust investigative authorities, they were not bona fide antitrust investigations. Nonetheless, they accounted for 29 percent of the Antitrust Division's full-review merger investigations in Fiscal Year 2019.

Regardless of whether these companies are complying with the Controlled Substances Act, the investigations I will describe are not investigations of potential violations of federal drug law. An appropriations rider restricts the Justice Department from prosecuting medical marijuana usage in states that have legalized it.

The Standard Merger Review Process

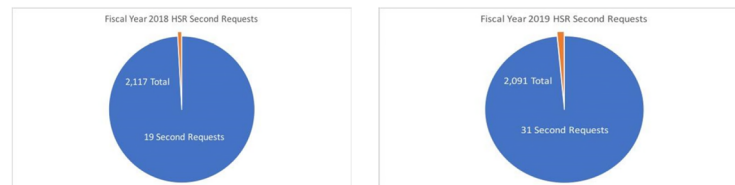
The mission of the Justice Department's Antitrust Division is to protect competitive marketplaces across our entire economy. The Division reviews for potential harm to competition every large-dollar merger taking place in the United States. The Division enforces the Clayton Act, which bars mergers that may substantially lessen competition or tend to create a monopoly.

After companies report their proposed mergers,¹ staff undertakes an individualized examination to identify those most likely to violate the antitrust laws. Staff assesses whether to perform no investigation, a brief investigation, or a full investigation. The Antitrust Division's Manual identifies as the first factor for staff to consider in determining whether to open an investigation "whether there is reason to believe that an antitrust violation may have been committed." Our Horizontal Merger Guidelines treat market shares as a key indicator of whether to give routine clearance or to perform the full and most searching examination of the merger by issuing what is called a "Second Request" subpoena. It usually takes high market shares – typically double-digit market shares – to trigger the extended review process. "Unconcentrated markets" require the least review.

Across the entire American economy, the Antitrust Division performs the full Second Request investigation on around 1-2% of the thousands of mergers filed each year – ordinarily, only the most concerning deals. The Division conducted 19 Second Request investigations in Fiscal Year 2018 and 31 in Fiscal Year 2019 from over 2000 transactions filed in each of those years.

¹ Under the Hart-Scott-Rodino Antitrust Improvements Act (HSR), mergers are reported to both the Antitrust Division and the Federal Trade Commission, which shares the Division's mandate to enforce the antitrust laws and which engages in similar merger reviews. The criteria for when a merger must be reported under HSR are described on the FTC website.

These figures illustrate the number of Second Request reviews as a share of total pre-merger notifications:



Second Request investigations are infrequent because they require companies to respond to burdensome administrative subpoenas – often 15 pages or longer – and produce hundreds of thousands or millions of documents. Pursuant to the Antitrust Division’s Manual, “Since a second request may have substantial consequences for the parties to the transaction, staff should carefully assess both the need for and the scope of the request; if a second request is necessary, staff should tailor it to the transaction and its possible anticompetitive consequences.” Merging companies have essentially no recourse to challenge a Second Request subpoena, and they cannot complete their proposed mergers until they have complied. Second Request investigations also consume DOJ staff resources.

The First Cannabis Investigation: The Merger of MedMen and PharmaCann

Last year, the Antitrust Division reviewed the proposed combination of MedMen and PharmaCann, two companies that supply cannabis. When career staff examined the transaction, they determined that the cannabis industry appeared to be fragmented with many market participants in the states that had legalized the product. As a result, they viewed the transaction as unlikely to raise any significant competitive concerns.

However, on March 5, 2019, Attorney General Barr called the Antitrust Division leadership to his office for a meeting entitled “Marijuana Industry Merger Review.” As a Microsoft Outlook delegate of one of the attendees, I was copied on the calendar appointment but did not attend the meeting. The Antitrust Division political leadership asked staff to prepare a short briefing memo for Attorney General Barr before the meeting. In that memo, staff emphasized in underlined text that in its preliminary view, the transaction was unlikely to raise any significant competitive concerns that would justify issuance of Second Requests.

Rejecting the analysis of career staff, Attorney General Barr ordered the Antitrust Division to issue Second Request subpoenas. The rationale for doing so centered not on an antitrust analysis, but because he did not like the nature of their underlying business.

After the meeting, Division political leadership turned to the career staff to implement Attorney General Barr's directive. In assembling the paperwork to issue the Second Request, which is normally styled as the career staff's "recommendation," career staff declined to recommend either opening an investigation or issuing the Second Request subpoenas. Instead, the staff reiterated its view that the transaction was "unlikely to raise any significant competitive concerns" and that the industry appeared to be fragmented, with many participants. The staff went on to say that, nonetheless, "[t]he Division has decided to open an investigation and issue Second Requests," for the purported reason that it had "not closely evaluated this industry before." This rationale – standing alone, without reference to a competition problem – is not described in the Merger Guidelines as a basis for investigating a transaction.

The Division's Front Office negotiated subpoena compliance with the companies, obtaining 1.3 million documents from the files of 40 employees. The investigation confirmed that the markets at issue were "unconcentrated" and closed in September 2019 without any enforcement action. The merger collapsed nonetheless, with MedMen citing unexpected delays in obtaining regulatory approval. During the course of the Division's investigation, MedMen's stock price declined by about one-third.

Nine More Cannabis Investigations and 29% of All Second Requests

The Division went on to conduct similar antitrust investigations of nine other mergers in the cannabis industry.² Staff continued to document at the outset of the investigations that the transaction appeared unlikely to raise significant competitive concerns but that the Division (meaning the political leadership) nonetheless had decided to proceed, purportedly because it had not closely evaluated this industry before. This remained the rationale through the tenth investigation.

However, in order to draw less attention to the investigations, the career staff was not permitted to take customary fact-finding steps. For example, staff was instructed not to conduct interviews of customers or competitors – a necessary step in any bona fide antitrust investigation both to assess marketplace conditions and to identify potential witnesses in any enforcement action.³

In many of these investigations, staff calculated market shares far smaller than the double-digit shares that ordinarily trigger a full antitrust review. Instead, it calculated, for example, a combined post-merger market share of 0.35 percent.

² In total, nine of the Division's ten cannabis investigations were conducted via Hart-Scott-Rodino Second Request authority. The tenth used only Civil Investigative Demand authority.

³ Recognizing the need for information from third-parties, the Division Manual instructs that "when preliminary investigation authority is obtained, staff should outline its provisional theory of anticompetitive harm and should begin contacting customers, trade associations, competitors, and other relevant parties to determine whether there are likely competitive concerns in any relevant markets."

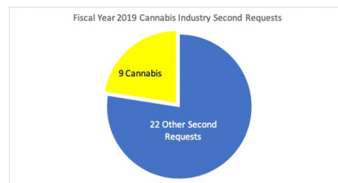
In two instances, staff determined at the outset that the merging companies operated in different geographies and *did not compete at all*. In one of these, the parties reevaluated their transaction after the Second Requests subpoenas had issued and determined that their deal's value fell below the HSR threshold. In other words, they were able to close their deal without complying with the Second Request subpoena. In closing the investigation, staff noted that they evaluated whether to proceed with the investigation anyway, using the more customary civil investigative demand (CID) subpoena power, "but recommend[ed] against that action because of the likelihood that the parties would successfully challenge the CIDs on the basis that there is no current or future geographic overlap, and thus no threat to actual or potential competition."

In several instances, staff sought to make the investigation less burdensome on the parties by narrowing the subpoenas. Political leadership refused such requests, resulting in the document productions described below.⁴

DOJ Investigation Control Number	Documents Produced (Approximate)
60-453998-0003	1,300,000
60-453998-0004	900,000
60-453998-0009	959,000
60-453998-0010	759,000
60-453998-0011	1,100,000
60-453998-0012	947,000

Few of these documents were viewed by Division staff. In one case, Division records show that the investigation closing process began before the documents had been uploaded and made available for viewing by Division staff.

Across all sectors of the American economy, the cannabis industry accounted for a full 29 percent of the Division's Second Request investigations in Fiscal Year 2019:



⁴ This table displays six of the ten investigations. The remaining four investigations either did not yield documents due to HSR withdrawal or I do not have the data.

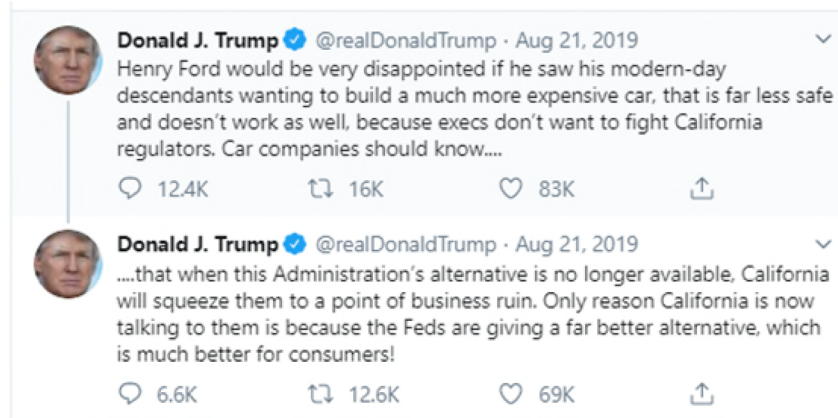
At one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices.

The head of the Antitrust Division, Assistant Attorney General Delrahim, responded to internal concerns about these investigations at an all-staff meeting on September 17, 2019. There, he acknowledged that the investigations were motivated by the fact that the cannabis industry is unpopular “on the fifth floor,” a reference to Attorney General Barr’s offices in the DOJ headquarters building. Personal dislike of the industry is not a proper basis upon which to ground an antitrust investigation.

Automobile Emissions Standards Investigation

In July 2019, California, together with four major automakers, announced an arrangement on air quality emissions standards that would be stricter than the rules the EPA was preparing to adopt. Under well-established antitrust precedent, states have wide latitude to regulate. In addition, under a doctrine called *Noerr-Pemington*, which is grounded in the First Amendment, companies are free to collectively lobby the government for regulation.

On August 20, 2019, the New York Times reported that President Trump was “enraged” by the deal and wanted to retaliate. The next day, August 21, the President tweeted about it. As reprinted below, he said, “Henry Ford would be very disappointed ... because [Ford] execs don’t want to fight California regulators.”



The day after the tweets, Antitrust Division political leadership instructed staff to initiate an investigation that day. Accordingly, the investigation opening memorandum is dated August 22, and the August 22 opening date is reflected in internal tracking records.

The investigation's initiating paperwork, like the cannabis opening memorandums, does not include a staff "recommendation" but instead states that "[t]he Antitrust Division would like to open an investigation." It was generated by the Division's policy staff, which does not conduct enforcement investigations of this type.⁵ Later, in an all-staff email of September 11, AAG Delrahim explained that he had had the policy staff convert an earlier analytical piece into an investigation opening memorandum "due to our current resource constraints."

Ordinarily, decisions of import – here, an investigation of a \$630 billion automobile market – take time and care to evaluate, especially when the action would face defenses. Here, in its opening memorandum, staff acknowledged that it had not fully examined the public record. For example, it made some assessment of the strength of a potential "state action" defense (immunity conferred by the active involvement of California) but left for a future step to research more about California law to determine whether state law authorized the agreement. Although consulting with state officials is a permissible pre-investigation step, and the Division could have contacted California to obtain information, it had not done so.

Once opened, the matter was transferred from the policy staff to an enforcement section. Upon receiving the matter, the enforcement staff expressed concerns about the legal and factual basis for the investigation. The enforcement staff asked for time to perform their own analysis and requested a delay in going overt with the investigation. The investigation proceeded anyway, with AAG Delrahim personally writing the automakers to inform them that the Division had decided to examine the arrangement with California.

When news of the investigation became public and spread within the Antitrust Division, many of my colleagues, who are familiar with the "state action" defense as well as the *Noerr-Pennington* doctrine, questioned why the Division was investigating conduct that appeared to be prompted by a state regulator. In response to criticism of the investigation, on September 11, AAG Delrahim circulated an all-Division email in which he stated that he "strongly believe[s]" that the Division has a basis to investigate and that the standards for opening a preliminary investigation were more than satisfied based on the available facts." AAG Delrahim simultaneously announced an all-staff town hall meeting for September 17. There, he stated that staff was not rushed into initiating the investigation. That representation conflicted with the recollection of a staff member who had assisted with the opening memorandum.

⁵ In addition, the investigation concerned a commodity (automobile manufacturing) that would normally be handled by the Federal Trade Commission rather than the Antitrust Division. The FTC is an independent agency, and its Commissioners cannot be removed by the President over mere political differences. Here, because the FTC did not clear the matter to DOJ until August 27, the Division did not conduct investigative steps before that date.

In October, the four automakers indicated that each company had independently entered into an agreement with California; there was no group agreement. The Division issued a subpoena to each automaker and on November 8 obtained a sworn affirmation of the earlier oral statements. The potential antitrust violation under investigation was premised on a group (competitor-to-competitor) agreement. With that undercut, the Division no longer needed to reach questions of state action immunity. At that point, a colleague with a key role in the investigation expressed optimism to me that the investigation would close by Thanksgiving.

Instead, the political leadership instructed staff to examine an announcement by California that it would purchase state vehicles only from automakers that comply with the stricter fuel efficiency standards. When operating as a market participant, states have wide latitude to determine their own purchases. Moreover, California's annual purchase of fewer than 2,700 vehicles in a state of nearly 40 million people did not confer it with the market power that could lead to antitrust liability. Accordingly, in February of this year, the Division notified the automakers that its investigation was closed.

* * *

Members of the Committee, thank you again, and I will be happy to answer your questions.

Chair NADLER. Thank you. Attorney General Mukasey?

TESTIMONY OF HONORABLE MICHAEL B. MUKASEY

Mr. MUKASEY. Thank you. Good afternoon, Chair Nadler, Ranking Member Jordan, and Members of this committee. Thank you for inviting me to testify at this hearing. The topic of today's hearing—claims of politicization of the Justice Department—is serious and important because the fundamental duty of the Department is to pursue equal justice under the law, and we can and should expect no less. As you may know, I was privileged to lead the men and women of the Justice Department during the George W. Bush Administration. Before that, I served for over 19 years as a district judge in the Southern District of New York, and that is the perspective that I bring to the testimony today.

The Department needs capable, experienced, and even-handed leadership. Its components and programs have reach across the country and across the world. It handles matters as diverse as antitrust and anti-terrorism. It takes an experienced lawyer and leader to manage such a department effectively, and I believe without reservation that William Barr is that kind of a leader, and that this country is fortunate that he leads one of the most important government departments. I do not have firsthand involvement in the particular matters to be discussed today, but based on my own experience, I can assure you that those are not issues of first impression for the Department or for the Federal courts.

The Justice Department is not politicized because senior officials disagreed with the sentencing recommendation for Mr. Stone. Trial lawyers in the Department are zealous advocates—that is their job—but zeal does not confer perfection or assure justice. My views on this case are no secret. I set them out on a piece written with Attorney General Meese in the *Wall Street Journal* where we pointed out that the sentencing guidelines which were adopted in 1987, initially as presumptively binding on the courts, have been strictly advisory since 2005 under Supreme Court law. Both as a judge and as Attorney General, I have declined to follow sentencing recommendations from trial lawyers.

As Attorney General Meese and I wrote, “Prosecutors are supposed to seek Justice, not to play the sentencing guidelines like some sort of pinball machine to see how many times they can ring the bell, or to try to pressure a judge to impose a harsh sentence, and also thereby cast doubt on the competence of the government by reading guidelines in a didactic and hyper-technical way without applying the one element that must be present when you read any law, whether statute or guidelines, and that is common sense.” In a highly-publicized and politically fraught case, it was not only proper, but also advisable, for the Attorney General to assure that the government sentencing recommendations not promote that unworthy end.

The decision to lower the recommendation was reached by others in the Department as well, including career lawyers, one of whom signed the lower recommendation. Attorney General Barr said publicly that he believed Mr. Stone's prosecution was warranted and that, with his conviction, that a jail sentence was warranted, and that the jail sentence imposed by the judge was appropriate. I be-

lieve the trial judge agreed that the original sentencing recommendation was overly harsh as her sentence reflects.

The Justice Department is not politicized because prosecutors dropped charges against General Flynn. In fact, as you heard this morning, the D.C. Circuit issued a writ of mandamus directing that the prosecution stop. As I understand it, the former FBI director talked publicly about having sent agents to interview General Flynn without following applicable protocols. Not using proper protocols wasn't simply a delicate problem of etiquette, like using the fish fork instead of the salad fork. It followed the deputy director's assurance to General Flynn that he need not have a lawyer present. The agents based their investigation on a potential violation of a law, the Logan Act, that has never been prosecuted successfully since its adoption in the 18th century, that is probably unconstitutional, and that no rational person would apply to a potential national security advisor in any event. This morning, we saw documents showing that that theory was discussed on January 4, 2017, at a meeting in the Oval Office, which is to say the interview was a pretext for getting General Flynn, as one senior FBI official put it, to either lie or admit to something that could have him fired.

The duty of the Department is to do justice, and that does not end after a guilty plea, particularly when that plea is procured with the threat to prosecute the defendant's son, and that is concealed from the Court and the probation department so that it would not have to be disclosed to future defendants against whom General Flynn might testify. That is a particularly gag-inducing feature of this episode, to me as a former district judge, that that was being kept from the Court. It is not unheard of for a prosecution to be dropped even after a guilty plea following the disclosure of new information that shows continued prosecution would be a miscarriage of justice.

There seems to be a tendency these days to read ulterior motives into every action of Attorney General Barr. As Attorney General Meese and I noted in our article, it is helpful to consider a few data points from Attorney General Barr's tenure. First, despite his own skepticism about aspects of Special Counsel Robert Mueller's investigation, he allowed that investigation to run its course. Second, he supported the decision not to prosecute Former Deputy FBI Director Andrew McCabe, a frequent critic of the President, despite evidence that not only did McCabe lie when he denied leaking information, but that he also berated others for the leaks to deflect suspicion from himself. He also—

Mr. JOHNSON of Georgia. Mr. Chair, point of order. We are again being disturbed by tapping as the Chair exercises his discretion in letting the witness testify beyond the 5-minute rule, and I would like for that tapping to stop. If it doesn't, I would like for the order.

Mr. GOHMERT. You want somebody removed because they want the rules enforced?

That is amazing.

Chair NADLER. Gentleman—

Mr. CICILLINE. Mr. Gohmert, you are not presiding over this hearing. Mr. Nadler is.

Chair NADLER. The Members will—

Mr. GOHMERT. Some of us would like the rules—

Chair NADLER. The Members will show courtesy to the witnesses, Mr. Gohmert. The witness may proceed.

Mr. MUKASEY. Thank you. So far, as the claim that William Barr's service is somehow a desecration of Edward Levi's service, I should point out that Edward Levi's portrait hangs where it hung when I was Attorney General, and that Edward Levi's grandson serves proudly as Attorney General Barr's Chief of Staff, so that attack is totally unjustified.

Now, I have come to know Attorney General Barr over the years. I have had many discussions with him about the law and about public policy issues, and, based on that, I have no doubt that the welfare of this country, upheld through the even-handed application of law to achieve justice, is what motivates him and motivates his decisions, and that is all that motivates his decisions. I think we are fortunate to have a person of his temperament, talents, and convictions in office during this difficult time in history. I thank you very much, and thank you for your indulgence, Mr. Chair.

[The statement of Mr. Mukasey follows:]

HOUSE JUDICIARY COMMITTEE – 6/24/20 – MUKASEY STATEMENT

GOOD AFTERNOON, CHAIRMAN NADLER , RANKING MEMBER JORDAN, AND MEMBERS OF THIS COMMITTEE. THANK YOU FOR INVITING ME TO TESTIFY AT THIS HEARING. THE TOPIC OF TODAY’S HEARING – CLAIMS OF POLITICIZATION AT THE JUSTICE DEPARTMENT – IS SERIOUS AND IMPORTANT BECAUSE THE FUNDAMENTAL DUTY OF THE DEPARTMENT IS TO PURSUE EQUAL JUSTICE UNDER THE LAW. WE CAN AND SHOULD EXPECT NO LESS.

AS YOU MAY KNOW, I WAS PRIVILEGED TO LEAD THE MEN AND WOMEN OF THE JUSTICE DEPARTMENT DURING THE GEORGE W.; BUSH ADMINISTRATION. BEFORE THAT, I SERVED FOR OVER 19 YEARS AS A DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK. THAT IS THE PERSPECTIVE I BRING TO MY TESTIMONY TODAY.

THE DEPARTMENT NEEDS CAPABLE, EXPERIENCED AND EVEN-HANDED LEADERSHIP. ITS COMPONENTS AND PROGRAMS HAVE REACH ACROSS THE COUNTRY AND THE WORLD. IT HANDLES MATTERS AS DIVERSE AS ANTITRUST AND ANTITERRORISM. IT TAKES AN EXPERIENCED LAWYER AND LEADER TO MANAGE SUCH A DEPARTMENT EFFECTIVELY. I BELIEVE WITHOUT RESERVATION THAT WILLIAM BARR IS

THAT KIND OF A LEADER , AND THAT THIS COUNTRY IS FORTUNATE THAT HE LEADS ONE OF THE MOST IMPORTANT GOVERNMENT DEPARTMENTS.

I DO NOT HAVE FIRST-HAND INVOLVEMENT IN THE PARTICULAR MATTERS TO BE DISCUSSED TODAY, BUT BASED ON MY OWN EXPERIENCE I ASSURE YOU THAT THESE ARE NOT ISSUES OF FIRST IMPRESSION FOR THE DEPARTMENT OR FOR THE FEDERAL COURTS.

THE JUSTICE DEPARTMENT IS NOT POLITICIZED BECAUSE SENIOR OFFICIALS DISAGREED WITH THE SENTENCING RECOMMENDATION FOR MR. STONE. TRIAL LAWYERS IN THE DEPARTMENT ARE ZEALOUS ADVOCATES; THAT IS THEIR JOB. BUT ZEAL DOES NOT CONFER PERFECTION OR ASSURE JUSTICE. MY VIEWS ON THIS CASE ARE NO SECRET. I SET THEM OUT IN A PIECE WRITTEN WITH ATTORNEY GENERAL MEESE IN THE WALL STREET JOURNAL, WHERE WE POINTED OUT THAT THE SENTENCING GUIDELINES, WHICH WERE ADOPTED IN 1987 INITIALLY AS PRESUMPTIVELY BINDING ON THE COURTS, HAVE BEEN STRICTLY ADVISORY SINCE 2005 UNDER SUPREME COURT LAW. BOTH AS A JUDGE AND AS ATTORNEY GENERAL I HAVE DECLINED TO FOLLOW SENTENCING RECOMMENDATIONS FROM TRIAL ATTORNEYS. AS ATTORNEY GENERAL MEESE AND I WROTE, PROSECUTORS ARE SUPPOSED TO SEEK JUSTICE – NOT TO PLAY THE SENTENCING GUIDELINES LIKE SOME SORT OF PINBALL MACHINE TO SEE HOW MANY TIMES THEY CAN RING THE BELL, OR TO

TRY TO PRESSURE A JUDGE TO IMPOSE A HARSH SENTENCE, AND ALSO CAST DOUBT ON THE COMPETENCE OF THE GOVERNMENT BY READING GUIDELINES IN A DIDACTIC AND HYPERTECHNICAL WAY, WITHOUT APPLYING THE ONE ELEMENT THAT MUST BE PRESENT WHEN READING ANY LAW – WHETHER STATUTES OR GUIDELINES – AND THAT IS COMMON SENSE. IN A HIGHLY PUBLICIZED AND POLITICALLY FRAUGHT CASE, IT WAS NOT ONLY PROPER BUT ALSO ADVISABLE FOR THE ATTORNEY GENERAL TO ASSURE THAT THE GOVERNMENT’S SENTENCING RECOMMENDATION NOT PROMOTE SUCH UNWORTHY ENDS..

THE DECISION TO LOWER THE RECOMMENDATION WAS REACHED BY OTHERS IN THE DEPARTMENT AS WELL, INCLUDING CAREER LAWYERS, ONE OF WHOM SIGNED THE LOWER RECOMMENDATION. ATTORNEY GENERAL BARR SAID PUBLICLY THAT HE BELIEVED MR. STONE’S PROSECUTION WAS WARRANTED AND THAT WITH HIS CONVICTION, THE JAIL SENTENCE ULTIMATELY IMPOSED BY THE TRIAL JUDGE WAS APPROPRIATE. I BELIEVE THE TRIAL JUDGE AGREED THAT THE INITIAL SENTENCING RECOMMENDATION WAS OVERLY HARSH, AS HER SENTENCE PROVED.

THE JUSTICE DEPARTMENT IS NOT POLITICIZED BECAUSE PROSECUTORS DROPPED CHARGES AGAINST GENERAL FLYNN. AS I UNDERSTAND IT, THE FORMER FBI DIRECTOR TALKED PUBLICLY ABOUT

HAVING SENT AGENTS TO INTERVIEW GENERAL FLYNN WITHOUT FOLLOWING APPLICABLE PROTOCOLS. NOT USING PROPER PROTOCOLS WAS NOT SIMPLY A DELICATE PROBLEM OF ETIQUETTE == USING THE FISH FORK INSTEAD OF THE SALAD FORK; IT FOLLOWED THE DEPUTY FBI DIRECTOR HAVING ASSURED GENERAL FLYNN THAT HE NEED NOT HAVE A LAWYER PRESENT AND HAVING AGENTS BASE THEIR INVESTIGATION ON A POTENTIAL VIOLATION OF A LAW – THE LOGAN ACT -- THAT HAS NEVER BEEN PROSECUTED SUCCESSFULLY SINCE ITS ADOPTION IN THE 18TH CENTURY, IS PROBABLY UNCONSTITUTIONAL, AND THAT NO RATIONAL PERSON WOULD APPLY TO A POTENTIAL NATIONAL SECURITY ADVISOR IN ANY EVENT. WHICH IS TO SAY, THE INTERVIEW WAS A PRETEXT FOR GETTING GENERAL FLYNN , AS ONE SENIOR FBI OFFICIAL PUT IT, TO EITHER LIE OR ADMIT TO SOMETHING THAT COULD GET HIM FIRED.

THE DUTY OF THE DEPARTMENT IS TO DO JUSTICE, AND THAT DOES NOT END AFTER A GUILTY PLEA, PARTICULARLY WHEN THAT PLEA IS PROCURED WITH A THREAT TO PROSECUTE THE DEFENDANT'S SON THAT IS CONCEALED FROM THE COURT AND THE PROBATION DEPARTMENT SO THAT IT WOULD NOT HAVE TO BE DISCLOSED TO FUTURE DEFENDANTS AGAINST WHOM GENERAL FLYNN MIGHT TESTIFY – A PARTICULARLY GAG-INDUCING FEATURE OF THIS EPISODE TO ME AS A FORMER

DISTRICT JUDGE. IT IS NOT UNHEARD OF FOR A PROSECUTION TO BE DROPPED EVEN AFTER A GUILTY PLEA FOLLOWING THE DISCLOSURE OF NEW INFORMATION THAT SHOWS CONTINUED PROSECUTION WOULD BE A MISCARRIAGE OF JUSTICE.

THERE SEEMS TO BE A TENDENCY THESE DAYS TO READ ULTERIOR MOTIVES INTO EVERY ACTION OF ATTORNEY GENERAL BARR. AS ATTORNEY GENERAL MEESE AND I NOTED IN OUR ARTICLE, IT IS HELPFUL TO CONSIDER A FEW DATA POINTS FROM ATTORNEY GENERAL BARR'S TENURE. FIRST, DESPITE HIS OWN SKEPTICISM ABOUT ASPECTS OF SPECIAL COUNSEL ROBERT MUELLER'S INVESTIGATION, HE ALLOWED THAT INVESTIGATION TO RUN ITS COURSE. SECOND, HE SUPPORTED THE DECISION NOT TO PROSECUTE FORMER DEPUTY FBI DIRECTOR ANDREW MCCABE, A FREQUENT CRITIC OF THE PRESIDENT, DESPITE EVIDENCE THAT HE NOT ONLY LIED WHEN HE DENIED LEAKING INFORMATION BUT ALSO BERATED OTHERS FOR THE LEAKS SO AS TO DEFLECT SUSPICION FROM HIMSELF.

I HAVE COME TO KNOW ATTORNEY GENERAL BARR OVER THE YEARS, AND HAVE HAD MANY DISCUSSIONS WITH HIM ABOUT THE LAW AND ABOUT PUBLIC POLICY ISSUES. BASED ON THAT, I HAVE NO DOUBT THAT THE WELFARE OF THIS COUNTRY, UPHOLD THROUGH THE EVEN-HANDED APPLICATION OF LAW SO AS TO ACHIEVE JUSTICE, IS WHAT

MOTIVATES HIS DECISIONS AS ATTORNEY GENERAL, AND ALL THAT
MOTIVATES THOSE DECISIONS. I THINK WE ARE FORTUNATE TO HAVE A
PERSON OF HIS TEMPERAMENT, TALENTS AND CONVICTIONS IN OFFICE
DURING THIS DIFFICULT TIME IN OUR HISTORY.

THANK YOU.

Chair NADLER. Thank you. We will now proceed under the 5-minute Rule with questions. Before I recognize myself, Oh, I am sorry. We have Mr. Zelinsky on video, and I didn't know that. Mr. Zelinsky will now testify.

TESTIMONY OF AARON S.J. ZELINSKY

Mr. ZELINSKY. Good afternoon, Chair Nadler, Ranking Member Jordan, and Members of the committee. In response to your subpoena, I am here today to testify about United States v. Roger Stone. I apologize for not appearing before you in person, and I thank the Committee for allowing me to appear remotely today. For family reasons, I should not risk infection.

As Chair mentioned, I'm privileged to serve as an Assistant United States Attorney, a non-partisan career prosecutor. Our job is to see that justice is done in every case without fear or favor, without party or politics. It's unusual for a prosecutor like myself to testify about a criminal case, and, as outlined further in my written remarks, there may be reasons why my testimony will, therefore, be limited in some respects. The Department of Justice has cleared me today to discuss matters related to the Roger Stone sentencing. Let me now turn to the Stone case.

The first thing that every AUSA learns is that we treat every defendant equally and fairly. In the United States of America, we do not prosecute people based on politics, and we don't cut them a break based on politics either. That wasn't what happened here. Roger Stone was treated differently because of politics. At the time of these events, February of 2020, I was a career Assistant United States Attorney, as I am proud to be now. I was not privy to discussions with political leadership at the Department of Justice. Everything that happened is based on two things: What I saw and what I heard.

What I saw was that Roger Stone was being treated differently from every other defendant. He received breaks that are, in my experience, unheard of, and more so for a defendant in his circumstances, a defendant who lied to Congress, who remained unrepentant, and who made threats against a judge and a witness in his case. What I heard repeatedly was that this leniency was happening because of Stone's relationship to the President, that the Acting U.S. Attorney for the District of Columbia was receiving heavy pressure from the highest levels of the Department of Justice, and that his instructions to us were based on political considerations. I was told that the Acting U.S. Attorney was giving Stone a break because he was afraid of the President of the United States.

I believe that was wrong, and, together with my fellow line prosecutors, I immediately and repeatedly said so. Unfortunately, our objections were not heeded. First, we were pressured to reduce the initial sentencing guidelines calculation for Mr. Stone without any clear legal rationale for doing so. When we refused to go along, we were instructed instead to disregard the guidelines entirely and to recommend an unspecified lower sentence for Mr. Stone. I was told that, to the best of anyone's recollection, such a recommendation has never been made by the Fraud and Public Corruption Section

of the United States Attorney's Office. When we again refused, we were told that we could be fired if we didn't go along.

I notified the office that I intended to withdraw from the case rather than file a memo that was the result of wrongful political pressure. While all this was happening, I was repeatedly told the Department's actions were not based on the law or the facts, but rather on political considerations, Mr. Stone's political relationships, and that the acting U.S. Attorney was afraid of the President. Shortly after I informed the office of my intent to withdraw, office leadership changed its position and allowed us to file a sentencing memorandum properly calculating the guidelines and seeking a guideline sentence. We filed the memo and heard nothing that evening.

At 2:48 a.m. that morning, the President tweeted that the sentencing memo was horrible and very unfair and "cannot allow this miscarriage of justice." Later that day, we learned the Department was going to issue a new sentencing memorandum mischaracterizing the application of the sentencing guidelines and asking for an open-ended downward departure for Mr. Stone. We were not allowed to see the new proposed memo. We weren't even told who was writing it. At this point, I made the difficult choice to resign from the case and my assignment in the U.S. Attorney's Office in DC. I resigned because following orders would have violated the oath I swore when I took my job.

To be clear, my concern is not with the sentence Mr. Stone received. I'm not here to criticize the judge's sentence or her reasoning. My concern is about process. The Department of Justice treated Roger Stone differently from everyone else, and I was told that the Department cut Roger Stone a break because of his relationship to the President.

I take no satisfaction in publicly criticizing the actions of the Department of Justice where I have spent most of my legal career. I have always been and I remain proud to be an Assistant United States Attorney. It pains me to describe these events, but, as Judge Jackson said in this case, truth still matters, and so I'm here today to tell you the truth. I would be pleased to answer your questions.

[The statement of Mr. Zelinsky follows:]

STATEMENT FOR THE RECORD
Assistant United States Attorney Aaron S. J. Zelinsky
House Judiciary Committee
June 24, 2020

Good afternoon, Chairman Nadler, ranking Member Jordan, and Members of the Committee. In response to your subpoena, I am prepared to testify before you today about the sentencing in *United States v. Roger Stone*.

Since 2014, I have been privileged to serve as one of over 5,000 Assistant United States Attorneys. We are non-partisan career prosecutors working in offices throughout the country. Our job is to see that justice is done, in every case, without fear or favor. Without party or politics.

I remain committed to these principles, as I am likewise committed to complying with your subpoena to the best of my ability. It is unusual for a prosecutor to testify about a criminal case, and given my role as a prosecutor, there are reasons why my testimony will necessarily be limited. The Department of Justice has indicated it may assert certain privileges related to investigative information and decisions, ongoing matters within the Department, and deliberations within the Department. I intend to respect the invocation of these privileges in appropriate circumstances, but also recognize that, for example, the deliberative process privilege does not apply when testimony sheds light on government misconduct, or when the Government has disclosed deliberative information selectively and misleadingly. The Department has cleared my submission of this written statement.

The first thing every AUSA learns is that we have an ethical and legal obligation to treat every defendant equally and fairly. No one is entitled to more or less because of who they are, who they know, or what they believe. In the United States of America, we do not prosecute people because of their politics.

And we don't cut them a break because of their politics either. In the many cases I have been privileged to work on in my career, I have never seen political influence play any role in prosecutorial decision making. With one exception: *United States v. Roger Stone*.

At the time of the events in question – February 2020, I was a career Assistant United States Attorney. I was not privy to discussions with political leadership at the Department of Justice. My understanding of what happened in *United States v. Stone* is based on two things. The first is what I saw with my own eyes: the unusual and unprecedented way that Roger Stone's sentencing was handled by the Department of Justice. The second is what was told to me at the time by my supervisors in the U.S. Attorney's Office: why the Department was treating Roger Stone differently from everyone else.

What I saw was the Department of Justice exerting significant pressure on the line prosecutors in the case to obscure the correct Sentencing Guidelines calculation to which Roger Stone was subject – and to water down and in some cases outright distort the events that transpired in his trial and the criminal conduct that gave rise to his conviction. Such pressure resulted in the virtually unprecedented decision to override the original sentencing recommendation in his case and to file a new sentencing memorandum that included statements and assertions at odds with the record and contrary to Department of Justice policy.

What I heard – repeatedly – was that Roger Stone was being treated differently from any other defendant because of his relationship to the President. I was told that the Acting U.S. Attorney for the District of Columbia, Timothy Shea, was receiving heavy pressure from the highest levels of the Department of Justice to cut Stone a break, and that the U.S. Attorney's sentencing instructions to us were based on political considerations. I was also told that the acting U.S. Attorney was giving Stone such unprecedentedly favorable treatment because he was "afraid of the President."

That explanation was deeply unsettling. Together with my fellow line Assistant United States Attorneys, I immediately and repeatedly raised concerns, in writing and orally, that such political favoritism was wrong and contrary to legal ethics and Department policy.

Our objections were not heeded.

When I learned that the Department was going to issue a new sentencing memo, I made the difficult decision to resign from the case and my temporary appointment in the U.S. Attorney's Office in D.C. rather than be associated with the

Department of Justice's actions at sentencing. I returned to the U.S. Attorney's Office in Maryland, where I work today.

1. Stone's Conduct in Advance of the 2016 Election

To put into context the events surrounding the sentencing of Mr. Stone, it is important to provide some background on the case itself and the basis for the charges that Mr. Stone obstructed and lied to Congress. I want to emphasize that in describing the proceedings against Mr. Stone that set the stage for his sentencing, I have limited myself to materials and filings that are a matter of public record, including the testimony at Mr. Stone's trial.

Roger Stone is a longtime friend and associate of President Trump. In the summer of 2016, Stone was considered by the Trump campaign to be the campaign's access point to WikiLeaks. Throughout the summer and fall, Stone was in regular contact with the highest levels of the Trump campaign, which was relying on him for information about WikiLeaks's activities.

Beginning in spring 2016, Stone told senior Trump campaign officials that he had inside knowledge regarding WikiLeaks's plans, and that he communicated with Julian Assange. Stone made these claims throughout the summer to Deputy Campaign Chairman Rick Gates, Campaign Chairman Paul Manafort, and Campaign CEO Steve Bannon. These men believed his claims, and they sought information from Stone about what WikiLeaks would do to help the Trump campaign. Moreover, as the summer wore on, the senior leadership found Stone's predictions to be reliable. Manafort instructed Gates to keep in touch with Stone regarding WikiLeaks so that he could keep then-candidate Trump updated on Stone's information. And the senior level of the Trump campaign began brainstorming a press strategy based in part on Stone's predictions of a WikiLeaks release of documents that would be damaging to the Clinton campaign.

That summer, Stone reached out to both Manafort and Bannon, telling Manafort that Stone had a "plan to save Trump's ass." And in August 2016, Stone told Bannon he knew how to "win but this ain't pretty." Bannon responded, "let's talk ASAP." In this same time period, Stone also publicly bragged that he had a backchannel to Julian Assange, and "therefore I am a recipient of pretty good information."

On Friday, October 7, 2016, WikiLeaks began dumping into the public domain thousands of emails which the Russian government had hacked from Clinton campaign Chairman John Podesta's personal email account. Minutes after WikiLeaks began releasing the hacked emails, one of Trump campaign CEO Bannon's aides texted Stone, "well done." That weekend, Campaign CEO Steve Bannon himself heard that Stone was involved in the WikiLeaks release of the hacked emails.

And that summer, Stone wasn't just talking to the CEO, Chairman, and Deputy Chairman of the campaign. He was talking directly to then-candidate Trump himself.

On June 14, 2016, the Democratic National Committee (DNC) announced that it had been hacked earlier that spring by the Russian Government. That evening, Stone called Trump, and they spoke on Trump's personal line. We don't know what they said.

On July 31, Stone again called then-candidate Trump, and the two spoke for approximately ten minutes. Again, we don't know what was said, but less than an hour after speaking with Trump, Stone emailed an associate of his, Jerome Corsi, to have someone else who was living in London "see Assange."

Less than two days later, on August 2, 2016, Corsi emailed Stone. Corsi told Stone that, "Word is friend in embassy [Assange] plans 2 more dumps. One "in October" and that "impact planned to be very damaging," "time to let more than Podesta to be exposed as in bed w enemy if they are not ready to drop HRC. That appears to be the game hackers are now about."

Around this time, Deputy Campaign Chairman Gates continued to have conversations with Stone about more information that would be coming out from WikiLeaks. Gates was also present for a phone call between Stone and Trump. While Gates couldn't hear the content of the call, he could hear Stone's voice on the phone and see his name on the caller ID. Thirty seconds after hanging up the phone with Stone, then-candidate Trump told Gates that there would be more information coming. Trump's personal lawyer, Michael Cohen, also stated that he was present for a phone call between Trump and Stone, where Stone told Trump

that he had just gotten off the phone with Julian Assange and in a couple of days WikiLeaks would release information, and Trump responded, “oh good, alright.” Paul Manafort also stated that he spoke with Trump about Stone’s predictions and his claimed access to WikiLeaks, and that Trump instructed Manafort to stay in touch with Stone.

In his written answers to the Special Counsel’s Office, President Trump denied remembering anything about his conversations with Stone during the summer of 2016, and he denied being aware that Stone had discussed WikiLeaks with anyone associated with the campaign. One week after submitting his written answers, President Trump criticized “flipping” witnesses and stated that Stone was “very brave” in indicating he would not cooperate with prosecutors. The Special Counsel’s Report stated that the President’s statements complimenting Stone “support the inference that the President intended to communicate a message that witnesses could be rewarded for refusing to provide testimony adverse to the President[.]”

2. Stone’s False Testimony to Congress

Given that Stone had publicly stated he was in contact with Julian Assange in the summer of 2016, the House Permanent Select Committee on Intelligence (HPSCI) called him as a witness in its investigation into Russian interference in the 2016 election. The HPSCI investigation sought to understand what Stone knew about WikiLeaks, how he heard about it, and what he told the Trump Campaign.

Stone repeatedly lied to the committee about these matters.

First, Stone claimed to Congress he didn’t have anything in writing that related to Julian Assange – no emails, texts, documents, or anything at all. In fact, he had hundreds of such communications.

Next, Stone lied to Congress about his intermediary to WikiLeaks, insisting that his public statements in August 2016 about an intermediary to Assange referred to Randy Credico – never naming Jerome Corsi, who had told him in August about the game “hackers were about,” and that they planned more dumps, including in October. Stone further testified that he had nothing in writing with his

intermediary, and that his intermediary was “not an email guy.” when Stone actually had hundreds of messages with both Corsi and Credico.

Lastly, Stone repeatedly lied to the Committee about his contacts with the Trump campaign. Stone testified that he’d never discussed his WikiLeaks intermediary with anyone involved with the Trump campaign. But Stone had extensive discussions involving the information he was receiving about WikiLeaks throughout the summer and fall with Manafort, Gates, Bannon, and Trump.

Rather than disclose this information, Roger Stone chose to lie. As Judge Jackson noted at sentencing, those lies hindered the efforts of Congress to investigate Russian interference in the 2016 election:

Mr. Stone lied, and he said he had no documents, no emails or texts with his claimed intermediary with Julian Assange; no emails or texts with people associated with the campaign concerning his contacts with WikiLeaks. So the committee did not issue a subpoena for the trove of material Stone had in his possession and lost that opportunity to consider them and to delve further. They spent considerable resources and they wasted them going after Credico as the supposed intermediary. They lost the benefit of his testimony when he acceded to pressure from Stone not to testify, and they didn't hear from Corsi, who wasn't identified by Stone at all. This obstruction lead the committee to reach incorrect conclusions about the lack of evidence that would contradict Stone's claims.

Judge Jackson also rejected the notion that Stone had been prosecuted “for standing up for the President. He was prosecuted for covering up for the President.”

Stone’s criminal conduct did not stop with his lies to the Committee. Following his congressional testimony, Stone embarked on an extended month-long campaign of witness intimidation and obstruction of justice targeted at Randy Credico. Stone tried to get Credico to go along with his lie that Credico had been his backchannel to Wikileaks in August 2016. Stone repeatedly told Credico to do a “Frank Pentangeli” – a character in the Godfather Part II, who lies to a congressional committee to save Don Corleone from getting prosecuted for perjury.

When Credico refused Stone's pressure, Stone threatened Credico, telling Credico to "prepare to die." And Stone promised that if Credico didn't keep quiet, Stone wouldn't just ruin Credico's life, he would ruin the life of Credico's friend, an attorney, by filing a bar complaint against her. In response to such threats, Credico told HPSCI he would invoke his Fifth Amendment rights if called to testify. Then, fearful of what Stone's associates might do to him, Credico moved out of his house and wore a disguise when going outside.

3. Indictment and Trial

Stone was indicted by a grand jury in January 2019. In the months that followed, Stone repeatedly violated orders of the court, culminating in him publishing a picture of the presiding judge, Amy Berman Jackson, with a crosshairs next to her head and attacking her as corrupt. At a hearing on the matter, Stone took the stand and claimed – under oath – that the crosshairs next to the judge's head was an "occult Celtic symbol" and that he couldn't remember who had access to his phone the week before when the images was posted. Judge Jackson found his testimony not credible.

After a six day trial at which Stone was represented by able counsel, the jury convicted Stone on all seven counts.

4. Sentencing Policy

In the federal system, the imposition of sentence is reserved for the judge. But in order to promote fairness in sentencing, the law requires that every sentencing begins with a calculation of the Sentencing Guidelines applicable to the defendant and his offense. The Sentencing Guidelines are a formulaic system that starts with a base level for each offense and adds or subtracts "points" for various characteristics of the offense and of the defendant. In the end the Guidelines calculation comes up with a number that corresponds to a range of incarceration; the higher the Guidelines number, the longer the sentence.

The purposes of the Guidelines are to ensure that similarly situated defendants get similar sentences; to prevent the courts from basing sentences on impermissible considerations; and to ensure that sentences reflect the gravity of the defendant's crime. While the Guidelines have their supporters and detractors,

the Department of Justice's official policy – which was reinforced and made more explicit in 2017 – is generally to recommend a sentence within the Guidelines range. Prosecutors are explicitly prohibited from seeking a below-Guidelines sentence without supervisory approval.

For the Department to seek a sentence below the Guidelines in a case where the defendant went to trial and remained unrepentant is in my experience unheard of – all the more so given Stone's conduct in the lead-up to the trial. I was told at the time that no one in the Fraud and Public Corruption Section of the United States Attorney's Office in the District of Columbia – which prosecuted the Stone case after the Special Counsel's office completed its work – could even recall a case where the government did not seek a Guidelines sentence after trial.

5. Guidelines Calculation

The applicable Guidelines calculation is an important aspect of what happened at sentencing. In this case, the Government calculated Stone's Guidelines as follows:

First, the so-called "Base Offense level" for obstruction of justice is 14.

Next, the government calculated that Stone received three (3) additional levels because he successfully blocked HPSCI from ever learning about Corsi, his messages and Stone's many contacts with the Trump Campaign. Stone received an additional two (2) levels for lying to the judge under oath regarding the photo of her with the crosshairs. Two (2) more levels were added because Stone's efforts to obstruct were extensive in scope. And eight (8) levels were added because Stone threatened to cause physical injury or property damage in order to obstruct justice – the threats to harm Credico.

Taken together, these enhancements resulted in a total offense level of 29 points. Since Stone was a first time offender, this corresponded to a Guidelines range of 87-108 months.

This Guidelines calculation reflected the egregious and unusual nature of Stone's conduct in this case – intentionally misleading Congress regarding a matter of critical national importance; posting a picture of the Judge with a crosshairs and

then lying under oath to the same judge about it; and engaging in an extended pattern of witness tampering and obstruction.

6. Sentencing Memorandum

The prosecution team – which consisted of three career prosecutors in addition to myself – prepared a draft sentencing memorandum reflecting this calculation and recommending a sentence at the low end of the Guidelines range. We sent our draft for review to the leadership of the U.S. Attorney's Office. We received word back from one of the supervisors on February 5, 2020, that the sentencing memo was strong, and that Stone "deserve[d] every day" of our recommendation.

However, just two days later, I learned that our team was being pressured by the leadership of the U.S. Attorney's Office not to seek all of the Guidelines enhancements that applied to Stone – that is, to provide an inaccurate Guidelines calculation that would result in a lower sentencing range. In particular, there was pressure not to seek enhancements for Stone's conduct prior to trial, the content of the threats he made to Credico, and the impact of his obstructive acts on the HPSCI investigation. Failure to seek these enhancements would have been contrary to the record in the case and to the Department's policy that the government must ensure that the relevant facts and sentencing factors are brought to the court's attention fully and accurately.

When we pushed back against incorrectly calculating the Guidelines, office leadership asked us instead to agree to recommend an open-ended downward variance from the Guidelines –to say that whatever the Guidelines recommended, Stone should get less. We repeatedly argued that failing to seek all relevant enhancements, or recommending a below-Guidelines sentence without support for doing so, would be inappropriate under DOJ policy and the practice of the D.C. U.S. Attorney's Office, and that given the nature of Stone's criminal activity and his wrongful conduct throughout the case, it was not warranted.

In response, we were told by a supervisor that the U.S. Attorney had political reasons for his instructions, which our supervisor agreed was unethical and wrong. However, we were instructed that we should go along with the U.S. Attorney's

instructions, because this case was “not the hill worth dying on” and that we could “lose our jobs” if we did not toe the line.

We responded that cutting a defendant a break because of his relationship to the President undermined the fundamental principles of the Department of Justice, and that we felt that was an important principle to defend.

Meanwhile, senior U.S. Attorney’s Office leadership also communicated an instruction from the acting U.S. Attorney that we remove portions of the sentencing memorandum that described Stone’s conduct. Again, this instruction was inconsistent with the usual practice in the U.S. Attorney’s Office, and with the Department’s policy that attorneys for the government must ensure that relevant facts are brought the attention of the sentencing court fully and accurately.

Ultimately, we refused to modify our memorandum to ask for a substantially lower sentence. Again, I was told that the U.S. Attorney’s instructions had nothing to do with Mr. Stone, the facts of the case, the law, or Department policy. Instead, I was explicitly told that the motivation for changing the sentencing memo was political, and because the U.S. Attorney was “afraid of the President.”

On Monday, February 10, 2020, after these conversations, I informed leadership at the U.S. Attorney’s Office in D.C. that I would withdraw from the case rather than sign a memo that was the result of wrongful political pressure. I was told that the acting U.S. Attorney was considering our recommendation and that no final decision had been made.

At 7:30PM Monday night, we were informed that we had received approval to file our sentencing memo with a recommendation for a Guidelines sentence, but with the language describing Stone’s conduct removed. We filed the memorandum immediately that evening.

At 2:48 AM the following morning, the President tweeted that the recommendation we had filed was “horrible and very unfair.” He stated that, “the real crimes were on the other side, as nothing happens to them.” President Trump closed, “Cannot allow this miscarriage of justice!”

The next morning, media reports began to circulate quoting a “senior Department of Justice official” stating that the Department would file a new sentencing memorandum overriding our old one. This was highly unusual, as the Department generally does not comment on pending filings in criminal cases. The first we heard of any new memorandum was from public media reports. When we asked the U.S. Attorney’s Office about these media reports, we were initially told they were false. But later that day, we were told that a new memorandum would be filed, countermanding our earlier recommendation and asking for a substantially lower sentence for Mr. Stone.

We repeatedly asked to see that new memorandum prior to its filing. Our request was denied. We were not informed about the content or substance of the proposed filing, or even who was writing it. We were told that one potential draft of the filing attacked us personally.

Concerned over the political influence in the case – and the explicit statements that the reasons for these actions were political, and that the U.S. Attorney was acting because he was “afraid of the President” – I withdrew. My three colleagues did the same.

That evening, the Department filed a new memorandum seeking a substantially lower sentence for Stone. No line AUSA signed the filing—which is also something that is virtually unprecedented.

The new filing stated that the first memo did not “accurately reflect” the views of the Department of Justice. This new memo muddled the analysis of the appropriate Guidelines range in ways that were contrary to the record and in conflict with Department policy. The memo said that the Guidelines were “perhaps technically applicable,” but attempted to minimize Stone’s conduct in threatening Credico and cast doubt on the applicability of the resulting enhancement, claiming that the enhancement “typically” did not apply to first time offenders who were not “part of a violent criminal organization.” The memo also stated that Stone’s lies to the Judge about the meaning of the image with the crosshairs and how it came to be posted on Instagram “overlaps to a degree with the offense conduct in this case,” and therefore should not be the basis for an enhancement.

The new memo did not engage with testimony in the record about Credico's concerns. Nor did the new memo engage with cases cited in the old memo where the obstruction enhancement was applied to non-violent first-time offenders. And the memo provided no analysis for why Stone's lies to Congress regarding WikiLeaks overlapped at all with his lies two years later to the judge about his posting images of her with a crosshairs. The new memo also stated that the court should give Stone a lower sentence because of his "health," though it provided no support for that contention, and the Guidelines explicitly discourage downward adjustments on that basis.

Ultimately, the memo argued, Stone deserved at least some time in jail—though it did not give an indication of what was reasonable. All the memo said was that a Guidelines sentence was "excessive and unwarranted," matching the President's tweet from that morning calling our recommendation "horrible and very unfair."

At sentencing, in the face of questioning from Judge Jackson, the Government's attorney ultimately conceded that the original sentencing memo had the legally correct analysis of the Guidelines and that the initial filing was fully consistent with DOJ policy – notwithstanding the Department's seeming change in position and muddled revised submission.

After hearing from both parties, Judge Jackson concluded that the Guidelines should be calculated as 27 (corresponding to 70-87 months' imprisonment) – two points lower than the recommendation in our initial sentencing memorandum. She noted that the "government's initial memorandum was well researched, and supported. It was true to the record. It was in accordance with the law and with DOJ policy, and it was submitted with the same level of evenhanded judgment and professionalism they exhibited throughout the trial." Judge Jackson also found there was no evidence at all that the defendant's health was an issue relevant to sentencing, and she rejected the contention that Stone's post-indictment conduct did not qualify for a separate obstruction enhancement, stating that he "engaged in threatening and intimidating conduct towards the Court, and later, participants in the National Security and Office of Special Counsel investigations that could and did impede the administration of Justice." Judge Jackson also found that the eight-level enhancement for threats resulted in a guidelines level above that which fairly reflected Stone's conduct. Judge Jackson then noted that the decision was a

difficult one, and that she would not be influenced by extraneous events, and that it was important that the responsibility to sentence falls to “someone neutral. . . Not someone whose political career was aided by the defendant. And surely not someone who has personal involvement in the events underlying the case.” Judge Jackson then imposed a sentence of 40 months, citing the nature of egregious nature of Stone’s conduct, and the fact that she couldn’t “ignore the circumstances involving Mr. Credico entirely.”

To be clear, my concern is not with this sentencing outcome – and I am not here to criticize the sentence Judge Jackson imposed in the case or the reasoning that she used. It is about process and the fact that the Department of Justice treated Roger Stone differently and more leniently in ways that are virtually, if not entirely, unprecedented.

When the sentence was announced, a supervisor from the D.C. U.S. Attorney’s Office forwarded me a copy of the sentencing transcript, noting that “things are raw. But I hope you know that I am grateful for you and your colleagues work. It may be cold to say, but congratulations – you achieved a remarkable result. Please be sure to read Judge Jackson’s imposition of sentence in its entirety; it is a tribute to your work.” I responded, “Thanks for the message. I continue to believe, as I previously expressed to you, that changing a sentencing recommendation based on political considerations and the fact that the U.S attorney was ‘afraid of the President’ (in your words) was wrong, contrary to DOJ policy, and unethical, at a minimum.”

7. Conclusion

Let me close briefly on a personal note.

I take no satisfaction in publicly criticizing the actions of the Department of Justice, where I have spent most of my legal career. I have always been and remain proud to be an Assistant United States Attorney.

It pains me to describe these events. But as Judge Jackson said in this case, the truth still matters. And so I am here today to tell you the truth.

Chair NADLER. Thank you very much. We will now proceed under the 5-minute Rule with questions. Before I recognize myself for questioning, without objection, correspondence between our witnesses, Mr. Elias and Mr. Zelinsky, and the Department of Justice, in advance of their testimony today will be entered into the record. These letters establish the parameters in which they are allowed to testify.

[The information follows:]

CHAIR NADLER FOR THE RECORD



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

June 18, 2020

David Z. Seide
Government Accountability Project
1612 K Street NW
Washington, D.C. 20006
By email: davids@whistleblower.org

Dear Mr. Seide:

The Department of Justice (Department) understands that you represent John Elias, a trial attorney in the criminal section of the Department's Antitrust Division, in connection with a subpoena for documents and his testimony before the Committee on the Judiciary of the U.S. House of Representatives (Committee). The Department understands that Mr. Elias has received a subpoena to appear before the Committee on June 24, 2020. I write to inform you of Department policies and to reiterate certain obligations of Mr. Elias concerning such an appearance.

The Department has significant confidentiality interests when it comes to congressional oversight of law enforcement matters, including civil investigative matters. "Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984); see *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32–33 (1982) (opinion of Attorney General Smith). Accordingly, while the Department's leaders may explain to a congressional committee the reasons underlying many of the Department's public decisions, the Department generally does not make available to Congress, or to the public at large, documents or other information involving internal deliberations about particular investigations or enforcement actions.

In particular, the Department has a long-standing policy in protecting its line attorneys against appearances before Congress to testify about investigative matters. Such appearances in politicized congressional hearings or staff interviews compromise the independence of the Department's investigative and enforcement functions and threaten to inhibit other line attorneys in their exercise of those functions. As we explained in 2000, "[t]he Department . . . has a strong

institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions.” Letter for Rep. John Linder, Chairman, Subcommittee on Rules and Organization, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs at 6 (Jan. 27, 2000). Years earlier, Attorney General Reno explained that “[p]ermitt[ing] Congressional examination of line prosecutors carries substantial danger of chilling the objective exercise of [prosecutorial] discretion and of generating the appearance of political influence on prosecutorial decisions.” Letter for Sen. Orrin Hatch from Janet Reno, Attorney General at 1 (Jan. 5, 1994). The same is true for line attorneys like Mr. Elias who investigate and enforce potential civil or criminal violations. Where congressional committees have expressed interest in the testimony of the Department’s line attorneys, the Department has historically been able to accommodate their legitimate interests by providing testimony or briefings from supervisory personnel or answering questions in writing, and only in rare and exceptional cases has made those attorneys available to provide factual information in non-public interviews or briefings outside the politicized arena of a congressional hearing. The Department here has made offers to accommodate the Committee’s legitimate interests in oversight of the Department, and remains willing to have those discussions, but the Committee so far has rejected these overtures.

Should Mr. Elias appear before the Committee, we expect that he will abide by his obligations under the law, the rules of professional responsibility, and Department policy to refrain from disclosing information relating to sensitive law enforcement information and confidential matters relating to his representation of the United States. Those matters include classified information, sources and methods, grand-jury information protected by Federal Rule of Criminal Procedure 6(e), and the deliberative processes that underlie investigative and enforcement decisions. The information subject to executive privilege in this context most likely will consist of attorney work product, deliberative process information, and information in law enforcement and civil investigative files. *See, e.g., Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 10 (2008) (opinion of Attorney General Mukasey) (“The President may invoke executive privilege to preserve the integrity and independence of criminal investigations and prosecutions.”); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Reno) (discussing the deliberative process, attorney-client, and attorney work product components of executive privilege).

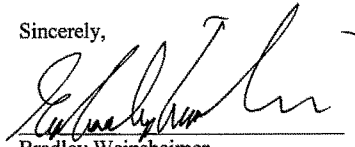
Although Mr. Elias has not advised the Department of the subjects of his intended testimony, Committee staff have apparently advised the press that the Committee will ask Mr. Elias about matters related to the Department’s effort to block a merger between AT&T and Time Warner and a separate investigation into a deal between automakers and the State of California concerning fuel efficiency and emissions standards. The deliberations related to those matters, as well as other associated non-public attorney communications or work product, are likely covered by one or more components of executive privilege and would implicate the rules

of professional responsibility. Disclosing non-public information about investigative and enforcement deliberations without authorization would compromise the confidentiality and integrity of the law enforcement process and would have a chilling effect on Department attorneys going forward.

Absent authorization, an individual attorney such as Mr. Elias lacks authority to reveal confidential deliberative information or attorney work product related to investigative and enforcement matters in response to a congressional subpoena. The balancing of a congressional committee's need for information and the Executive Branch's need for confidentiality occurs through the constitutionally mandated accommodation process between authorized representatives of the Executive Branch and Congress. Accordingly, consistent with appropriate governmental privileges, the Department expects that Mr. Elias will decline to respond to questions seeking such information and advise the Committee to contact the Department's Office of Legislative Affairs should it seek information that he is unable to provide.

Finally, Mr. Elias is not authorized to disclose any records of the Department to Congress with respect to the Committee's request for Mr. Elias to produce documents and communications referring or relating to any documents he produced to the Department's Office of Inspector General, the United States Office of Special Counsel, or a Member of Congress. Such records constitute property of the Department and are subject to restrictions on the unauthorized disclosure of information, including information protected by executive privilege. Department policy requires that the production of such records be coordinated through the Office of Legislative Affairs. *See* Justice Manual §§ 1-8.200, 1-8.210. The Committee's interest in documents relevant to investigations pending with the Office of the Inspector General or the Office of Special Counsel raises concerns of political interference in the autonomy of those investigations. To the extent the Committee has a legitimate interest in seeking such information, its requests should be directed to those offices.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley Weinsheimer', is written over a horizontal line.

Bradley Weinsheimer
Associate Deputy Attorney General



June 22, 2020

By Email

Bradley Weinsheimer
Associate Deputy Attorney General
U.S. Department of Justice
Washington D.C.
bradley.weinsheimer@usdoj.gov

Re: Congressional Subpoena Ordering John Elias to Give Testimony and Produce Documents at the June 24, 2020 Hearing of the House Judiciary Committee

Dear Mr. Weinsheimer:

I am writing to reply to your June 18, 2020 letter to me. Under ordinary circumstances, the Justice Department maintains the confidentiality of its operations, and that is necessary for the Department to do its work effectively. However, when serious government misconduct occurs, whistleblower protections empower its employees to speak out.

1. Mr. Elias is a whistleblower. He has lawfully reported abuses of authority and other wrongdoing by Antitrust Division and Department of Justice political leadership, disclosing significant government misconduct adversely and improperly affecting specific industries and companies. Months before the House Judiciary Committee's June 24 hearing was ever contemplated, Mr. Elias filed complaints and expressed concerns to the Department of Justice Office of Inspector General, the U.S. Office of Special Counsel and the Congress – all protected disclosures. The government faces substantial legal risk if it makes personnel decisions adversely affecting employees who make protected disclosures.
2. Mr. Elias is being compelled by subpoena. In the absence of a valid judicial order saying otherwise, we are advising him to comply.
3. The letter's blanket invocation of executive branch privileges and other authorities fails to acknowledge Congress's ability to compel information in this context. Its reference to the deliberative process privilege is just one example of the letter's overreach. That qualified privileged "disappears altogether when there is any reason to believe government misconduct occurred." *In re sealed Case*, 121 F. 3d 729, 746 (D.C. Cir. 1997). "[W]here there is reason to believe the documents sought may shed light on

Associate Deputy Attorney General Bradley Weinsheimer
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Page 2

government misconduct, 'the privilege is routinely denied,' on the grounds that shielding internal government deliberations in this context does not serve "the public's interest in honest, effective government.'" *Id.* at 738 (citations omitted). Here, Mr. Elias has already lawfully disclosed significant government misconduct within the Antitrust Division.

Mr. Elias has been committed to exposing the abuses of which he has knowledge in a lawful manner. He maintains that commitment.

Very truly yours,

/s/

David Z. Seide
davids@whistleblower.org



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

June 23, 2020

David Z. Seide
Government Accountability Project
1612 K Street NW
Washington, D.C. 20006
By email: davids@whistleblower.org

Dear Mr. Seide:

I write in response to your June 22, 2020 letter concerning the testimony your client, John Elias, a trial attorney in the criminal section of the Department's Antitrust Division, plans to provide in connection with a subpoena he received to appear before the Committee on the Judiciary of the U.S. House of Representatives (Committee).

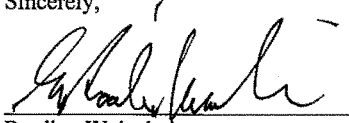
In your letter, you offer conclusory claims about Mr. Elias's expected testimony but do not furnish any specific information about its content. Lacking such information, the Department is unable to evaluate the nature of his claims or his assertion that he has knowledge of "abuses of authority and other wrongdoing." Mr. Elias should understand, however, that he does not have the Department's authorization to testify about privileged matters.

In addition, it is incorrect as a matter of law to suggest that your client has no responsibility to honor the deliberative process privilege because he believes himself to be a witness to unidentified government misconduct. Although you cite the D.C. Circuit's decision in *In re Sealed Case*, that decision made clear that with respect to the relevant privileges, "*courts* must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking evidence." 121 F.3d 729, 746 (D.C. Cir. 1997) (emphasis added). Your client does not have the authority to perform such a balancing of interests on his own.

As I indicated previously, absent authorization, an individual attorney such as Mr. Elias lacks authority to reveal confidential deliberative information or attorney work product related to investigative and enforcement matters in response to a congressional subpoena. The balancing of a congressional committee's need for information and the Executive Branch's need for confidentiality occurs through the constitutionally mandated accommodation process between authorized representatives of the Executive Branch and Congress. Accordingly, consistent with appropriate governmental privileges, the Department expects that Mr. Elias will decline to respond to questions seeking such information and advise the Committee to contact the

Department's Office of Legislative Affairs should it seek information that he is unable to provide.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley Weinsheimer', written over a horizontal line.

Bradley Weinsheimer
Associate Deputy Attorney General

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June 19, 2020

Writer's Direct Contact
+1 (202) 887.1588
RLitt@mofocom

VIA EMAIL

Bradley Weinsheimer
Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530

Re: Aaron Zelinsky

Dear Mr. Weinsheimer:

We have received your letter regarding the subpoena Mr. Zelinsky received from the House Judiciary Committee. The subpoena, of course, is compulsory process issued by a co-ordinate branch of government. Mr. Zelinsky does not believe there are any grounds for him to decline to appear in response to the subpoena and your letter does not suggest otherwise.

At the same time, Mr. Zelinsky recognizes and intends to respect his obligation to protect information that is properly subject to privilege. He has no intention of testifying about any classified material, or any grand jury or law enforcement sensitive information. In addition, however, your letter makes a general reference to the possibility that some of Mr. Zelinsky's testimony may be covered by a deliberative process privilege. The applicability of any such privilege to Mr. Zelinsky's proposed testimony is uncertain, and we are seeking clarification from the Department. We set forth below some of the relevant legal principles.

The deliberative process privilege only applies to information that is both predecisional and deliberative. *In re Sealed Case*, 121 F.3d 729, 737 (D.C.Cir.1997). It is therefore our understanding that the privilege has no applicability to communications that occur after a final decision has been made. Nor would it apply to any testimony about the manner in which the Department's final recommendation in this case departed from established policies or Mr. Zelinsky's own experience as a prosecutor.

Moreover, any concern that disclosure of discussions among prosecutors might have a "chilling effect" would seem to be significantly lessened in this particular situation by the public statements made by the Attorney General and others about the circumstances of, and reasons for, the Department's withdrawal of its sentencing recommendation – particularly

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Bradley Weinsheimer
 June 19, 2020
 Page Two

since Mr. Zelinsky believes that some of those statements were materially misleading. Indeed, the Department has already disclosed deliberative information regarding the Roger Stone prosecution. *See Comm. on Oversight & Gov't Reform, United States House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 106 (D.D.C. 2016) (finding that the qualified privilege “must yield,” given that the “Department itself has already publicly revealed the sum and substance of the very material it is now seeking to withhold,” and “any harm that would flow from the disclosures sought here would be merely incremental.”).

For example, Attorney General Barr publicly discussed the internal discussions concerning the sentencing recommendation, and the position he and others wished to take: “A new U.S. attorney had just started in Washington D.C. and the week before the filing, he engaged in conversations with senior staff here who raised some questions about the sentencing because he was concerned that the so called guidelines, the sentencing guideline formula, was indicating a sentence between 7 and 9 years. Which, he felt and all of us immediately felt was very, very high and excessive in this case.” The Attorney General continued: “In those discussions here at the department, you know, I came to the view as my colleagues did that I wouldn't support affirmatively advocating what I thought was an excessive sentence. So, what I wanted to do what to provide dis -- defer to the discretion of the judge, let the judge make the determination.”¹

Finally, where there is reason to believe the information sought “may shed light” on government misconduct, the privilege is “routinely denied,” on the grounds that “shielding internal government deliberations in this context does not serve ‘the public's interest in honest, effective government.’” *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997). It is Mr. Zelinsky's view that the manner in which the Stone sentencing was handled violated fundamental principles of fairness and nonpartisanship in law enforcement, and established Justice Department policy, by according favorable treatment to a defendant by virtue of his political relationship to the President. The Congressional hearing for which he has been subpoenaed is investigating the same concerns.

To assist us in understanding how the Department believes that a privilege would nonetheless apply in these circumstances, we have enclosed a copy of a draft of Mr. Zelinsky's written statement. We would appreciate it if, by close of business Monday you would identify any specific portions of this testimony that you believe are protected by privilege, and explain why. We also urge you and the Committee (whose majority and minority counsel are receiving copies of this letter without Mr. Zelinsky's statement) to have prompt discussions to reach agreement pursuant to the accommodation process referenced in your letter.

¹ *Transcript of Attorney General Bill Barr's exclusive interview with ABC News*, ABC News, February 13, 2020, 9:40 PM, available at <https://abcnews.go.com/Politics/transcript-attorney-general-bill-barrs-exclusive-interview-abc/story?id=68975178>.

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Bradley Weinsheimer
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Page Three

Mr. Zelinsky understands the Committee to be interested in his testimony in respect of the Stone sentencing. To the extent questions are put to him about other matters, including the Special Counsel's investigation, he understands the Department's position to be that he would be very limited in his ability to provide testimony – and would accordingly as a general matter decline to elaborate on those matters for the same reasons that Robert Mueller did in his testimony. In any event Mr. Mueller's testimony did not involve issues of waiver or potential wrongdoing as are present here.

Thank you for your prompt attention to this matter of public importance.

Sincerely,



Robert S. Litt

Encl.

cc.: Acting Assistant Attorney General Stephen Boyd
Aaron Hiller (w/o enclosure)
Stephen Castor (w/o enclosure)



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

June 22, 2020

Robert S. Litt
Morrison Foerster
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006
By email: rlitt@mofo.com

Dear Mr. Litt:

I write in response to your June 19, 2020 letter concerning the written statement that your client, Aaron Zelinsky, an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Maryland, proposes to submit in connection with his appearance before the Committee on the Judiciary of the U.S. House of Representatives (Committee) on June 24, 2020.

As explained in my June 18, 2020 letter, the Department of Justice (Department) has a strong and long-standing interest in protecting the confidentiality of prosecutorial deliberations. Your letter does not challenge the legitimacy of that interest, but offers several reasons why you believe that neither those confidentiality interests nor the deliberative process privilege precludes the testimony your client wishes to present in his written statement.

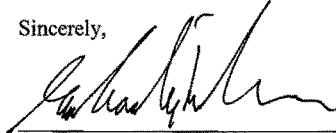
The Department disagrees with your suggestion that none of the internal discussions addressed in AUSA Zelinsky's draft statement are pre-decisional under the deliberative process privilege. Your client's testimony includes deliberations within the U.S. Attorney's Office concerning the initial decision to file a sentencing memorandum in the *Stone* case and the subsequent decision to file a second filing in the *Stone* case. Those discussions are pre-decisional and covered by privilege.

The Department also disagrees with the suggestion that the deliberative process privilege does not apply merely because someone describes what he or she views to be "political influence" in a matter. That is not the law, and the Department does not waive its important confidentiality interests in prosecutorial deliberations simply because someone alleges that a particular decision was political in nature. Given the frequency in which such allegations are made during congressional oversight, accepting that proposition would destroy the Department's confidentiality interests and threaten itself to politicize the criminal-justice process by inviting congressional intrusion into prosecutorial deliberations in many, if not virtually all, high-profile investigations and prosecutions.

That said, the Department does not object to your client submitting the proposed statement and to providing oral testimony that does not go beyond the scope of the statement. Much of what is contained in the statement constitutes your client's opinions of actions that were

taken in *Stone*. The opinions he holds on these matters (as opposed to how he may have expressed his opinions to others during his Office's deliberations) are not privileged, and he is free to express them, limited only by the rules of professional responsibility. As for deliberative information, the two sentencing memoranda in *Stone* are a matter of public record, and the Attorney General has publicly disclosed general information concerning the Department's deliberations. As drafted, the proposed statement is similarly limited to a high level of generality about the deliberations. The statement does not reveal the content of specific deliberative communications, and we do not authorize your client to reveal that kind of specific information in the statement or his oral testimony. Accordingly, consistent with the guidance in my June 18 letter, the Department expects that AUSA Zelinsky will decline to respond at the hearing to questions seeking such information and will advise the Committee to contact the Department's Office of Legislative Affairs should it seek information that he is unable to provide.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley Weinsheimer', written over a horizontal line.

Bradley Weinsheimer
Associate Deputy Attorney General

Mara, Priyanka

From: Litt, Robert S.
Sent: Tuesday, June 23, 2020 9:29 AM
To: 'Weinsheimer, Bradley (ODAG)' <Bradley.Weinsheimer@usdoj.gov>
Cc: Boyd, Stephen E. (OLA) <Stephen.E.Boyd@usdoj.gov>
Subject: RE: Status

Brad –

Thank you for your letter of last evening and for the Department's review and clearance of Mr. Zelinsky's written statement, which has now been submitted to the House Judiciary Committee (with only minor changes) without objection from the Department. Unless you have concerns with my doing so, I plan to forward your letter this morning to the majority and minority staff on the Committee, along with this response.

As we have said previously, Mr. Zelinsky is subject to compulsory process to provide testimony before the Committee but is fully aware of his professional obligations and has no intention of testifying about information that is properly subject to privilege. In that respect, he has sought and will be informed by the Department's position on the appropriate scope of the privilege in these circumstances, taking into account the public statements that the Department has already made with respect to the subject of his testimony, the extensive public record of these matters, and the nature of the activities to which his testimony relates.

We appreciate your letter's assurance that "the Department does not object to [Mr. Zelinsky] submitting the proposed statement and to providing oral testimony that does not go beyond the scope of the statement." But in light of seemingly contradictory assertions in your letter of yesterday, we cannot discern what concrete limits the Department asserts should guide Mr. Zelinsky's answers to questions he is likely to receive at the hearing. For example, you state that the Department "does not authorize" Mr. Zelinsky to discuss "specific deliberative communications." However, as you know, Mr. Zelinsky's written statement, which the Department has approved, includes numerous references to specific communications (e.g., "we were told by a supervisor that the U.S. Attorney had political reasons for his instructions, which our supervisor agreed was unethical and wrong," or "senior U.S. Attorney's Office leadership also communicated an instruction from the acting U.S. Attorney that we remove portions of the sentencing memorandum that described Stone's conduct"). It is not clear what the Department believes Mr. Zelinsky should do if he is asked about those specific communications, or similar ones.

Mr. Zelinsky does not wish to violate any professional obligations, although, as our earlier letter made clear, we have a different view of some of the legal principles than the Department does. Because the Department's view of the applicability of the deliberative privilege to Mr. Zelinsky's testimony is unclear, we would ask that the Department send a representative to the hearing, live or virtually (Mr. Zelinsky will be testifying via remote connection), and make arrangements with the Committee so that Mr. Zelinsky can be advised when the Department believes testimony is subject to privilege.

Thank you again for your cooperation.

Bob Litt

From: Weinsheimer, Bradley (ODAG) <Bradley.Weinsheimer@usdoj.gov>
Sent: Monday, June 22, 2020 8:50 PM
To: Litt, Robert S. <RLitt@mofo.com>

Cc: Boyd, Stephen E. (OLA) <Stephen.E.Boyd@usdoj.gov>
Subject: RE: Status

- External Email -

Bob:

Attached is the Department's response to your June 19 letter.

Thanks, Brad.

Brad Weinsheimer
 Associate Deputy Attorney General
 Department of Justice
 950 Pennsylvania Ave., NW, Rm. 4113
 Washington, DC 20530
 202-305-7848
Bradley.weinsheimer@usdoj.gov

From: Litt, Robert S. <RLitt@mofo.com>
Sent: Monday, June 22, 2020 12:40 PM
To: Weinsheimer, Bradley (ODAG) <bradweinsheimer@imd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@imd.usdoj.gov>
Cc: stephen.castor@mail.house.gov; Hiller, Aaron <Aaron.Hiller@mail.house.gov>; Hariharan, Arya <Arya.Hariharan@mail.house.gov>
Subject: Status

In light of the hearing date of Wednesday, the Committee's rules require that Mr. Zelinsky submit his written testimony today. In anticipation of the possibility that there might have to be further discussions, I would appreciate getting the views of the Department on his testimony as soon as possible.

Thanks for your assistance.

Bob Litt

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Chair NADLER. I will now recognize myself for 5 minutes.

Mr. Zelinsky, you recommended a sentence of 7 to 9 years in prison for Roger Stone's felony crimes. Was your recommendation based on Department guidelines?

Mr. ZELINSKY. Yes, it was.

Chair NADLER. Based on your 14 years at the Department, did you believe that recommendation was warranted?

Mr. ZELINSKY. I want to correct you, Chair. I have been at the Department for just about, it will be 6 years this November, but based on my experience, I did believe that the recommendation was warranted, yes.

Chair NADLER. Leadership at the Department wanted a lower sentence. When you asked the Department why they wanted a below-guideline sentence for Mr. Stone, you were told it was "political and because the U.S. Attorney was afraid of the President." Is that correct?

Mr. ZELINSKY. That is correct.

Chair NADLER. What did you understand that to mean?

Mr. ZELINSKY. I understood it, as described in my written statement, to mean that political considerations were weighing in the U.S. Attorney's decision, and that the concern about the President was driving his decision-making process.

Chair NADLER. What were you told could happen to you if you refused to go along with this lower recommendation?

Mr. ZELINSKY. We were told that we could be fired.

Chair NADLER. Now, you have described clearly that the Department treated Roger Stone differently than any other defendant because of his relationship to President Trump. Is this against Department policy?

Mr. ZELINSKY. It is.

Chair NADLER. Is it wrong?

Mr. ZELINSKY. It is.

Chair NADLER. Is it unethical?

Mr. ZELINSKY. It is.

Chair NADLER. You wrote in your written testimony that it pains you to describe these events. Can you explain why it pains you?

Mr. ZELINSKY. Mr. Chair, I took an oath when I took this job, as did all my colleagues who are assistant U.S. attorneys across the country. We are immensely proud of what we do, but we are proud to serve in the Department of Justice, and we are proud that we prosecute without fear or favor. To describe an abdication of responsibility like this and this sort of contradiction of all the reasons that we have taken these jobs is deeply painful to me.

Chair NADLER. Thank you. Mr. Elias, we just heard from Mr. Zelinsky how the Department violated its own policies just to appease the President's whims. In your testimony, you described a similar pattern. Am I correct that the Department also pursued antitrust investigations against the advice of career attorneys to satisfy the political and personal whims of President Trump and senior leadership at DOJ?

Mr. ELIAS. Yes, you are correct.

Chair NADLER. Do you believe these investigations are in the best interests of the American people?

Mr. ELIAS. I do not, no.

Chair NADLER. In your opinion, should the Department have prioritized investigations that benefited the American people instead of pursuing the Attorney General and President's political vendettas?

Mr. ELIAS. I think the Department should be using its resources in a way that fulfills its mission, yes.

Chair NADLER. Mr. Ayer, I would like to turn to you. You have decades of experience in public service at the highest levels of the Department of Justice. These witnesses confirmed that the Attorney General is weaponizing government resources and taxpayer dollars to pursue investigations that do not in any way benefit Americans, but instead advance the President's personal and political agenda. Briefly, what is the impact on our justice system if Barr is allowed to get away with this?

Mr. AYER. Well, let me just correct one thing. I don't really have decades. I have really had a little over 1 decade. Nonetheless, to answer your question, I think the problem is that there is a finite number of resources to be spent to advance a whole lot of areas of our justice system, and so you are throwing money away. That is the first thing. The more important thing is that by channeling enforcement efforts into inappropriate targets for the purpose, in some cases, of harassing people, which I think is often what we are dealing with, and also for channeling resources and spending time trying to give a special deal to other people, you are not only wasting money, but you are totally undermining public trust in the system. You are creating a situation.

I think we are on the way to something far worse than Watergate where you had a problem of public distrust because it is becoming very transparent that many things are being done essentially for reasons that are completely unrelated to the merits of the case.

Chair NADLER. Mr. Zelinsky, you testified that you came forward because telling the truth still matters. I, too, believe the truth still matters, and we will not let this conduct stand. Attorney General Barr will be held accountable. I recognize the gentleman from Ohio.

Mr. CHABOT. Thank you, Mr. Chair. Today's hearing is yet another attempt by the majority to smear this President and his Administration. My Democratic colleagues were shocked and deeply offended that he won the presidency in the first place. They are still grieving that they failed to remove him from office through their phony impeachment debacle, and now they are targeting Administration officials, in this case Attorney General Barr, for merely acting within the scope of their duties.

Where was the outrage when the Obama-Biden Justice Department investigated journalists, or when they retaliated against whistleblowers, or when they surveilled the Trump campaign? It is hypocrisy, and most people are going to see right through it.

It just shows that the majority will stop at nothing in attempting to distract and harass this President and his Administration. Their efforts are particularly disturbing at a time when a global pandemic has negatively impacted us all, and the country has been rocked by racial strife and civil unrest. There are other more important things we ought to be focusing our time and attention on rather than this distraction.

Despite an exemplary record and career, Democrats are now going after Attorney General Barr. Why? Because he is cleaning up the mess of the previous Administration and restoring integrity and honor to the DOJ and the FBI.

Now, speaking about messes from the previous Administration, Hillary's funding of the Steele dossier and the FISA scandal led to the Mueller investigation and the waste of a whole lot of our time and taxpayer dollars.

Now, Mr. Zelinsky, you were part of that Mueller team, weren't you?

Mr. ZELINSKY. I was. I was.

Mr. CHABOT. That supposedly unbiased team of 17 attorneys consisted of 13 Democrats. That doesn't sound very unbiased to me. Does it to you?

Mr. ZELINSKY. I would disagree with the premise of your question. We are, as I said, career professionals. Prosecutors do our job and we do it regardless of party or politics—

Mr. CHABOT. It was 13 Democrats—

Mr. ZELINSKY. —and we did—

Mr. CHABOT. —13 Democrats out of 17.

Mr. ZELINSKY. There has been public reporting to that effect.

Mr. CHABOT. All right. Thank you. Former Deputy Attorney General Rod Rosenstein, your boss, I believe, testified before the Senate recently that he wished Mueller had chosen a, quote, "more politically diverse group." Don't you think he has a point?

Mr. ZELINSKY. I don't think it would be appropriate to choose any prosecutor based on their politics, and that is not what the Special Counsel did in that circumstance. In fact, if anything, if the Special Counsel had tried to weigh the politics of the prosecutors when he was choosing them, that would have been far more deeply problematic than what he did, which is hiring professionals to do their job.

Mr. CHABOT. I guess it was just coincidental, 13 out of 17.

Something else I would like to point out that I think clearly shows that there was indeed bias on the Mueller team was that as a group they had given \$3,000 to Republican candidates in the past but over \$60,000—\$62,000 to be exact—to Democrats, a 20-to-1 bias in one direction.

Mr. Mukasey, let me turn to you if I can at this time. Do you believe that the Department of Justice under Attorney General Barr has become politicized, as my colleagues on the other side are alleging?

Mr. MUKASEY. As I said, I do not.

Mr. CHABOT. Would you agree that Attorney General Barr has worked to root out politics, in fact, and bring transparency back to the Department?

Mr. MUKASEY. I think he has made every effort to try to run the Department the way it should be run and to conduct investigations on the merits.

Mr. CHABOT. Do you believe that Attorney General Barr makes decisions based upon political calculations or upon the relevant facts and law?

Mr. MUKASEY. I believe he makes decisions based on the relevant facts and the law, and that if he made decisions based on political

calculations, he would not have made the decisions that I alluded to in the last part of my remarks.

Mr. CHABOT. Absolutely. I completely agree with you.

I am almost out of time so let me conclude with this. Mr. Chair, this hearing is just another sad attempt by you and the majority to attack this Administration, specifically the Attorney General, unfairly, and it is a shame because there is so much other important work that we should be engaged in, to unite this nation, not to further tear us apart.

With that I yield back the balance of my time.

Chair NADLER. The gentleman yields back. The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chair. Given the appearance of political influence exhibited by this Administration and the AG, and based on the testimonies presented to us, I am concerned about the integrity of our elections. In February, the Attorney General outlined restrictions and policies for campaign-related investigations. I would like to make a copy of that memo available in the record.

[The information follows:]

MS. LOFGREN FOR THE RECORD



Office of the Attorney General
Washington, D. C. 20530

February 5, 2020

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS
 ALL DEPARTMENT COMPONENT HEADS
 ALL LAW ENFORCEMENT AGENCY HEADS

FROM: THE ATTORNEY GENERAL *W.P. Barr*
 SUBJECT: ADDITIONAL REQUIREMENTS FOR THE OPENING OF
 CERTAIN SENSITIVE INVESTIGATIONS

The Department of Justice, along with other federal agencies, is charged with the responsibility of protecting the integrity of our elections and democratic system of government against improper influences. While the Department must respond swiftly and decisively when faced with credible threats to our democratic processes, we also must be sensitive to safeguarding the Department's reputation for fairness, neutrality, and nonpartisanship. In certain cases, the existence of a federal criminal or counter-intelligence investigation, if it becomes known to the public, may have unintended effects on our elections. For this reason, the Department has long recognized that it must exercise particular care regarding sensitive investigations and prosecutions that relate to political candidates, campaigns, and other politically sensitive individuals and organizations – especially in an election year.¹

As we enter the 2020 election year, the Department remains committed to ensuring that this fall's elections are conducted in a fair manner that is free from inappropriate influences. Accordingly, I am establishing the following requirements to govern the opening of criminal and counter-intelligence investigations by the Department, including its law enforcement agencies, relating to politically sensitive individuals and entities. These requirements are intended to operate in addition to all existing policies governing the opening of sensitive investigations, including all notice, consultation, and approval requirements currently found in the Justice Manual and those in place at the Department's law enforcement agencies.

¹ See, e.g., Loretta Lynch, Attorney General, U.S. Department of Justice, Mem. for all Department Employees, Election Year Sensitivities, April 11, 2016; Eric Holder, Attorney General, U.S. Department of Justice, Mem. for all Department Employees, Election Year Sensitivities, March 9, 2012; Michael Mukasey, Attorney General, U.S. Department of Justice, Mem. for all Department Employees, Election Year Sensitivities, March 5, 2008.

Memorandum from The Attorney General

Subject: Additional Requirements for the Opening of Certain Sensitive Investigations Page 2

No investigation (including any preliminary investigation)² may be opened or initiated by the Department or any of its law enforcement agencies:

1. Of a Declared candidate for president or vice president, a presidential campaign, or a senior presidential campaign staff member or advisor³ absent prior (i) written notification to and consultation with the Assistant Attorney(s) General and U.S. Attorney(s) with jurisdiction over the matter and (ii) written approval of the Attorney General, through the Deputy Attorney General;
2. Of a Declared candidate for U.S. Senate or U.S. House of Representatives, or his or her campaign, absent prior written notification to and consultation with the Assistant Attorney(s) General and U.S. Attorney(s) with jurisdiction over the matter;
3. Relating to illegal contributions, donations, or expenditures by foreign nationals to a presidential or congressional campaign absent prior written notification to the Assistant Attorney(s) General and U.S. Attorney(s) with jurisdiction over the matter.

Department law enforcement agencies are directed to adopt appropriate internal policies and procedures to ensure that the agency head reviews and approves any matter covered by this memorandum before the matter is presented to Department leadership for consultation or approval.

As a general matter, it is often good practice to notify the Office of the Deputy Attorney General (ODAG) concerning any sensitive or high-profile investigation to ensure that the Department can effectively coordinate its resources and efforts. Accordingly, once an investigation covered by this memorandum has been opened, component and law enforcement agency heads should make arrangements to provide ODAG with regular updates. Per the Justice Manual, U.S. Attorneys and component heads also should provide updates to Department leadership via Urgent Reports when appropriate.

The scope of this memorandum should be broadly construed to ensure that Department leadership is made aware of the opening of matters that could potentially be disruptive to our democratic processes if publicly disclosed prior to an election. You should err on the side of consulting or seeking approval if there could be any question as to whether such actions are required under this policy.

² Upon opening an assessment of, or taking exploratory investigative steps relating to, any person or campaign covered by this memorandum, law enforcement agencies shall promptly notify in writing the Assistant Attorney(s) General and U.S. Attorney(s) with jurisdiction over the matter.

³ This includes any person who has been publicly announced by a campaign as a staffer or member of an official campaign advisory committee or group.

Memorandum from The Attorney General

Subject: Additional Requirements for the Opening of Certain Sensitive Investigations Page 3

The requirements set forth in this memorandum shall remain in effect through the 2020 elections and until withdrawn or amended by further order of the Attorney General. Following the 2020 elections, the Department will study its experiences and consider whether changes to these requirements are necessary. In addition, I am directing that Department components and law enforcement agencies review their existing policies governing notification, consultation, and/or approval of politically sensitive investigations and that each submit a report to ODAG within sixty (60) days summarizing their existing policies and making recommendations for any necessary changes or updates.

As noted, the Department has a strong interest in the prosecution of election-related crimes, including those involving corruption of the election process. Yet we must investigate and prosecute those matters with sensitivity and care to ensure that the Department's actions do not unnecessarily advantage or disadvantage any candidate or political party. As always, I rely on you to exercise your sound judgment in pursuing all meritorious cases while at the same time maintaining our duty to protect the First Amendment rights of our citizens and their right to participate in a democratic electoral process free from improper activity or influences.

Ms. LOFGREN. Now, in part, the memo requires that no investigations should be opened or initiated of a declared candidate for President or Vice-President, *et cetera*, absent written approval of the Attorney General. This is a departure from previous campaign investigation protocol. Having heard from witnesses today about the significant political influence affecting the Department of Justice, this, at the very least, raises the specter that decisions to investigate presidential campaigns could be politically motivated.

Mr. Ayer, does the appearance of political influence over investigations into presidential campaigns raised by this memo concern you?

Mr. AYER. It does, and it is one of a number of things that does. Obviously, the election is upcoming, and it is a hugely important phase of our national life. So, the idea that we are not going to be handling possible investigations relating to the election, we are not going to be handling them in the ordinary course by even-handed professionals who are trained to do it, but we are going to have them handled in some special way, which I don't think we really know quite what it is. We know that it is a cadre of people that Mr. Barr has sort of set aside and said they will handle this.

This is only one of a number of areas where he has done this, and we know of some. I am afraid there are others we don't, where whenever there is something sensitive it essentially gets turned over to somebody that he can trust, as opposed to someone who is a professional, trained, and even-handed in their handling of it.

Ms. LOFGREN. Thank you very much. I want to talk about concerns that the Attorney General is abusing power in a way that is quite real to Californians. As we know, the Supreme Court has held that due to their stake in protecting their quasi-sovereign interest, States have the authority to set regulations governing greenhouses gasses. That is a *Massachusetts v. EPA* case from 2007.

Now, California has applied for and received more than 100 Clean Air waivers over the past 50 years. None have been revoked. As a result, the average car sold nationwide is more than 99 percent cleaner than a car from the 1970s.

Now, as we know, the Trump Administration has attempted to curtail California's action, and following that carmakers in California worked together to come up with emissions that would work for California.

This is important. This isn't just arcane stuff. I mean, in the Central Valley of California we have the highest asthma rate among children in the United States, and a lot of that is because of emissions on I-5 and Highway 99.

So, when I saw this, the antitrust announcement, I thought he is just trying to scare these automakers, to let them know that they are going to have to spend a lot of money if they deal with California as the law permits them to do.

Mr. Elias, the investigation initiated, was there any legitimate antitrust concern, or was it simply an attempt by the Administration to muscle the auto companies into not dealing with the State of California?

Mr. ELIAS. So, as I pointed out, the coincidence in time with the opening of the investigation was the day after the Trump tweets.

I think staff had looked through some public resources, public laws, to see whether it might be permissible or not, and that kind of thing we do all the time and don't proceed to a formal, full investigation. So, to answer your question, no, I don't believe there was a proper basis to actually go forward with a formal investigation.

Ms. LOFGREN. Well, it looked to me that the Department announced these investigations in really a bad-faith manner, after the President publicly threatened these companies for disagreeing with his own policies. This matters. It matters not in an arcane way or in an academic way. It matters to the lungs of the children of the State of California. I think it is a direct example of how misconduct and political corruption in the Department of Justice has a direct adverse impact on the people of America, and most specifically in this case, the people of California.

I would just like to know that I, too, was around during the Watergate matter, and I see some parallels. Actually, this is worse, worse than Watergate, worse than Nixon.

I see my time is up, Mr. Chair, so I yield back.

Chair NADLER. The gentlelady yields back. Mr. Gohmert.

Mr. GOHMERT. This is incredible. Mr. Ayer, you called Jeff Jensen, a 20-year career prosecutor, a political crony. By the way, do you care to say, into the microphone, what you mouthed at me earlier when you had gone over two minutes past your time?

Mr. AYER. I didn't mouth anything at you, Congressman.

Mr. GOHMERT. Well, you just showed your lack of credibility, both with Thornburgh and people that have followed has a real basis in fact. In fact, rarely have we had anybody with a chip you have on your shoulder come before us. Thornburgh said he believed that you were really never around. He said, "Bill Barr was the"—and I am quoting—"the first deputy I had, and that came when I was two years into the job."

Anyway, I understand you got fired by Thornburgh. In fact, he said, "Ayer proved"—this is in his book—"Ayer proved to have exaggerated notions of his responsibility to resent my confidence in Ross, Runkel, and Murray Dickman. Soon developing a serious chip on his shoulder, he began taking actions independent of, or in conflict with, my wishes. Once he sent a letter to Boyden Gray containing recommendations for corporate sentencing guidelines that I had not even reviewed. Ayers' resignation was announced on May 11th. Bill Barr succeeded him and proved to be the deputy I had needed from the beginning."

So, I can understand why you would be resentful 30 years later, but at some point, hopefully Mr. Ayers will get over his chip. The fact that Mr. Zelinsky, I was going to ask him questions but—and I understand family matters, and, by the way, I am grateful to my wife for sticking with me for 42 years today, and there are family matters. Yeah, she is a lot more fair than we are getting around here. So, 42 years. Thank you, Kathy.

Some of us have family matters too that are very pressing, but this is very pressing too, and I won't try to compare those. Mr. Barr has come and testified, and he is coming again soon, so statements that he wouldn't come here, that is just not true.

You know what? I have not heard anybody, any of these three Democrat witnesses, express any concern for the Justice Depart-

ment under President Obama going after local law enforcement. Why? Because in the opinion of the Justice Department they violated people's civil rights. AG Barr had that same concern that people's civil rights were being violated by governors or local authorities, and if he had no right to say anything then the Justice Department under Obama had no right to pursue local law enforcement either.

I guess it just, again, testifies to the credibility, or the lack thereof, of the people that have been brought before us. It is absolutely incredible that people could come in here, and after the Justice Department, including the FBI, intel, top people—even DoD was paying Stefan Halper—all these people were involved in trying to prevent a Republican from becoming President, and these three witnesses don't have any problem whatsoever with that. History will not judge you kindly in the days ahead, whether we get to continue this little experiment in self-government or not, because you have been an accomplice after the fact to what has occurred in the Justice Department, and you are so biased you cannot even see it.

So, I don't have a lot of questions for people who don't have credibility, have chips on their shoulders. Mr. Elias, for heaven's sake, you come in here with your complaints. It is just a shame we don't have a serious hearing. It is just a sideshow, and it ought to be called for what it is, and that is why I am. If we are concerned about justice we need to get after the people that created the injustice through the last Administration.

I yield back. Hank, I don't have any problem with you doing that.

Chair NADLER. The gentleman yields back. The gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chair, I know that we are not here to discuss personal matters of the witnesses. Let me acknowledge, General, for your presence here today, Mukasey. We have certainly worked together in the past. Let me acknowledge our three witnesses, of whom each and every one of you are patriots, and I thank you for your service.

I am reminded of the time at the Department of Justice when those of us in the South, during the midst of the Civil Rights Movement, looked to the DOJ for the relief of then the Assistant Attorney General for civil rights—honest, straightforward in dealing with not the crisis but the bloodshed of the South, in the midst of fighting for freedom. They were a hand that we held onto.

I am disappointed that we now face the circumstances of a drunken party gone wild. Sadly, the Department of Justice has gone wild. So, I think it is important that we highlight and begin to move on correcting the wildness, the out-of-controlness, and begin to focus on standing up a Justice Department that works for the American people.

We heard today from all of you about the effects of the President's politicization of his Justice Department for his own ends. My colleagues on the other side of the aisle would like to suggest that this is not true. They want to cover their ears to this injustice. So, I would ask them what Jonathan Kravis, a career prosecutor with a decade of experience, similar to some of you here today, asked in his recent op-ed, quote, "If the Department truly acted because of good faith, commitments to legal positions, then where is the evi-

dence of those commitments in other cases that do not involve friends of the President? Where are the narcotics cases in which the Department has filed a sentencing memorandum overruling career prosecutors? Where are the other U.S. Attorneys who wouldn't go quietly into the night?"

As Mr. Kravis wrote, "There are none." All the cases are political cases, friends of the President. Is that because the only cases in the United States that warranted intervention by Department leadership happened to involve friends of the President? Of course not. Is that because attorney generals regularly lie to the American people about U.S. Attorneys resigning when, in reality, he is being pushed out for prosecuting the President's inner circle? Of course not. Remember, Attorney General Barr, it was the President that fired him. Remember the President saying, "I had nothing to do with it. I didn't know anything about it."

What the Department of Justice is doing is an unprecedented erosion of our constitutional system. It has gone wild. My colleagues on the other side of the aisle have then refused to acknowledge the truth for a while. When asked about Lafayette Square they said they didn't see it firsthand. It is never acceptable to turn a blind eye to injustice, and thousands of former officials are now coming out to speak truth to power. There are literally thousands of individuals across Republican and Democratic Administrations. Over 2,000 that worked in the Department of Justice signed a letter.

So, it is a grave threat to fair Administration in this nation. We are all equal before the law. A person should not be given special treatment in a criminal prosecution. Thousands of Department officials wrote again after the Flynn prosecution, expressing the same sentiment, and yesterday Members of George Washington Law School faculty did the same. Over 1,000 former DOJ talked about the rule of law.

I believe it is a clear and present danger, and he must be held accountable, the Attorney General, who, yes, has been invited to this Committee but has refused over and over again.

Mr. Ayer, you have served in multiple Administrations in both parties. Are these thousands of people right? Is Barr's current and present danger to our constitutional order of the rule of law—constitutional order, rule of law, and an even-handed Administration of justice? Is Attorney General Barr a current and present danger? Mr. Ayers.

Mr. AYER. Yes, Congressman Jackson Lee, I think he is, and that was the theme of what I tried to say before. I think essentially it is for two reasons. One is that he has a personal belief that the President should be above the law, and he has worked very hard to achieve that by negating the checks and balances in a variety of ways by making the President not accountable, stonewalling the Congress, stonewalling the Southern District of New York—I am sorry, the District Attorney's Office is trying to do a criminal investigation. So, preventing information from coming out, and otherwise essentially putting the President beyond the law.

The second thing he is doing, and this has accelerated this spring, is getting involved in a very political, essentially in using the Justice Department to support the President's campaign, and

comments he has made about opening up the country, the activities in Lafayette Square.

The most serious problem here that I am concerned about is his accelerating recitation of this narrative about, I don't know what you call it, Obama-gate or deep State conspiracy or whatever it is, the thing that we were hearing from Ranking Member Jordan earlier. He is using the fact that he has his own investigation going on as a basis for supposed facts, to assert that these things are true.

Number one, I don't believe they are true, but more importantly, that is a totally improper misuse of the Department of Justice. Even if those facts were true, it would be a violation of the Justice Department rules to be reporting to the public on things that he is supposedly finding in that investigation.

If you look at my written submitted testimony you will see just a very concise chronicle of the number of times he has gone on television and on the radio to make these assertions in detail about these things that are going on. In fact, one of the ones that I had to chuckle about was on Sunday, with Maria Bartiromo. He actually said that he was surprised that the public doesn't seem to be paying attention to the things that he has been saying about these outrageous things that have been uncovered. He doesn't understand why people aren't paying enough attention to his reports on the Durham investigation. Well, that is gross violation of the Justice Department's policies, even if the facts were true, which I frankly think they clearly are not.

So, we have a real problem here, and the drum beat of his misbehavior is accelerating as we get closer to the election. I don't know what is next, but I am scared to think about what it might be.

Chair NADLER. The time of the gentlelady has expired.

Ms. JACKSON LEE. Mr. Chair, I would like to ask unanimous consent to submit into the record DOJ Alum Statement on Roger Stone, DOJ Alum Statement Regarding the Sentencing of Roger Stone, and the statement on Mr. Flynn, and DOJ Alum Statement to Michael Horowitz, the Inspector General. I ask unanimous consent to place these in the record at this time.

Chair NADLER. Without objection.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD



To the Honorable Chair and Members of Judiciary Committee of the United States House of Representatives:

In May, our coalition, the Lawyer's Allied to Uphold the Rule Of Law, sent you a [letter](#) expressing our concern that actions by the Department of Justice and the present Administration have undermined our country's core constitutional commitment to the impartial administration of justice. We now submit this follow-up letter out of concern that Attorney General William Barr's continued abuse of power and subversion of the Department of Justice's mission have become a present danger to our democracy, and demand your urgent attention.

Time and again, General Barr has compromised the integrity of the Department of Justice by placing President Trump's political and personal interests above the interests of the American people in carrying out the President's orders. Rather than leading a Department of Justice that fairly enforces our nation's laws and serves the American people, General Barr has undermined the Department's mission, acting as if the President is his sole client, and the DOJ is the President's personal law firm. That General Barr has been willing to make false statements and corrupt the Department's resources in order to protect the President is deeply disturbing, and warrants intensive scrutiny by this Committee.

The recent firing of Geoffrey Berman as U.S. Attorney for the Southern District of New York provides a vivid example. The jurisdiction of the Southern District of New York, located in Manhattan, overlaps with (until recently) the President's state of residence, campaign headquarters, and business operations, and was the locus of activities involving the President's friends, colleagues, and in some cases adversaries. Accordingly, that office has been responsible for investigations into the Trump Organization, the President's personal lawyers, and the President's campaign finance violations. First, General Barr issued a false statement that Mr. Berman was "stepping down" from his role. Mr. Berman in fact was not, as Mr. Berman stated in a letter at that time vigorously defending his position and the integrity of the investigations his office was conducting. President Trump then fired Mr. Berman as requested by General Barr. General Barr then sent a final letter about the firing, reversing his original expressed intention to appoint a neighboring U.S. Attorney to temporarily serve and naming the Deputy U.S. Attorney to assume that position as is the usual practice.

The firing of U.S. Attorneys was consistent with this Administration's systematic firing of Inspectors General considered insufficiently deferential to the desires of the President, and of anyone who investigated Trump allies or cooperated in these investigations. The irregularities in Mr. Berman's dismissal highlights how General Barr has facilitated this

Administration's redirection of the power of government to protect the President's friends and punish his enemies. As has often been the case, no substantial reasons have been given for his removal, announced late on a Friday. Meanwhile, bipartisan officials and others already have expressed grave concern about the failure to justify recent terminations of Inspectors General who reached conclusions unpopular with this administration. General Barr's second letter to Mr. Berman states that those uncomfortable with the course of investigations undertaken after his departure may contact the appropriate Inspector General whom he, General Barr, has authorized to review such assertions. This Administration's demonstrated hostility to Inspectors General they consider "disloyal" for maintaining the independence required of that role, makes these suggestions at the least suspect.

The investigations undertaken by the U.S. Attorney's office under Mr. Berman's direction contrast sharply with General Barr's decisions to end prosecutions of foreign actors who interfered in our elections, and instead to open investigations into the United States' own intelligence community. The clear message is that anyone who fails to comply with the President's wishes risks suffering the same removal from their posts, and that the arm of government charged with implementing the rule of law will instead act in accordance with the wishes of a "ruler."

The public deserves accountability from the nation's top law enforcement official, and we remain very disturbed that Attorney General Barr has never testified before the House Judiciary Committee during his tenure despite multiple invitations and promises to do so. This rejection of public transparency and refusal to be held accountable yet again undermines the system of checks and balances designed by our Constitution. We should no longer countenance this Attorney General eroding the mechanisms that protect our national interests and that ensure America's leaders remain accountable to the same laws as its people.

As lawyers and public servants, and without regard to political or other affiliations, we thank the Committee for its focus on the abuse of power by Attorney General Barr, which we fear has endangered American citizens, the system of checks and balances, and the Rule of Law—the very essence of our democracy.

Sincerely,

/s/ Joseph R. Grodin, Jeffrey L. Bleich, Beth Jay

Joseph R. Grodin, Associate Justice, California Supreme Court (ret'd); Distinguished Emeritus Professor, U.C. Hastings College of the Law; Jeffrey L. Bleich, United States Ambassador (Ret.), Past-President State Bar of California; Beth J. Jay, Former Principal Attorney to the Chief Justice of California, Of Counsel to Horvitz and Levy

DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone

 medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-e2cb75ae4937

February 18, 2020



We, the undersigned, are alumni of the United States Department of Justice (DOJ) who have collectively served both Republican and Democratic administrations. Each of us strongly condemns President Trump's and Attorney General Barr's interference in the fair administration of justice.

As former DOJ officials, we each proudly took an oath to support and defend our Constitution and faithfully execute the duties of our offices. The very first of these duties is to apply the law equally to all Americans. This obligation flows directly from the Constitution, and it is embedded in countless rules and laws governing the conduct of DOJ lawyers. The Justice Manual — the DOJ's rulebook for its lawyers — states that “the rule of law depends on the evenhanded administration of justice”; that the Department's legal decisions “must be impartial and insulated from political influence”; and that the Department's prosecutorial powers, in particular, must be “exercised free from partisan consideration.”

All DOJ lawyers are well-versed in these rules, regulations, and constitutional commands. They stand for the proposition that political interference in the conduct of a criminal prosecution is anathema to the Department's core mission and to its sacred obligation to ensure equal justice under the law.

And yet, President Trump and Attorney General Barr have openly and repeatedly flouted this fundamental principle, most recently in connection with the sentencing of President Trump's close associate, Roger Stone, who was convicted of serious crimes. The Department has a long-standing practice in which political appointees set broad policies that line prosecutors apply to individual cases. That practice exists to animate the constitutional principles regarding the even-handed application of the law. Although there are times when political leadership appropriately weighs in on individual prosecutions, it is unheard of for the Department's top leaders to overrule line prosecutors, who are following established policies, in order to give preferential treatment to a close associate of the President, as Attorney General Barr did in the Stone case. It is even more outrageous for the Attorney General to intervene as he did here — after the President publicly condemned the sentencing recommendation that line prosecutors had already filed in court.

Such behavior is a grave threat to the fair administration of justice. In this nation, we are all equal before the law. A person should not be given special treatment in a criminal prosecution because they are a close political ally of the President. Governments that use the

enormous power of law enforcement to punish their enemies and reward their allies are not constitutional republics; they are autocracies.

We welcome Attorney General Barr's belated acknowledgment that the DOJ's law enforcement decisions must be independent of politics; that it is wrong for the President to interfere in specific enforcement matters, either to punish his opponents or to help his friends; and that the President's public comments on DOJ matters have gravely damaged the Department's credibility. But Mr. Barr's actions in doing the President's personal bidding unfortunately speak louder than his words. Those actions, and the damage they have done to the Department of Justice's reputation for integrity and the rule of law, require Mr. Barr to resign. But because we have little expectation he will do so, it falls to the Department's career officials to take appropriate action to uphold their oaths of office and defend nonpartisan, apolitical justice.

For these reasons, we support and commend the four career prosecutors who upheld their oaths and stood up for the Department's independence by withdrawing from the Stone case and/or resigning from the Department. Our simple message to them is that we — and millions of other Americans — stand with them. And we call on every DOJ employee to follow their heroic example and be prepared to report future abuses to the Inspector General, the Office of Professional Responsibility, and Congress; to refuse to carry out directives that are inconsistent with their oaths of office; to withdraw from cases that involve such directives or other misconduct; and, if necessary, to resign and report publicly — in a manner consistent with professional ethics — to the American people the reasons for their resignation. We likewise call on the other branches of government to protect from retaliation those employees who uphold their oaths in the face of unlawful directives. The rule of law and the survival of our Republic demand nothing less.

If you are a former DOJ employee and would like to add your name below, [click here](#). Protect Democracy will update this list daily with new signatories.

Signatories have been vetted to the best of our ability. We will continue to update the signatory list until Wednesday, February 26th.

DOJ Alumni Statement on Flynn Case

 medium.com/@dojalumni/doj-alumni-statement-on-flynn-case-7c38a9a945b9

May 12, 2020



We, the undersigned, are alumni of the United States Department of Justice (DOJ) who have collectively served both Republican and Democratic administrations. Each of us proudly took an oath to defend the Constitution and pursue the evenhanded administration of justice free from partisan consideration.

Many of us have spoken out previously to condemn President Trump's and Attorney General Barr's political interference in the Department's law enforcement decisions, as we did when Attorney General Barr overruled the sentencing recommendation of career prosecutors to seek favorable treatment for President Trump's close associate, Roger Stone. The Attorney General's intervention in the Stone case to seek political favor for a personal ally of the President flouted the core principle that politics must never enter into the Department's law enforcement decisions and undermined its mission to ensure equal justice under the law. As we said then, "Governments that use the enormous power of law enforcement to punish their enemies and reward their allies are not constitutional republics; they are autocracies."

Now, Attorney General Barr has once again assaulted the rule of law, this time in the case of President Trump's former national security adviser Michael Flynn. In December 2017, Flynn pleaded guilty to lying to the FBI about his communications with the Russian ambassador to the United States. Subsequent events strongly suggest political interference in Flynn's prosecution. Despite previously acknowledging that he "had to fire General Flynn because he lied to the Vice President and the FBI," President Trump has repeatedly and publicly complained that Flynn has been mistreated and subjected to a "witch hunt." The President has also said that Flynn was "essentially exonerated" and that he was "strongly considering a [full] [pardon]." The Department has now moved to dismiss the charges against Flynn, in a filing signed by a single political appointee and no career prosecutors. The Department's purported justification for doing so does not hold up to scrutiny, given the ample evidence that the investigation was well-founded and — more importantly — the fact that Flynn admitted under oath and in open court that he told material lies to the FBI in violation of longstanding federal law.

Make no mistake: The Department's action is extraordinarily rare, if not unprecedented. If any of us, or anyone reading this statement who is not a friend of the President, were to lie to federal investigators in the course of a properly predicated counterintelligence investigation, and admit we did so under oath, we would be prosecuted for it.

We thus unequivocally support the decision of the career prosecutor who withdrew from the Flynn case, just as we supported the prosecutors who withdrew from the Stone case. They are upholding the oath that we all took, and we call on their colleagues to continue to follow their example. President Trump accused the career investigators and prosecutors involved in the Flynn case of “treason” and threatened that they should pay “a big price.” It is incumbent upon the other branches of government to protect from retaliation these public servants and any others who are targeted for seeking to uphold their oaths of office and pursue justice.

It is now up to the district court to consider the government’s motion to dismiss the Flynn indictment. We urge Judge Sullivan to closely examine the Department’s stated rationale for dismissing the charges — including holding an evidentiary hearing with witnesses — and to deny the motion and proceed with sentencing if appropriate. While it is rare for a court to deny the Department’s request to dismiss an indictment, if ever there were a case where the public interest counseled the court to take a long, hard look at the government’s explanation and the evidence, it is this one. Attorney General Barr’s repeated actions to use the Department as a tool to further President Trump’s personal and political interests have undermined any claim to the deference that courts usually apply to the Department’s decisions about whether or not to prosecute a case.

Finally, in our previous statement, we called on Attorney General Barr to resign, although we recognized then that there was little chance that he would do so. We continue to believe that it would be best for the integrity of the Justice Department and for our democracy for Attorney General Barr to step aside. In the meantime, we call on Congress to hold the Attorney General accountable. In the midst of the greatest public health crisis our nation has faced in over a century, we would all prefer it if Congress could focus on the health and prosperity of Americans, not threats to the health of our democracy. Yet Attorney General Barr has left Congress with no choice. Attorney General Barr was previously set to give testimony before the House Judiciary Committee on March 31, but the hearing was postponed due to the COVID-19 pandemic. We urge the Committee to reschedule Attorney General Barr’s testimony as soon as safely possible and demand that he answer for his abuses of power. We also call upon Congress to formally censure Attorney General Barr for his repeated assaults on the rule of law in doing the President’s personal bidding rather than acting in the public interest. Our democracy depends on a Department of Justice that acts as an independent arbiter of equal justice, not as an arm of the president’s political apparatus.

(If you are a former DOJ employee and would like to add your name to this statement, **please complete this form**. Protect Democracy will update this list daily with new signatories until May 25th.)

Signatories have been vetted to the best of our ability.

DOJ Alumni Letter to Inspector General Michael Horowitz

 medium.com/@dojalumni/doj-alumni-letter-to-inspector-general-michael-horowitz-8011bb12167b

June 10, 2020

Dear Mr. Horowitz:

We write to you as alumni of the United States Department of Justice (“DOJ” or the “Department”). Collectively, we have served in both career and high-ranking politically-appointed positions in both Republican and Democratic administrations. Some of us had careers that spanned decades and multiple administrations.

We are deeply concerned about the Department’s actions, and those of Attorney General William Barr himself, in response to the nationwide lawful gatherings to protest the systemic racism that has plagued this country throughout its history, recently exemplified by the brutal killings of George Floyd and Breonna Taylor by sworn law enforcement officers acting under the color of law. These unjustified killings are anathema to the fair administration of justice, and have rightly outraged Americans of all races and political persuasions, many of whom have chosen to exercise their First Amendment rights through public protest. In particular, we are disturbed by Attorney General Barr’s possible role in ordering law enforcement personnel to suppress a peaceful domestic protest in Lafayette Square on June 1, 2020, for the purpose of enabling President Trump to walk across the street from the White House and stage a photo op at St. John’s Church, a politically motivated event in which Attorney General Barr participated.

While the full scope of the Attorney General’s role is not yet clear, he has admitted that he was present in front of the White House before law enforcement personnel took action to disperse the crowd. Department of Justice and White House personnel initially said that the Attorney General gave an order to law enforcement personnel to “get going” or “get it done.” A day later, the Attorney General told the Associated Press that he was “not involved in giving tactical commands.” If the Attorney General issued orders to officers of a variety of federal agencies, including U.S. Secret Service, U.S. Park Police, D.C. National Guard, and U.S. Military Police, it is unclear under what purported authority he did so. After the order was given, and before the start of a city-imposed curfew, federal law enforcement officers in riot gear reportedly fired rubber bullets, chemical gas, smoke canisters, and stun grenades at peaceful protesters, and otherwise used excessive force, physically injuring many people, including journalists and an Episcopal priest who had come to give food and water to the protestors. Based on what we now know, these actions violated both the First Amendment of the United States Constitution, which protects freedom of speech and the press, and the right to assemble; and the Fourth Amendment, which prohibits unreasonable seizures, to include objectively unreasonable uses of force by law enforcement officers. None of us would ever have considered directing or engaging in such actions to be consistent with our oaths to support and defend the Constitution.

We are also disturbed by the Attorney General's deployment of federal law enforcement officers throughout the country, and especially within the District of Columbia, to participate in quelling lawful First Amendment activity. According to a Department press release, participating personnel include officers and agents from the Federal Bureau of Investigation, the Bureau of Alcohol and Firearms, the Drug Enforcement Administration, the Federal Bureau of Prisons, and the U.S. Marshals Service. We have profound doubts that the personnel deployed from these agencies are adequately trained in policing mass protests or protecting the constitutional rights of individuals who are not subject to arrest or have not been convicted of a crime. Moreover, reports from witnesses indicate that federal officers were blocking streets, guarding buildings, and interacting with civilians without displaying or otherwise providing identification, even when asked to do so by peaceful protestors. Accountability requires law enforcement personnel to identify themselves and be identifiable. Especially in view of the events in Lafayette Square, we have no assurance that these officers are lawfully deployed, that they will respect the rights of the civilians they encounter, or that there are proper mechanisms in place to identify and investigate possible law enforcement misconduct.

For all of these reasons, we are asking you to immediately open and conduct an investigation of the full scope of the Attorney General's and the DOJ's role in these events. The rule of law, the maintenance of the Department's integrity, and the very safety of our citizens demand nothing less. The Office of the Inspector General has the authority and the independence to conduct this investigation in a manner that will credibly probe the actions of the Attorney General and other DOJ employees. If the Attorney General or any other DOJ employee has directly participated in actions that have deprived Americans of their constitutional rights or that physically injured Americans lawfully exercising their rights, that would be misconduct of the utmost seriousness, the details of which must be shared with the American people.

Thank you for your consideration.

(If you are a former DOJ employee and would like to add your name to this statement, **please complete this form.** Protect Democracy will update this list daily with new signatories until June 24th.)

Signatories have been vetted to the best of our ability.

Chair NADLER. As I notified Members during the markup on June 17th, I view the wearing of face masks as a safety issue and therefore as an important matter of order and decorum. Because I am responsible for preserving order and decorum in this committee, I am requiring Members and staff attending this hearing to wear face masks.

I came to this decision after the Office of the Attending Physician released new guidance requiring masks in Committee hearings. The Chair's authority to enforce the preservation of order and decorum during Committee proceedings derives from the Speaker's enforcement authority under Clause 2 of Rule 1 of the House. The Chair would greatly prefer that all present simply uphold the decorum of the Committee by complying with these reasonable safety standards. Failing that, any member who fails to wear a mask will not be recognized.

I now recognize Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chair. I appreciate that, and I would like to make a couple of statements. Number one, there may be discretion for the Chair in opening statements, and you may enjoy hearing Mr. Ayers talk, but under Rule 11 you do not have discretion of under the five-minute questioning rule to continue that.

It is interesting, though, as we are talking about political consideration of prosecutors today. In fact, I have a really big problem going on right now in Fulton County, Georgia, where a prosecutor, it appears, has put political motivations in a reelection bid at the heart of going after the Atlanta Police Department. Just as was said earlier by the gentlelady from Texas, it is never acceptable to turn a blind eye to unfairness, and this needs to stop. Mr. Howard does need to remove himself. The investigation, which has never been done and finished, needs to continue so that the right can be done for all parties, as we have been speaking about prosecutorial ethics today.

Ms. JACKSON LEE. Will the gentleman yield.

Mr. COLLINS. No, I will not.

Mr. ELIAS, do you consider yourself to be nonpolitical career staff? That was your statement. Correct?

Mr. ELIAS. When I go into the Justice Department every day, as a career employee, I leave my politics at home, yes.

Mr. COLLINS. Okay. That was the same as Mr. Zelinsky, Mr. Strzok, Ms. Page, and others have done that.

Let me ask you a question. As a career staff, being nonpolitical, did you ever attempt to get detailed to this committee's majority staff?

Mr. ELIAS. I, like—

Mr. COLLINS. Yes or no.

Mr. ELIAS. —people, over time, have explored various career options.

Mr. COLLINS. Did you, within the last—under this majority, ask to be detailed to this majority staff?

Mr. ELIAS. I had a very preliminary conversation with—

Mr. COLLINS. So, you did have a conversation.

Mr. ELIAS. Yes.

Mr. COLLINS. Was it to work on antitrust policy?

Mr. ELIAS. It was, yes.

Mr. COLLINS. Okay. As we have all sworn under oath here, in fact, did you not ask to be detailed on the committee's work on oversight during impeachment? Is that not correct? Refresh your memory.

Mr. ELIAS. I may have also asked for oversight at one point, with the blessing of Assistant Attorney General.

Mr. COLLINS. Okay. So, you asked to come to this committee. As a career staffer, nonpolitical career staffer, you were asking to be detailed to this Committee to work on impeachment. You wanted to come work for the majority during the impeachment of Donald Trump. Is that not correct?

If not—I understand how that answer would be troubling. So, if you want to just stop right there—

Mr. ELIAS. I actually think it was a year prior. I honestly think it was.

Mr. COLLINS. Detailed to this majority—we were the majority beforehand. This was to the majority.

Mr. ELIAS. It was early 2019.

Mr. COLLINS. Okay. That's the majority of this staff here, and we were starting every investigation known to man at that point. In fact, they hired very good attorneys out of New York, and I have become friends with them. You asked to come to this committee.

So a little bit of the career staff—let's just leave it there. Let's go to your actual testimony today.

Mr. ELIAS. Okay.

Mr. COLLINS. In your written testimony you contended that mergers with cannabis industries were, quote, “unlikely to raise significant competitive concerns.” You further stated that few of the documents produced in response to the subpoenas were ever reviewed by Antitrust Division staff. You essentially said that the second requests were made for purposes of burdening these companies.

So, you filed, as you stated earlier, a DOJ complaint about this with the Inspector General. Is that correct? Yes or no.

Mr. ELIAS. Yes.

Mr. COLLINS. Okay. The Inspector General handed the complaint over to the Office of Professional Responsibility for the investigation. Correct?

Mr. ELIAS. No.

Mr. COLLINS. Excuse me?

Mr. ELIAS. The Office of Special Counsel handed it to the Office of Professional Responsibility.

Mr. COLLINS. So, it was handed over and investigated.

Mr. ELIAS. Yes.

Mr. COLLINS. Is that not correct?

Mr. ELIAS. That is correct.

Mr. COLLINS. Okay. So, as your reading—and that is fine; you can give your half of the story—continuing on, the letter of the Office of Professional Responsibility, the Office of Professional Responsibility indicated that they conducted a thorough review of the claims and concluded they were without merit. Is that not true?

Mr. ELIAS. So, they concluded that even if the investigations were motivated by animosity, that would still comply with the DOJ.

Mr. COLLINS. So, my answer to my question is yes. In fact, what did the letter say? It said from the OPR review, the submissions from the whistleblower's counsel and ATR conducted its own review of the relevant laws, regulations, rules, policies, guidelines governing the issuance of a second request, and reviewed publicly available information concerning the cannabis industry. OPR's review found support for the ATR's response. The cannabis industry provided a unique challenge to the Federal and State regulators alike and it was reasonable for ATR to seek additional information from the industry through its second request process.

In addition, contrary to the whistleblower's allegations, the documents provided by ATR reflect significant and successful negotiations among ATR and the cannabis companies concerning the narrowing of the scope of the second request.

Furthermore, the internal memorandum recommended the closure of the investigation, stating that ATR staff conducted a significant amount of analysis regarding the competitive impact of the proposed mergers, and often explained how the actions of State regulators offset competitive concerns, basically undercutting the very discussion that you had in your opening statement.

The concern even goes on further, and this is an interesting one. You wrote in your written testimony that the cannabis industry, you refer to the staff, quote, "were not instructed to conduct interviews of customers," and that marijuana is not a Schedule 1 drug. Correct? Is it a Schedule 1 or not?

Mr. ELIAS. I am not—

Mr. COLLINS. That is an easy one.

Mr. ELIAS. —sure exactly which schedule it is on, but it is on one of them, yes.

Mr. COLLINS. You were part of an antitrust in marijuana and didn't know how it was scheduled, and then asked to be part of this committee?

Mr. ELIAS. The credibility of this is going downhill quickly here. Mr. Chair, I mean, at this point in time, I am entering into the record the letter from the Office of Professional Responsibility, basically clearing anything that was done in DOJ. I ask that it be committed into the record.

Chair NADLER. Without objection.

[The information follows:]

MR. COLLINS FOR THE RECORD



U.S. Department of Justice
Office of Professional Responsibility

*950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530*

MEMORANDUM

TO: Bradley Weinsheimer
Associate Deputy Attorney General

Date: June 11, 2020

FROM: Jeffrey R. Ragsdale
Director and Chief Counsel

A handwritten signature in black ink, reading "Jeffrey R. Ragsdale", is placed to the right of the printed name.

SUBJECT: OSC File Nos. DI-20-000194 and DI-20-000232

This is in response to your request for the Department of Justice (DOJ) Office of Professional Responsibility (OPR) to review allegations submitted by the Office of Special Counsel (OSC) on December 12, 2019, to the Office of the Deputy Attorney General for informal review and resolution. Specifically, two anonymous whistleblowers made allegations that the Antitrust Division (ATR) violated the Clayton Act §7A(e) and the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) by conducting pretextual investigations of, and placing onerous demands on, merging companies in the cannabis industry through the issuance of Second Requests, even though such mergers presented no competitive concerns.

On December 13, 2019, your Office referred these allegations to OPR, which conducted an investigation. OPR contacted OSC and requested additional information from the whistleblowers. On January 30, 2020, OSC provided OPR two submissions from the whistleblowers' counsel. In addition to identifying the transactions at issue, these submissions provided additional detail regarding the original allegations. The submissions added an allegation that ATR, at the direction of the Attorney General's Office, placed these demands on merging cannabis companies in order to slow the growth of the cannabis industry due to DOJ leadership's animosity towards the industry. They further alleged that ATR designed the demands so that they would be as burdensome as possible, and ATR leadership rejected any attempts to narrow their scope by the merging companies or ATR staff. Finally, the submissions added an allegation that the stated reason for these demands, to understand the industry better, was pretextual, as ATR staff conducted limited reviews of the submissions and otherwise omitted several steps in their investigations.

On February 13, 2020, OPR asked ATR to respond to these allegations, and submitted thirteen requests for information and ten requests for documents. On March 13, 2020, ATR provided a 21-page written response to the allegations and made an initial production of

documents, with a second production of documents following on April 3, 2020, providing a total of 2,593 pages of documents.¹ ATR responded with a categorical denial of the allegations, and argued that even if those allegations were true, there would be no violation of any laws, regulations, rules, policies, or guidelines.² ATR's response also explained how the cannabis industry exploded overnight, with multiple mergers taking place in a matter of months. These mergers provided unique challenges for ATR because ATR lacked experience with the cannabis industry, that industry was rapidly expanding and consolidating, many cannabis companies are unsophisticated, and ATR was limited in its ability to collect information from the merging companies and third parties because cannabis is illegal under federal law. In contrast to the allegation that the mergers provided no competitive concerns, ATR stated that these challenges made it impossible for ATR to reach that conclusion within the statutory thirty-day period in which it can issue Second Requests. Furthermore, ATR refuted the allegations that ATR staff did not appropriately conduct its reviews and that ATR leadership rejected attempts to narrow the scope of the Second Requests. Finally, ATR also flagged how other regulators, including the Federal Trade Commission (FTC) and state regulators, took an interest in these mergers, with the FTC deferring to ATR.

OPR reviewed the submissions from the whistleblowers' counsel and ATR, conducted its own review of the relevant laws, regulations, rules, policies, and guidelines governing the issuance of Second Requests, and reviewed publicly available information concerning the cannabis industry. OPR's review found support for ATR's response. The cannabis industry provided a unique challenge to federal and state regulators alike, and it was reasonable for ATR to seek additional information from the industry through its Second Request process. In addition, contrary to the whistleblowers' allegations, the documents provided by ATR reflect significant, and successful, negotiations among ATR and the cannabis companies concerning narrowing the scope of the Second Requests. Furthermore, the internal memoranda recommending the closure of the investigations reflect that ATR staff conducted a significant amount of analysis regarding the competitive impact of the proposed mergers, and often explained how the actions of state regulators offset any competitive concerns.

Finally, based on its review of the law and applicable DOJ rules, policies, and guidelines, OPR agrees with ATR's interpretation of the latitude it has in issuing Second Requests. Accordingly, even if the whistleblowers' allegations were true, OPR finds that ATR's Second Requests would not have violated any relevant laws, regulations, rules, policies, or guidelines. Because OPR concludes that ATR acted consistent with all applicable laws, regulations, and DOJ guidelines in its review of the proposed cannabis mergers, OPR is closing its investigation.

¹ The documents consisted of, among other things, internal and external communications regarding the merger investigations, the Second Requests submitted to the merging cannabis companies, negotiations with merger company counsel surrounding those requests, and the memoranda and analysis closing out ATR's investigations into those mergers.

² For example, ATR explained that the Clayton Act does not govern the issuance of Second Requests, and the only limitation on Second Requests in the HSR Act is that the requests seek information "relevant to the proposed acquisition."

Mr. COLLINS. I yield back.

Mr. ELIAS. Mr. Chair, if I could respond?

Chair NADLER. The gentleman yields back.

I want to note that Mr. Elias' political inclinations and job prospects, obviously, have absolutely no bearing on whether the serious allegations that he is making about the Attorney General are true. That is the subject of this hearing, and anything else is merely a personal attack and a distraction from the corruption he has uncovered at the department.

Mr. COLLINS. It goes directly to intent of the witness.

Chair NADLER. It is understandable why some Members may want to change the subject, but I hope we will focus on the issue at hand.

Mr. COLLINS. The intent.

Chair NADLER. Mr. Cohen is recognized.

Mr. COHEN. Thank you, Mr. Chair. It is interesting how all these things kind of come together. Today, a three-judge Federal panel, district court of appeals here, said that the Flynn case could be dismissed, and the person that wrote that opinion was Judge Rao. Judge Rao had been at ORIAA, the agency that reviews regulations and does what Trump likes best, which is jeopardize the safe air and water of the American public and give in to industry, profits, and pollution. She did a good job of it. The case she was most well-known for was overriding President Obama's regulations on automobile exhaust.

She became a judge a year ago. She said today, "The District Court's actions will result in specific harms to the exercise of the Executive branch's exclusive prosecutorial power. If evidence comes to light calling into question the integrity of purpose of an underlying criminal investigation, the Executive branch must have the authority to decide that further prosecution is not in the interest of justice."

Well, I wonder, Judge Rao, who is supposed to look into the Executive branch when what they do is not in the interest of justice. Well, it should have been Judge Rao. It was one of the three judges, and maybe the full panel will review it. They should. The other way to do it is impeachment, and impeachment is the process by which, if the Justice Department and the Executive branch are not pursuing the interest of justice, is the process left. Even if the ultimate trier of the Senate is impotent to see the truth and to exercise discretion in keeping with the American public and with the rule of law, we should pursue impeachment of Bill Barr, because he is reigning terror on the rule of law, and it is questionable what he is doing.

Mr. MUKASEY, you said that there was an 1807 law, the Logan Act, and you disparaged it because it was an old law. Is that correct, that was the one that was used to prosecute?

Mr. MUKASEY. I did not disparage it because it was an old law. There are many old laws that are very fine. Our Constitution is even older.

Mr. COHEN. You said that it was 1807, hardly ever used, and you disparaged it, in the terminology that—

Mr. MUKASEY. I didn't use the specific date, 1807. What I said was it has never been prosecuted successfully. It was prosecuted

twice, in the 18th and in the beginning of the 19th century, both unsuccessfully, and that it is probably unconstitutional.

Mr. COHEN. Well, thank you, sir. I would just note that Bill Barr used an 1807 law, the Insurrection Act, to interfere with First amendment rights so that the President could march through Lafayette Park and do his photo op, holding a Bible in front of a church, not quote from the Bible, not lead people in prayer, but have a photo op in front of a church—a desecration of the Bible and a desecration of that church. So that was an 1807 law.

Mr. ELIAS, you have testified as to cases that justice and antitrust took up concerning areas that otherwise, you didn't think, and the Justice Department superiors didn't think were worthy of antitrust investigations. One was cannabis.

Mr. ELIAS. That is correct.

Mr. COHEN. Does that cost the cannabis folks a lot of money?

Mr. ELIAS. Absolutely. These subpoenas that get issued that require production of millions of documents is very burdensome.

Mr. COHEN. So, it was harassment by Bill Barr of an industry he didn't like. Is that right?

Mr. ELIAS. I think that's a fair way to characterize it, yes.

Mr. COHEN. Ironically, that, just like Judge Rao, it all comes back to one place. Barr doesn't like marijuana, marijuana is seven times more likely to be enforced against young African Americans, breeding discontent with police, and breeding interactions with police. Barr doesn't care about that type of stuff because he doesn't like marijuana so that is okay. That is one of the breeding grounds of distrust of African Americans and police, and police and African American contact and problems. Very unfortunate.

You also brought up the antitrust case, which brings us back here with Judge Rao, on the antitrust with the automobile manufacturers. Did Mercedes-Benz not join in on that case later?

Mr. ELIAS. That is correct.

Mr. COHEN. Why do you think Mercedes-Benz didn't join in on that case?

Mr. ELIAS. So, I have read news reports that the German government discouraged it from joining because of the DOJ investigation. I don't have firsthand knowledge of those events.

Mr. COHEN. So, the likelihood is President Trump, who didn't like what Governor Newsom did, got his way and kept Mercedes-Benz out of it, and was able to try to change them from taking their position to be similar.

Let me ask, Mr. Mukasey, let me ask you this. Mr. Zelinsky testified that for the guidelines where the defendant went to trial and remained unrepentant, in his experience it was unheard of, especially like in Stone's case and lead-up to the trial, we were told at no time, no one in the Fraud and Public Corruption Section of the United States Attorney's Office in DC, which prosecuted that case, at no time could he ever recall, or anyone recall where the government did not seek guideline sentencings after trial.

Do you know of any cases where the Fraud and Public Integrity Section did not seek guideline representation?

Mr. MUKASEY. I do not, nor do I know of any cases—

Mr. COHEN. Thank you, sir. You don't, because there is not a case. There isn't a case, but Bill Barr did it because Trump's friend—

Mr. BIGGS. Point of order. The witness was trying to answer the question.

Mr. MUKASEY. That was not a guideline recommendation. It was a travesty of a guideline recommendation.

Mr. COHEN. I have the time, and I don't know who over there is playing—I have the time. This is a travesty because—

Mr. JORDAN. Point of order. The gentleman's time has expired.

Mr. COHEN. —it was another case where politics is overcoming the rule of law and destroying America.

I yield back the balance of my time.

Chair NADLER. The gentleman yields back. Mr. Johnson.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. Questions for Mr. Zelinsky, if he can hear us on video.

Mr. Zelinsky, where are you physically located today?

Mr. ZELINSKY. I am in my attorney's office.

Mr. JOHNSON of Louisiana. What State is that, sir?

Mr. ZELINSKY. It is in the District of Columbia.

Mr. JOHNSON of Louisiana. So how far are you, approximately, from where we sit right now?

Mr. ZELINSKY. I would guess about a half mile.

Mr. JOHNSON of Louisiana. Hmm. What is your reason for not appearing here today, sir?

Mr. ZELINSKY. Well, thank you for allowing me to clarify. As a prosecutor, particularly with the experiences that I have had in Baltimore, I am reticent to discuss my family publicly—

Mr. JOHNSON of Louisiana. You have family concerns. Is that right? Is that right? That is what you testified earlier.

Mr. ZELINSKY. I have a newborn child, Congressman. My wife is a physician, we discussed the matter.

Mr. JOHNSON of Louisiana. Okay. Fair enough.

Mr. ZELINSKY. I am actually on—

Mr. JOHNSON of Louisiana. Listen. I just want to—listen, it is my time. Hold on. Mr. Zelinsky, because you are an attorney you know that having a witness appear and submit to cross-examination in person is obviously much more effective and reliable than one who simply phones it in. We will leave it at that.

I just want to point out the Honorable Judge Mukasey showed up, flew from New York. He has family concerns as well. Many people do here as well. In fact, he has got to quarantine himself after this hearing because he has a young grandchild who is sick with other—

Chair NADLER. The gentleman is improper.

Mr. JOHNSON of Louisiana. It is my time.

Chair NADLER. The witness is complying with the rules of the House. We make no distinction between people who are present physically and people who are present by video.

Mr. JOHNSON of Louisiana. Mr. Chair, it is my time, and it is not inappropriate, and you don't get to decide how I ask my questions with all due respect.

Chair NADLER. Oh yes, I do.

You said in your opening, Mr. Zelinsky, that we don't prosecute people based on politics. The question is, do you investigate people based on politics?

Mr. ZELINSKY. No.

Mr. JOHNSON of Louisiana. A couple of questions for you related to Inspector General Horowitz's report outlining the FBI's improper FISA surveillance of Carter Page. You are familiar with that, correct?

Mr. ZELINSKY. I have read press reports regarding it. I have read some of the report. I have not studied it closely.

Mr. JOHNSON of Louisiana. Do you know what role Christopher Steele played in the FBI's investigation of Carter Page?

Mr. ZELINSKY. I only know what has been publicly reported and what is in the Inspector General's report, Congressman.

Mr. JOHNSON of Louisiana. If you are familiar with the report then you must know that it states, at page 359, quote, "We concluded that Crossfire Hurricane team's receipt of Steele's election reporting on September 19, 2016, played a central and essential role in the decision by the FBI OGC to support the request for FISA surveillance targeting Carter Page, as well as the Department's ultimate decision to seek the FISA order." Does that sound familiar?

Mr. ZELINSKY. I have no reason to doubt that you are accurately reading from the report.

Mr. JOHNSON of Louisiana. What discussions did the Special Counsel team have about Christopher Steele?

Mr. ZELINSKY. Congressman, I have been asked by the Department, because of privilege, not to discuss matters related to the Special Counsel's Office. I am happy to go back to the Department, as I have been told that I should do, to ask them if I can answer your question, and if I am able to provide you an answer at a later time. I have been told by the Department that my testimony today has been cleared only for matters related to *United States v. Roger Stone*.

Mr. JOHNSON of Louisiana. That is pretty convenient. The subpoena that you were issued says, "You are hereby commanded to be and appear before the Committee on the Judiciary to testify at a hearing touching matters of inquiry committed to said Committee or subcommittee, and you are not to depart without leave of said Committee or subcommittee."

The point is, Mr. Zelinsky, it would be very useful to have you here. It would be very useful to have you speaking to the full scope of the concerns of this Committee and things that we have been working on for a long time. We think it is very unfortunate that you could not make your appearance here today, especially since you are a half a mile away and others took great risks to be here.

Look, I am not quibbling with you about family concerns, but a lot of people have them, and this is a very important matter for the country. I think we all agree to that. We have concern that this is being politicized, and that the current Attorney General's Office is being accused of politicizing something, when what he is trying to do is clear up and clean up messes that were made by his predecessors, in previous Administration.

Everybody can look at the facts, I guess, and draw their own conclusions, but it would be helpful if we were able to—

Ms. JACKSON LEE. Will the gentleman yield.

Mr. JOHNSON of Louisiana. I won't yield.

Ms. JACKSON LEE. Will the gentleman yield?

Mr. JOHNSON of Louisiana. I will not yield, because our problem with this is not only with the process, as has been stated, with the unequal Administration of the rules here, but with the way that this committee's time is being used right now. With all the important issues that are within our scope of jurisdiction, with all the pressing matters facing the country right now, this is a farce, and we are really sorry that you couldn't be here for it.

Mr. CICILLINE. Mr. Johnson, will you yield.

Mr. JOHNSON of Louisiana. I will yield.

Mr. CICILLINE. I would just urge you to consider, when you say, "with all the pressing issues," is there any issue more pressing than the integrity of the Administration of justice.

Mr. JOHNSON of Louisiana. Yeah, absolutely, I am reclaiming my time.

Mr. CICILLINE. I mean, is there anything more important?

Mr. JOHNSON of Louisiana. Reclaiming my time.

We would love to have hearings about the origins of the Russia collusion thing that you guys wasted the country's time on for five or six months, and the sham impeachment. Don't get me started because I am out of time. I yield back.

Mr. COHEN. Ask John Bolton about the sham impeachment.

Mr. JOHNSON of Louisiana. Not your time. Not your time.

Chair NADLER. The gentleman's time has expired. Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair. Mr. Zelinsky, and Mr. Elias, you put duty over country, and you have come to testify today, putting your job at risk, and I think the Nation owes you both a debt of gratitude for coming forward as whistleblowers.

Now, Mr. Elias, last summer the State of California announced that it had reached an agreement with four automakers on air quality standards that would be stricter than the rules the Trump Administration was preparing to adopt for the country. Correct?

Mr. ELIAS. Yes. That is correct.

Mr. JOHNSON of Georgia. When California announced that agreement, President Trump made clear that he did not like it, didn't he?

Mr. ELIAS. He did criticize the agreement on Twitter, yes.

Mr. JOHNSON of Georgia. On August 20, 2019, *The New York Times* reported that he was, quote, "enraged by California's deal," end quote. Trump even apparently called a White House meeting to plot ways to retaliate, all because he resented the fact that California and the four automakers would dare to undermine his loosening of air quality emission standards. So, the next day, August 21st, Trump went public and he threatened the four automakers, saying that these these companies, quote, "will be out of business," end quote, if they don't get in line.

Then, the day after those tweets, August 22nd, President Trump's Justice Department followed through on that threat. That is when Attorney General—Assistant Attorney General Delrahim

gave an instruction to your division to start an antitrust investigation immediately into those four automakers. Is that correct?

Mr. ELIAS. That is when the instruction to open the investigation happened, on August 22nd, yes.

Mr. JOHNSON of Georgia. So, the President tweets out threats, and then the next day the automakers get hit with an antitrust investigation. That is what happened, didn't it?

Mr. ELIAS. A point I would like to underscore is normally for significant, complicated matters, people put time and attention into assessing a potential—

Mr. JOHNSON of Georgia. You didn't have any time to do that because the President made the order on August 21st, and the investigation began on August 22nd.

Mr. ELIAS. There was very little time between those two events, yes.

Mr. JOHNSON of Georgia. Do you believe that the Department commenced that investigation based on good faith belief that they had committed a violation of the antitrust laws, or not?

Mr. ELIAS. So, the career staff who examined it saw some very obvious defenses, things called State action, Noerr-Pennington, and you really have to twist things to get around those. So, it did not appear to be in good faith, no.

Mr. JOHNSON of Georgia. That investigation didn't have anything to do with protecting the American people from anti-competitive behavior, did it?

Mr. ELIAS. So, the career staff who reviewed it had some grave concerns about opening it, especially the people who were then charged with actually conducting the investigation. They documented their concerns with the legal underpinning of the case. If you are immune from eventual prosecution for something, because you have a legal defense, you should be immune from investigation for having—

Mr. JOHNSON of Georgia. The law was clear that the State of California was immune.

Mr. ELIAS. So, what I describe in my complaint is how staff was not given enough time to go through and properly understand—

Mr. JOHNSON of Georgia. I wish I could give you a chance to explain more, but bottom line, it wasn't a legitimate antitrust investigation, was it?

Mr. ELIAS. That is what my complaint alleges, yes.

Mr. JOHNSON of Georgia. If it had been, the first step would have been for the Department to get with California officials and get the facts from those officials, but it never did even establish contact with California, did it, before it instituted the investigation?

Mr. ELIAS. That step is permitted even before an investigation. You could have resolved things even before opening the investigation. It is correct, yeah, to my knowledge they were never contacted.

Mr. JOHNSON of Georgia. So, what we have here is a clear-cut case of the Antitrust Division being made to respond to a President's tweet the day before, to begin an investigation that had no basis in law or in fact. Would you describe that as an abuse of authority of the upper echelons of the Justice Department?

Mr. ELIAS. I did submit my complaint to the IG on the grounds that the events here constituted an abuse of authority.

Mr. JOHNSON of Georgia. All right. With that I will yield back. Thank you.

Chair NADLER. The gentleman yields back. Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chair. Mr. Zelinsky, it seems to me you have got just one problem. The judge disagreed with you.

Mr. ZELINSKY. Congressman, as I said, I am not here to critique the judge's sentence. We need to follow DoJ—

Mr. JORDAN. Well, you write Mr. Zelinsky, a 13-page statement for your statement to this committee. You allege all kinds of politics. You go after the Justice Department. You go after Bill Barr. You go after the President. You file a sentencing memo on February 10th, recommending seven to nine years. The very next day your boss files a supplemental sentencing memo recommending three to four years, and nine days later Judge Berman Jackson picks the three-to-four-year sentence. So, the judge disagreed with you.

Mr. ZELINSKY. Congressman, I don't agree with the premise of your question on two levels. The first is the—

Mr. JORDAN. Well, tell me what in that fact pattern is wrong. Didn't Roger Stone get 40 months?

Mr. ZELINSKY. The supplemental memo, Congressman, did not recommend three to four years. It recommended a sentence of incarceration. The supplemental memo also mischaracterized other aspects of the guidelines—

Mr. JORDAN. Mr. Zelinsky—

Mr. ZELINSKY. —and mischaracterized it—

Mr. JORDAN. —I have looked at the supplemental—I have looked at the supplemental memo and it said 37 to 47 months. What was the—take away the enhancement. It said 37 to 47 months. Those were the numbers referred in the memo, and Judge Berman Jackson picked 40 months. She didn't pick seven to nine years. Is that right?

Mr. ZELINSKY. She sentenced Mr. Stone to 40 months. That is correct.

Mr. JORDAN. That is between three and four years, exactly what was in the supplemental memo. Did you talk to Bill Barr about your concerns?

Mr. ZELINSKY. No. As I stated, I did not talk to the Attorney General.

Mr. JORDAN. You didn't talk to the Attorney—did you talk to the DAG? Did you talk to the Deputy Attorney General?

Mr. ZELINSKY. I was not provided the opportunity.

Mr. JORDAN. Did you talk to Mr. Shea? Did you talk to the U.S. Attorney?

Mr. ZELINSKY. I requested to, but was not given a meeting.

Mr. JORDAN. So, you didn't talk to any of the people who ultimately make these decisions, did you, Mr. Zelinsky?

Mr. ZELINSKY. I requested to speak with the U.S. Attorney, but I was not allowed.

Mr. JORDAN. I didn't ask you if you requested. I said did you talk to them? You didn't talk to the Attorney General, didn't talk to the DAG, didn't talk to the U.S. Attorney. Who is the supervisor?

Mr. ZELINSKY. Which supervisor are you referring to?

Mr. JORDAN. I am talking about the one you referenced about six times in your testimony. Page 2, "It was told to me at the time, by my supervisor in the U.S. Attorney's Office." You said, "I was told that the Acting U.S. Attorney for the District of Columbia, Timothy Shea, was receiving heavy pressure from the highest levels of the Department of Justice."

On page 10 of your testimony, you say this, "I was explicitly told that the motivation for changing the sentencing memo was political and because the U.S. Attorney was 'afraid of the President.'"

Who told you?

Mr. ZELINSKY. Thank you for clarifying, Congressman. I just want to be sure that I get the right supervisor because there are a couple of supervisors that told me things.

Mr. JORDAN. Well, tell me all their names then.

Mr. ZELINSKY. So, the supervisor for the questions you were asking is the supervisor of the Fraud and Public Corruption Section at the time in the U.S. Attorney's Office.

Mr. JORDAN. Who?

Mr. ZELINSKY. His name is J.P. Cooney.

Mr. JORDAN. All right. Who else?

Mr. ZELINSKY. At the time in the office there was a first assistant, there was a criminal chief. They were all involved in these discussions, to my knowledge.

Mr. JORDAN. Did any of them talk to the Attorney General, the Deputy Attorney General, or Mr. Shea?

Mr. ZELINSKY. Yes. My understanding is they did.

Mr. JORDAN. Well, did it—not understanding. Did they, or didn't they?

Mr. ZELINSKY. Congressman, I can only tell you what I know. I can tell you, from what I understand.

Mr. JORDAN. It sounds like you don't know much. It sounds like you heard stuff that you are now bringing to this Committee as fact. So-and-so says to someone what they told someone else, and you bring that here as fact. Yet you didn't talk to the Attorney General?

Mr. ZELINSKY. Congressman—

Mr. JORDAN. You didn't talk to the Deputy Attorney General, and didn't talk to the U.S. Attorney, who made the decision, and oh, by the way, the judge sided with their supplemental memo, not the memo you signed.

Mr. ZELINSKY. Congressman, as I said, I don't agree with the premises of your question, and I am happy to explain further involving sentencing. My understanding is that all the people I mentioned, those supervisors, were all in meetings with Acting U.S. Attorney Shea.

Mr. JORDAN. Well, I just—this is as bad the whole impeachment, the anonymous whistleblower who had no firsthand knowledge, was biased against the President, and who worked for Joe Biden. Now, we have a so-called whistleblower with no firsthand knowledge, who didn't talk to any of the people who make the decisions, and who is obviously biased against the Attorney General. It seems just as bad, just as lame as what we went through just a few months back.

It seems to me, as others have pointed out—I know my time is winding down—that the real politics here was in some of the investigations that took place prior, and when we have some time, I would like to get into that as well, Mr. Chair.

With that I yield back.

Chair NADLER. The gentleman yields back. Mr. Deutch?

Mr. DEUTCH. Thank you, Mr. Chair. Mr. Zelinsky, I would like to follow up on Mr. Jordan's questions and ask about the severity of Roger Stone's crimes. He was convicted on one count of witness tampering and six counts of obstructing a congressional investigation by making numerous false statements. Isn't that right?

Mr. ZELINSKY. He was actually convicted on the one count of obstructing a congressional investigation, five counts of lying to Congress, and one count of tampering with a witness, Congressman.

Mr. DEUTCH. What did he lie about?

Mr. ZELINSKY. He lied, as I go over my written remarks, about a number of things, including what he was doing in the summer of 2016 related to Wikileaks, and what he was telling the Trump campaign about it.

Mr. DEUTCH. He lied about providing information stolen by a foreign government to Trump's campaign. Isn't that right?

Mr. ZELINSKY. He lied about providing information to Trump's campaign regarding the Wikileaks material.

Mr. DEUTCH. Yes.

Mr. ZELINSKY. That is correct.

Mr. DEUTCH. Right. Were these minor misstatements or did they impact the congressional investigation?

Mr. ZELINSKY. Both the judge found at the sentencing, and we argued that they profoundly impacted the House Permanent Select Committee on Intelligence and Investigations.

Mr. DEUTCH. The judge found that too. That is helpful. Roger Stone communicated with Wikileaks and then lied when he said he didn't tell the Trump campaign staff, even Donald Trump himself. Isn't that right?

Mr. ZELINSKY. Mr. Stone lied about what he told the Trump campaign regarding Wikileaks. That is correct.

Mr. DEUTCH. Right. What did Roger Stone that threatened a witness?

Mr. ZELINSKY. He did a number of things. He had told the witness to prepare to die. He had threatened the witness' dog. He had threatened to harm the career of one of the witness' friends. He had written a slew of nasty messages to the witness.

Mr. DEUTCH. I know that we have been talking about these issues for a while. It is worth pointing out, he told the witness to prepare to die. Did it appear that the threats worked, Mr. Zelinsky? Did they impact the witness' testimony?

Mr. ZELINSKY. They did.

Mr. DEUTCH. Mr. Zelinsky, would you say that these are serious offenses?

Mr. ZELINSKY. Yes.

Mr. DEUTCH. Help us understand. How did you come up with the seven-to-nine-year recommendations? Did you follow the guideline? Was it at the top or bottom of the range? What were the enhancements that increased the sentencing range?

Mr. ZELINSKY. So, in coming to the recommendation we did, we do what we do in every case. We consult the PSR which is a report that is prepared by the court, we consult the relevant Department of Justice policies, and then we look at the guidelines for sentencing.

It is important to understand that the guidelines in this case were clear and the applications were readily apparent. It was not a tough calculation. After looking at that, what other sentences have been, we determine what a reasonable sentence would be in this case.

Mr. DEUTCH. Normally the Department defends recommendations within the guidelines range, don't they?

Mr. ZELINSKY. It is the policy of the Department, and reiterated in a memo in 2017, to set guidelines recommendations, in general.

Mr. DEUTCH. In your written testimony you stated the team was pressured to submit inaccurate guidelines calculations that would result in a lower sentencing range. What was the nature of that pressure, Mr. Zelinsky?

Mr. ZELINSKY. So, there were meetings the Members of my team had with leadership at the U.S. Attorney's Office and the Acting U.S. Attorney, where he sought to get us not to ask for the guidelines that really applied.

Mr. DEUTCH. So, after the pressure you submitted your sentencing memo. Then the Department leadership submitted a new sentencing memo for a lighter sentence. That is very much outside the normal practice, in your experience, isn't it?

Mr. ZELINSKY. I think outside of normal practice is not an accurate description. Unprecedented and virtually unheard of is what I would call it.

Mr. DEUTCH. After your sentencing recommendation was overruled, you and your entire team withdrew from the case. Why did you do that?

Mr. ZELINSKY. Because we took an oath to prosecute without fear of favor, and we weren't going to violate our oath.

Mr. DEUTCH. Mr. Zelinsky, it was political pressure that got Roger Stone a lighter sentence than he deserved. Mr. Stone got special treatment because of his connections to the President. That is not justice. The rule of law is supposed to mean equality under the law. Now, this case is a glaring example of Bill Barr corrupting DOJ, undermining equality in our legal system, and that is one of the reasons that we are here today.

On Monday you did your job and filed your recommendations to hold Roger Stone accountable. In the middle of that very night, the President tweeted, and Bill Barr's DOJ snapped into action the next day to take pressure off. That, Mr. Zelinsky, is not justice.

I yield back.

Chair NADLER. The gentleman yields back.

Mr. Johnson?

[No response.]

Chair NADLER. Mr. McClintock?

[No response.]

Chair NADLER. Mr. Biggs?

Mr. BIGGS. Am I recognized, Mr. Chair?

Mr. Chair, am I recognized?

Chair NADLER. Yes.

Mr. BIGGS. Okay. Thank you, Mr. Chair.

So, I do find the setting for this to be deliciously ironic on the day that the Circuit Court dismissed the Flynn prosecution because, you see, the Flynn case typifies the previous Administration's abuse of the process for political reasons.

I mean, you have a political appointee who is attacked, leveraged. They went after him for political purposes. Used and abused the power and authority that they have.

In fact, they knew it was bogus all along. I mean, even Peter Strzok's notes indicate pretty clearly that Director Comey acknowledged that General Flynn's phone calls with Ambassador Kislyak appear legit and those were the basis for trying to invoke even the Logan Act.

I mean, that is really kind of the way it is. I thank Judge Mukasey for being here today.

Judge Mukasey, Chair indicated in his opening that he views Attorney General Barr as a fixer for President Trump.

Yet, what we have here is the President—excuse me, Attorney General Barr saying that “President Trump has never asked me to do anything in a criminal case,” and wishes that he would stop tweeting because “it makes it impossible for me to do my job.”

Does that sound like a guy who is a fixer?

Mr. MUKASEY. Not to me, sir.

Mr. BIGGS. Well, how about this? If you heard somebody, say this, that “I am still the President's wing man so I am there with my boy,” does that sound maybe like—if that is coming from an attorney general does that sound like somebody who may be more of a fixer?

Mr. MUKASEY. I don't know about fixer. If I had ever said anything like that when I was Attorney General, I would have expected to return to the department and find the building empty with a pile of resignations on my desk.

Mr. BIGGS. So, that statement was made by former Attorney General Holder. So, my question is, we know that under Attorney General Holder, DOJ went after multitudes of investigative journalists.

Judge Mukasey, have you heard, or do you have any information whether under William Barr, for whatever reason, that he has gone after investigative journalist?

Mr. MUKASEY. I do not.

Mr. BIGGS. Then we know that under that department, that Justice Department, they prosecuted whistleblowers. I know President Trump has expressed exasperation and disapprobation of certain whistleblowers and wished that they were prosecuted.

Do you know of any prosecutions administered by this Administration under William Barr of whistleblowers?

Mr. MUKASEY. I don't. I don't.

Mr. BIGGS. We could go over a whole plethora of these types of things. Civil Rights Division, U.S. Commission on Civil Rights—they dismissed voter intimidation lawsuits.

I guess my question for you is do you know of any dismissal of voter intimidation lawsuits on the part of William Barr?

Mr. MUKASEY. No, although I would have to say I have not made a particular study of that area.

Mr. BIGGS. Fair enough. Fair enough.

I don't know of any. The Fast and Furious issue—in that particular situation, Attorney General Holder would not come in for over a year to testify. Attorney General Barr has been in to testify. He has indicated a willingness to come back and then testify.

The whole plethora of abuses by the previous Administration's politicized Attorney General's office leads me to ask this question of my colleagues, and I think it has been typified of what we have seen here today.

We have gone through here, there has been running over of the minority by the rules. It is really problematic. It really is problematic.

If you want to know why this body, this group, this Committee gets out of hand from time to time, people talking across each other, I am going to tell you what it is.

It is when you don't invoke and follow the rules you become a little bit chippy, and that is what we have in this committee, and it is because we don't have the rules fairly and evenly followed.

That is the crying shame of this, Mr. Chair.

With that, I yield back.

Chair NADLER. The gentleman yields back.

Mr. Richmond?

Mr. RICHMOND. Thank you, Mr. Chair.

Mr. Chair, let me just start by saying that part of our colleagues said that the whole hearing is here so that we can embarrass the President.

Let us just be clear. If we wanted to embarrass the President, we would sit back and do nothing and just let him continue to embarrass himself and say that you should drink bleach or disinfectant to cure COVID-19, that he has slowed down testing, that it will magically go away, or the absurd statement that he has done more for Black people than Abraham Lincoln.

So, in law we just say *res ipsa loquitur*, which means the thing speaks for itself. So instead of trying to embarrass the President, we would just let him continue to do it himself.

What we are here today to talk about is the abuse of power, the miscarriage of justice.

So, Mr. Zelinsky, let me just go to you, and I think that I want to follow up on what Mr. Deutch was talking about and that is to really understand why Roger Stone got such special treatment but make sure we focus on the context of his crime.

So, what his crime was was lying to Congress about his dealings with the Trump campaign, one of the convictions, right?

Mr. ZELINSKY. That was one of his crimes, yes.

Mr. RICHMOND. The summer before the elections, Stone told the Trump campaign that he had, quote, "a plan to save Trump's butt" and he knew how, but to win—"but it wouldn't be pretty."

Do you recall that?

Mr. ZELINSKY. Yes, Congressman. I think you have replaced the profanity with another one. That is correct.

Mr. RICHMOND. Then also, Mr. Zelinsky, what was Mr. Stone's plan?

Mr. ZELINSKY. Testimony at trial indicated that this was related to Wikileaks.

Mr. RICHMOND. Did you find evidence that Stone communicated with senior levels of the Trump campaign about Wikileaks releasing stolen information about Trump's opponent?

Mr. ZELINSKY. Yes.

Mr. RICHMOND. In fact, there are dozens of calls between Stone and the Trump campaign's top officials, right?

Mr. ZELINSKY. That is correct.

Mr. RICHMOND. Also, during that time, did you find evidence that Stone was talking to Trump directly?

Mr. ZELINSKY. Yes.

Mr. RICHMOND. In fact, our witnesses also testified that they were present when Stone spoke to then candidate Trump, right?

Mr. ZELINSKY. Mr. Gates testified to that at trial. Mr. Cohen testified to that at Congress and Mr. Manafort told that to the Special Counsel's office.

Mr. RICHMOND. Did you all find any records for these calls?

Mr. ZELINSKY. As I discussed earlier, it is difficult to know because we can't get content. We can only see call detail records—when calls happened.

There certainly are calls within that time period. It is impossible to know the content. Only the people on the calls or anyone that overheard them would know the answer to that.

Mr. RICHMOND. Why that is so startling is because President Trump's written answers to the Special Counsel he denied recalling having any conversations with Stone at all that summer and he denied being aware Stone was having any conversations with Wikileaks or anyone on his campaign.

Do you remember that?

Mr. ZELINSKY. You have accurately described the President's answers. Yes, Congressman.

Mr. RICHMOND. Mr. Zelinsky, have Roger Stone and Donald Trump have been friends for over 30 years?

Mr. ZELINSKY. The evidence introduced at trial showed that to be the case, and Mr. Stone—and I believe the President has acknowledged that as well publicly.

Mr. RICHMOND. So, you found evidence from multiple sources that Roger Stone regularly communicated with the Trump campaign about the stolen information.

You also found evidence from multiple sources that Roger Stone talked to President Trump, his friend of 30 years, directly during this time, and you have phone records corroborating all of this.

Yet, the President doesn't remember speaking to Roger Stone. Then when you recommend seven to nine years for Stone's crimes, all of a sudden your department gets pressure from the top to give Stone an unprecedentedly favorable treatment.

Is that a correct characterization?

Mr. ZELINSKY. Congressman, I want to be very careful on how you describe the phone records that would give corroboration. We have call detail records. They don't give the full universe of possible calls because we only have them for the number that we have.

So, for example, a conversation took place on a line that we had not subpoenaed or someone else's phone, we wouldn't have them.

As I said before, we do not know the content of the calls. We know only what people testified. So, I want to be very careful as to what we say about call detail records.

Mr. RICHMOND. That is fair. Let me tell you, as a former defense attorney and lawyer, it is clear to me what happened here.

Roger Stone got special treatment because he was covering up the President's misconduct. An Attorney General made it possible. The double standard here is absolutely sinful.

The president's long-time pal, if you are covering up his wrongdoing, you get special favors. If you are peacefully protesting brutality, you get tear gas.

With that, Mr. Chair, I yield back.

Chair NADLER. The gentleman yields back.

The Committee will stand in recess for five minutes.

[Recess.]

Chair NADLER. The Committee will come back to order.

Mr. McClintock?

Mr. MCCLINTOCK. Thank you, Mr. Chair.

First, I want to protest the Chair's continued practice of denying seats on the dais to Members of the Committee who have cared enough to be personally present out of respect both to the Committee process and to the magnitude of the issues before us.

This impedes and diminishes our work as Members of the committee, and it is an abrogation of Chair's responsibility to maintain fair and equal access to the committee's proceedings to all Members of the committee.

Now, the business at hand. This morning an appeals court issued a highly unusual writ of mandamus ordering the trial court to dismiss the Flynn case.

This came about because of overwhelming evidence illegally withheld by DOJ prosecutors for years that the prosecution was contrived, politically motivated, and directed not by career prosecutors but by political operatives at the very highest levels of our government.

Mr. Flynn's attorney, Sidney Powell, told us she believes Mr. Flynn was targeted because he knew exactly the extent of corruption in our intelligence agencies and that his appointment as national security advisor was a direct threat to these forces within those agencies.

Now, we give to our intelligence and justice agencies the most terrifying powers our government possess, the power to spy on American citizens, the power to strip people of their privacy, of their livelihoods, of their liberty, and to destroy their lives and even their families' lives.

When these powers can be turned against our democratic principles and our republican institutions, we forfeit our Constitution and all the blessings of liberty that it protects.

We now know that a cabal of political activists did exactly that. They took a document that they knew was false and they used it as a pretext to initiate an investigation, accusing a presidential candidate of colluding with a foreign power, leaked the existence of that investigation in an attempt to influence the 2016 presidential election, and having failed to do that, then to use it to undermine and obstruct the duly elected President of the United States.

As the truth comes out, and we just saw a bombshell today in the Comey notes in the Flynn case, the other shoe is about to drop.

As Tennyson said, “the wheels of the gods grind slow, but they grind exceedingly fine.” So, now we have a concerted effort to undermine these investigations by travesties like the proceedings today.

Attorney General Barr has a responsibility to uphold the rule of law, the equal protection of our laws, and the impartial Administration of these laws. That is exactly what he is doing and that is exactly what makes him such a threat to those who abuse their powers and undermine the rule of law.

Judge Mukasey, what happens if our justice and intelligence agencies can target rival candidates on specious grounds? If the incoming NSA director can be targeted at the highest levels of our government and set up to be maliciously prosecuted? If excessive sentences can be sought against politically disfavored defendants in direct contravention to sentencing guidelines?

Judge, you have devoted your life to the equal protection of the law. What is your assessment of the events that I have referenced and where are we going if these bad actors can go unchallenged and unpunished?

Mr. MUKASEY. I think the matters you reference are a serious threat to the faith that people have to have in the functioning of their government in order for this country to continue to function.

I was a great supporter and still am of the intelligence community. When people in that community abuse their power, that really shakes people’s faith in the work product of that group and in their government, generally.

Mr. MCCLINTOCK. If you are talking to the American people right now, what would you tell them that they need to know?

Mr. MUKASEY. Well, how long do we have?

I don’t think that I am in a position to give a long discursive presentation on what they need to know. I think they are going to find out what they need to know in due course when investigations now underway run their course and we will find out what happened.

Mr. MCCLINTOCK. Are you concerned that there is a concerted effort to derail those investigations before they are completed, and the truth is out?

Mr. MUKASEY. Well, I don’t know about derail because I don’t think that John—

Mr. MCCLINTOCK. Well, these proceedings, for example.

Mr. MUKASEY. These proceedings could have the effect of tainting the Attorney General and, through him, John Durham. John Durham has been at this for a long time. He had the faith of three Attorney Generals at least: Janet Reno, me, my successor, and the Attorney General Barr. That is four.

Mr. MCCLINTOCK. Well, hopefully, the truth will come out and justice will be served. Thank you.

Chair NADLER. The gentleman’s time has expired.

Mr. Jeffries?

Mr. JEFFRIES. Mr. Mukasey, I respect you, but these proceedings are consistent with the United States Constitution. The House is a separate and coequal branch of government.

We don't work for Donald Trump or any other president. We work for the American people. We have a constitutional responsibility to serve as a check and balance on an out-of-control executive branch.

The Attorney General and the Department of Justice under his leadership is out of control. The Attorney General works for the people. He is not the White House counsel. The Attorney General in the Department of Justice should be an agent of liberty and justice for all Americans regardless of political affiliation.

Now, Mr. Zelinsky, you testified that in the many cases that you have been privileged to work on during your career you have never seen political influence play any role in prosecutorial decision-making with one exception, *United States v. Roger Stone*.

Is that correct?

Mr. ZELINSKY. That is correct.

Mr. JEFFRIES. You were the lead prosecutor on the Roger Stone case, which included a variety of different criminal charges such as lying to Congress and witness tampering. Is that right?

Mr. ZELINSKY. I was a lead prosecutor on the Roger Stone case.

Mr. JEFFRIES. These were serious offenses. Is that correct?

Mr. ZELINSKY. Yes.

Mr. JEFFRIES. They undermine the rule of law. True?

Mr. ZELINSKY. True.

Mr. JEFFRIES. Now, your prosecution team was pressured by the highest levels of the Department of Justice to cut Roger Stone a break. Is that correct?

Mr. ZELINSKY. That is correct.

Mr. JEFFRIES. Specifically, you were pressured to ask for a substantially lower sentence for Roger Stone than what you believe the facts justified. Is that true?

Mr. ZELINSKY. In addition to being pressured to misstate the guidelines, yes.

Mr. JEFFRIES. You were also pressured to distort the events that transpired during the course of the trial. Is that right?

Mr. ZELINSKY. Both during the course of the events leading up to the trial of Mr. Stone's criminal conduct and some events in the trial itself, yes.

Mr. JEFFRIES. Can you give us one example of the type of distortion that you were asked to engage in?

Mr. ZELINSKY. So, for example, involving Mr. Credico, Mr. Credico was the witness that was intimidated by Mr. Stone. He both testified at trial and submitted a letter after the fact.

The letter seemed to indicate that he wasn't as worried about the witness intimidation, but he had previously testified before the Grand Jury and he also said at trial that he was concerned about what others might do as a result of Mr. Stone's actions.

We were pressured to say that Mr. Credico had no concerns and expressed no worries as a result of Mr. Stone's obstructive conduct.

Mr. JEFFRIES. Now, the reason you were pressured to modify your overall sentencing recommendation was because of Roger Stone's close relationship with President Donald Trump. Is that correct?

Mr. ZELINSKY. That is what I was told.

Mr. JEFFRIES. You were even warned that if you did not toe the line and give Roger Stone special and preferential treatment you could, quote, "lose your job," closed quote. Is that correct?

Mr. ZELINSKY. That is correct.

Mr. JEFFRIES. You also told that the acting U.S. Attorney was giving Roger Stone favorable treatment because he was afraid of President Trump. Is that right?

Mr. ZELINSKY. Yes.

Mr. JEFFRIES. Notwithstanding this pressure, you refused to cut Roger Stone a break and you filed your sentencing recommendation, which included seven to 10 years in a proposed prison sentence. Is that right?

Mr. ZELINSKY. I believe the upper end of the range, the guidelines that we filed, it was nine, Congressman.

Mr. JEFFRIES. Seven to nine years.

Just a few hours after your filing, the President tweeted that it was, quote, "Horrible and very unfair situation. Cannot allow this miscarriage of justice," closed quote. Is that true?

Mr. ZELINSKY. Yes.

Mr. JEFFRIES. The Department of Justice thereafter quickly filed a new sentencing recommendation for Roger Stone that reduced the number of years proposed that he would serve in prison for his crimes. Is that true?

Mr. ZELINSKY. Yes. It actually reduced the number of potential years to zero because it said that he should have a sentence of incarceration, but it provided no information as to what that sentence should be.

Mr. JEFFRIES. Finally, the Department of Justice gave Roger Stone special treatment because of his close relationship with President Trump. Is that fair to say?

Mr. ZELINSKY. That is what I was told.

Mr. JEFFRIES. Thank you. I yield back.

Chair NADLER. The gentleman yields back.

Mr. Gaetz?

Mr. GAETZ. Thank you, Mr. Chair.

Roger Stone should be pardoned. I believe Roger Stone will be pardoned, and then this proceeding will look even more ridiculous than it does today.

I fear that my Democrat colleagues tend to behave the worst when they are caught. Undoubtedly, the Obama Administration and their allies in the Deep State were caught entirely off guard by the election of President Trump.

They believed that their smears and coup attempt against him would be like an insurance policy in the event that you die before you are 40. They believed he should lose 100,000,000 to zero.

Then, of course, he won, and Democrats were caught yet again. This time the DNC and the Hillary Clinton campaign, colluding with Russia, utilizing a dossier that we now know had its sub-sources targeted by Russian intelligence.

That is not a debate point. That is a finding by the inspector general. Now we see House Democrats caught yet again with a failed impeachment, with a lack of an agenda. As we sit here today, America's cities are burning.

Our monuments are being desecrated. Our history is being, presumably, erased by people who are ashamed of the United States of America, and we have the audacity to have a meeting about the rule of law on a case that is already over, on an impeachment that has already failed, when there is real work for this Committee to do.

It is a joke. I yield to Mr. Jordan.

Mr. JORDAN. I thank the gentleman for yielding. I thank him for his well-stated comments.

Mr. Zelinsky, you took issue a few minutes ago when I said there is just one problem—the judge disagreed with you. I just want to read for the Committee for those viewing what Judge Berman Jackson said.

She said, “I agree with the defense and with the government’s second memo.” So, she didn’t agree with your memo, Mr. Zelinsky. She agreed with the second supplemental memo and the defense team for Mr. Flynn.

You also mentioned a few minutes ago that the supervisors—in your testimony you said that you were told at the time “by my supervisors in the U.S. Attorney’s Office,” and I didn’t get those names. So, if you could give me those names I would appreciate it, Mr. Zelinsky.

Mr. ZELINSKY. So, Congressman, I had earlier indicated that my supervisor, my immediate supervisor in the office, was the head of the Fraud and Public Corruption Section. You asked me for his name, and I told you it was J.P. Cooney.

Mr. JORDAN. Okay. Your testimony, it says “my supervisors.” It is plural. J.P. Cooney. Who else?

Mr. ZELINSKY. There was the first assistant in the U.S. Attorney’s Office.

Mr. JORDAN. That is who?

Mr. ZELINSKY. Alessio. I will have to get back to you. Off the top of my head I confess, he is no longer the first assistant. So, his last name escapes me at this moment. I will tell you immediately when it comes to my mind. Then there is—

Mr. JORDAN. Something this important you can’t even remember the person’s last name who told you. Yet, you are here in front of the Committee as a so-called whistleblower where Chair of this Committee has said—indicated that he wants to impeach Bill Barr. I mean, this is amazing.

Okay. How about on page 10 where you said, “I was explicitly told that the motivation for changing the sentencing memo was political and because the U.S. Attorney was, quote, ‘afraid of the President.’” Who explicitly told you that?

Mr. ZELINSKY. That was the supervisor of the Fraud and Public Corruption Section that I referenced earlier.

Mr. JORDAN. Mr. Cooney? Or a name you can’t remember?

Mr. ZELINSKY. Mr. Cooney.

Mr. JORDAN. Okay. All right.

Tell me about Joseph Mifsud.

Mr. ZELINSKY. Congressman, if I could for a second, I apologize that it took me a moment to come up with the name. Alessio—the first assistant’s name is Evangelista.

Mr. JORDAN. Okay. So, tell me why the special counsel didn't charge Joseph Misfud with lying to the FBI. He lied three times.

You charged everybody else. You charged Gates. You charged Flynn. You charged Stone. You charged 13 Russians no one had ever seen. We, obviously, know that the Flynn charge was wrong as evidenced by what happened today.

Why didn't you charge Joseph Misfud, who lied to you guys back in February of 2017?

Mr. ZELINSKY. Congressman, I have been told by the Department of Justice that my testimony today should adhere to the four corners of the Special Counsel's Office report. There are privilege issues with going outside of that.

I would be happy to consult with them, see if they will provide me the answer. Then yes, I will answer the question.

Mr. JORDAN. Well, you were awful quick just a few minutes ago. Here is the sentence: "Manafort told the Special Counsel." So, you were fine talking to Democrats about what Manafort told the Special Counsel. I am asking you a simpler question. Joseph Misfud, the guy who first tells Papadopoulos that they have dirt on the Clintons.

Papadopoulos then tells the foreign diplomat, who tells the FBI, and then we get this investigation that takes three years, and when you interview him, he lies three times. It is on page 192 of the Mueller report. I am just asking why you guys didn't charge him.

Mr. ZELINSKY. Congressman, I want to address your issue as to why I discussed what Mr. Manafort said.

Chair NADLER. The time of the gentleman—the time of the gentleman—the time of the gentleman has expired.

Mr. Cicilline?

Mr. CICILLINE. Thank you, Mr. Chair.

Mr. Elias, Mr. Ayer, and Mr. Zelinsky, you are courageous American heroes. Because of you and others like you, our Justice Department has been the envy of the world. Equal justice is a founding principle of our great country. Justice is done in every case without fear or favor, without party or politics, and we say in our Pledge of Allegiance liberty and justice for all. Those words mean something.

In the face of staggering evidence of corruption, of misconduct, of lawlessness, we hear the same refrain from our colleagues on the other side of the aisle, "You just don't like the President."

Of course, the answer is we love our country. We love the rule of law. We love our system of justice, and we love the integrity of the Department of Justice, and we are deeply troubled by the testimony that is being presented today and what it says about this attorney general and this president.

So, Mr. Elias, as a Chair of the Antitrust Subcommittee, I am extremely troubled by the testimony that you have provided that confirms that the Trump Administration has weaponized the department's Antitrust Division to reward friends and punish enemies.

For years public reporting has suggested that the Trump Administration has been wielding antitrust in this abusive way, from the AT&T Time-Warner merger, which the DOJ sued to block, reportedly at the President's direction, to the Sprint-T-Mobile merger

and Disney Fox transactions, both of which the DOJ smoothly approved, despite serious anticompetitive concerns, allegedly due to personal ties that the CEOs and investors had to President Trump.

So, Mr. Elias, I had to come back to the facts on why the investigation into four major automakers was ever open because there seemed to be no evidence to support it.

In fact, at a Senate hearing last year, the Chief of the Antitrust Division told senators, and I quote, “I have nothing” when he was asked if he had any information of misconduct to justify this investigation of automakers.

Your testimony today seems to confirm without question that there was, in fact, simply no basis to support the investigation.

I wanted to be clear. Do you have any evidence that these automakers did anything wrong when they agreed to adhere to California’s strict emission standards?

Mr. ELIAS. I believe that—had clear legal defenses for what they were doing under well-established procedures.

Mr. CICILLINE. Was there any evidence that this investigation would in any way help the American people?

Mr. ELIAS. I am not aware of any, no.

Mr. CICILLINE. There is evidence, in your mind, that this investigation was opened in bad faith to cater to the President’s political whims. Isn’t that correct?

Mr. ELIAS. I think the coincidence of time between the President’s tweets and the instruction the next day to open the investigation could lead to the inference that you are describing.

Mr. CICILLINE. Am I correct in saying that the investigation was ultimately closed without any evidence of wrongdoing found, correct?

Mr. ELIAS. Correct.

Mr. CICILLINE. Now, your testimony makes clear to me that this investigation was meritless. It had nothing to do with protecting the American people or American consumers and everything to do with helping the President retaliate against automakers and support the President’s feud against a specific state.

What is worse, the Attorney General used taxpayer money to do this.

Mr. Elias, you have described an entire division writing a memo, an all-staff meeting, weeks and weeks of work. Given this investigation was clearly not about protecting the interests of the American people, am I correct that it still required the expenditure of significant resources?

Mr. ELIAS. It did require some staff time, some attorney time, and was a use of funds that did not ultimately yield a real violation.

Mr. CICILLINE. So, rather than pursuing meritless investigations in support of the President’s personal vendetta, the resources could have been used and better spent elsewhere. Do you agree?

Mr. ELIAS. I certainly agree, yes.

Mr. CICILLINE. Finally, Mr. Elias, what has been the effect on morale in your division, given that the Attorney General is pursuing investigations based on the President’s tweets and not on what is best for the American people?

Mr. ELIAS. Well, I do know that in the Federal Employment Viewpoint Survey, which surveys employees every year, the Anti-trust Division is now ranked 404 out of 420.

Mr. CICILLINE. Thank you.

Mr. Ayer, I would like to turn to you for a moment.

The President is, of course, free to pursue an anti-environment agenda within the confines of the law. There is a line between the department prioritizing executive policies and prosecuting companies and individuals solely to retaliate against the President's perceived political enemies.

Can you just please describe the difference between the department prioritizing an Administration's policies and what happened here, and what effect does it have on our justice system and democratic institutions if the President uses the department to attack those he disagrees with without legal cause?

Mr. AYER. The whole premise of a system of justice is that it will be brought to bear on the facts as they are and proceed pursuant to the best assessment that hard thinking and hard work can bring to it in terms of what action is appropriate.

The citizens of the country need to have trust that things are being done in an evenhanded way for good reasons. The problem comes when there starts to be a widespread sense of concern or doubt that the government is actually taking an often-harsh action, sometimes punitive and criminal actions, other times civil enforcement actions or otherwise in civil cases acting in a way to help someone for special reasons that are totally unrelated to the public interest or any evenhanded considerations.

Then trust breaks down, as it did after Watergate and that is not a place we want to be as a country because order starts to deteriorate.

Chair NADLER. The time of the gentleman has expired.

Mr. CICILLINE. Mr. Chair, I have a unanimous consent request.

Chair NADLER. The gentleman will State his unanimous consent request.

Mr. CICILLINE. Thank you. Mr. Chair, I ask unanimous consent that this letter signed by over 1,100 former U.S. Attorneys and Justice Department officials, both Republicans and Democrats, which strongly condemns President Trump and Attorney General Barr's interference in the fair Administration of justice and calls on the Attorney General of the United States to resign, be made part of the record.

Chair NADLER. Without objection.

[The information follows:]

MR. CICILLINE FOR THE RECORD

DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone

 medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-e2cb75ae4937

February 18, 2020



We, the undersigned, are alumni of the United States Department of Justice (DOJ) who have collectively served both Republican and Democratic administrations. Each of us strongly condemns President Trump's and Attorney General Barr's interference in the fair administration of justice.

As former DOJ officials, we each proudly took an oath to support and defend our Constitution and faithfully execute the duties of our offices. The very first of these duties is to apply the law equally to all Americans. This obligation flows directly from the Constitution, and it is embedded in countless rules and laws governing the conduct of DOJ lawyers. The Justice Manual — the DOJ's rulebook for its lawyers — states that “the rule of law depends on the evenhanded administration of justice”; that the Department's legal decisions “must be impartial and insulated from political influence”; and that the Department's prosecutorial powers, in particular, must be “exercised free from partisan consideration.”

All DOJ lawyers are well-versed in these rules, regulations, and constitutional commands. They stand for the proposition that political interference in the conduct of a criminal prosecution is anathema to the Department's core mission and to its sacred obligation to ensure equal justice under the law.

And yet, President Trump and Attorney General Barr have openly and repeatedly flouted this fundamental principle, most recently in connection with the sentencing of President Trump's close associate, Roger Stone, who was convicted of serious crimes. The Department has a long-standing practice in which political appointees set broad policies that line prosecutors apply to individual cases. That practice exists to animate the constitutional principles regarding the even-handed application of the law. Although there are times when political leadership appropriately weighs in on individual prosecutions, it is unheard of for the Department's top leaders to overrule line prosecutors, who are following established policies, in order to give preferential treatment to a close associate of the President, as Attorney General Barr did in the Stone case. It is even more outrageous for the Attorney General to intervene as he did here — after the President publicly condemned the sentencing recommendation that line prosecutors had already filed in court.

Such behavior is a grave threat to the fair administration of justice. In this nation, we are all equal before the law. A person should not be given special treatment in a criminal prosecution because they are a close political ally of the President. Governments that use the

enormous power of law enforcement to punish their enemies and reward their allies are not constitutional republics; they are autocracies.

We welcome Attorney General Barr's belated acknowledgment that the DOJ's law enforcement decisions must be independent of politics; that it is wrong for the President to interfere in specific enforcement matters, either to punish his opponents or to help his friends; and that the President's public comments on DOJ matters have gravely damaged the Department's credibility. But Mr. Barr's actions in doing the President's personal bidding unfortunately speak louder than his words. Those actions, and the damage they have done to the Department of Justice's reputation for integrity and the rule of law, require Mr. Barr to resign. But because we have little expectation he will do so, it falls to the Department's career officials to take appropriate action to uphold their oaths of office and defend nonpartisan, apolitical justice.

For these reasons, we support and commend the four career prosecutors who upheld their oaths and stood up for the Department's independence by withdrawing from the Stone case and/or resigning from the Department. Our simple message to them is that we — and millions of other Americans — stand with them. And we call on every DOJ employee to follow their heroic example and be prepared to report future abuses to the Inspector General, the Office of Professional Responsibility, and Congress; to refuse to carry out directives that are inconsistent with their oaths of office; to withdraw from cases that involve such directives or other misconduct; and, if necessary, to resign and report publicly — in a manner consistent with professional ethics — to the American people the reasons for their resignation. We likewise call on the other branches of government to protect from retaliation those employees who uphold their oaths in the face of unlawful directives. The rule of law and the survival of our Republic demand nothing less.

If you are a former DOJ employee and would like to add your name below, [click here](#). Protect Democracy will update this list daily with new signatories.

Signatories have been vetted to the best of our ability. We will continue to update the signatory list until Wednesday, February 26th.

Chair NADLER. Mr. Cline?

Mr. CLINE. Thank you, Mr. Chair. I want to thank our witnesses for being here.

Mr. ZELINSKY. I wish you were here in person, but I want to ask you in particular. You have already been asked about the 13 and the 17 attorneys and the Special Counsel team registered Democrats.

What was Andrew Weissmann's role in the Special Counsel investigation?

Mr. ZELINSKY. Andrew Weissmann was a senior assistant special counsel, I believe, was his title.

Mr. CLINE. Were you aware that Weissmann sent an email to then Deputy Attorney General Sally Yates saying he was, quote, "So proud and in awe," end quote, of her after she disobeyed President Trump? Were you aware of that?

Mr. ZELINSKY. I am familiar with that press report, yes.

Mr. CLINE. Do you think this email compromised the appearance of an independent investigation?

Mr. ZELINSKY. I think that the attorneys in the Special Counsel's office did our job, and we did our job fairly and truthfully.

Mr. CLINE. So, you don't think that that email compromised the appearance of an independent investigation?

Mr. ZELINSKY. I think the investigation was independent and I am not able to comment beyond the confines of the report. I can tell you, Congressman, that we did our jobs and we followed the law.

Mr. CLINE. So, what did Special Counsel Mueller do after finding out that Weissmann emailed that he was so proud and in awe of Deputy Attorney General Yates? He didn't remove him, correct?

I am sorry. Remove for—

Mr. ZELINSKY. I want to be very careful.

Mr. CLINE. No. Remove Weissmann.

Mr. ZELINSKY. I want to be very careful, Congressman, for the same reason that I referenced earlier.

I have to go to the department to be able to talk about matters that are outside the scope of the Special Counsel office's report and receive their permission to do so.

The government has—the Department of Justice has given me permission today to discuss matters related to the Stone sentencing. They have not given me permission to discuss internal matters in the Special Counsel's office that are outside the scope of the four corners of the Special Counsel office's report.

If you would like, I can go to the department, and I will ask them for permission to answer your question.

Mr. CLINE. You have spoken to things that you have read in the press or seen in the public sphere, correct?

Mr. ZELINSKY. I have confirmed, yes.

Mr. CLINE. You have spoken to earlier today. So, are you aware that Weissmann agreed to host a fundraiser for candidate Joe Biden's victory fund?

Mr. ZELINSKY. I have read press reports to that effect.

Mr. CLINE. Okay. Are you aware of unauthorized press leaks coming out of the Special Counsel's office?

Mr. ZELINSKY. No.

Mr. CLINE. Okay. Has the Justice Department Office of Inspector General ever contacted you about unauthorized leaks to media?

Mr. ZELINSKY. They have not.

Mr. CLINE. Are you aware if Justice Department Office of Inspector General has contacted anyone else at the Special Counsel's office about unauthorized leaks to the media?

Mr. ZELINSKY. I am not.

Mr. CLINE. All right.

With that, I am going to yield to the gentleman from Ohio.

Mr. JORDAN. I thank the gentleman for yielding.

Mr. MUKASEY. I want you to take a look at this chart up here because this is, in my mind, what politics at the Justice Department looks like.

"Hillary should win 100,000,000 to zero."

"Trump is not ever going to become president, right?"

That is from Lisa Page to Peter Strzok. Peter Strzok responds, "No. No, he is not. We will stop it."

Now, this is not just any old person saying, "We will stop it." This is Peter Strzok, deputy head of counterintelligence at the FBI and the guy who ran the investigation into Hillary Clinton, code name Mid-Year Exam, and ran the investigation Crossfire Hurricane into the Trump-Russia—so-called Trump-Russia collusion.

That is what politics at the Justice Department looks like, not what the Democrats are serving up today.

Your response, Mr. Mukasey?

Mr. MUKASEY. Well, that is not the only exchange, I think, that suggests politics. In fact, there is one that hasn't gotten very much attention that occurred on the night that Ted Cruz withdrew, and Donald Trump became the only candidate for the Republican nomination.

There was an exchange where one said to the other, "I can't believe this guy is going to be the nominee," and the response was, "This raises the pressure to terminate MYE." MYE was code for Mid-Year Exam.

Mr. JORDAN. Yeah, Mid-Year Exam.

Mr. MUKASEY. How the candidacy of Donald Trump could raise the pressure to terminate MYE has been something that has mystified me ever since I saw that.

Mr. JORDAN. Yeah. No kidding. It shouldn't matter who the candidate is for the other party determining what, how, when, and why you close an investigation, finishing an investigation, or what you do in an investigation.

Mr. MUKASEY. Right.

Mr. JORDAN. Yeah. Thank you very much.

Yield back.

Chair NADLER. The gentleman yields back.

Mr. Swalwell?

Mr. SWALWELL. Mr. Zelinsky, on July 24 of last year, Special Counsel Mueller described in his testimony to this Committee that there were identified gaps in his investigation that he could not account for.

Do you recall that testimony?

Mr. ZELINSKY. I do.

Mr. SWALWELL. That includes lies, deletion of text messages, and obstruction of justice. Is that right?

Mr. ZELINSKY. That is what the Special Counsel's office report says, yes.

Mr. SWALWELL. In our federal system, defendants are rewarded for accepting responsibility early in the proceedings for their sentence. Is that right?

Mr. ZELINSKY. That is correct.

Mr. SWALWELL. Did Mr. Stone go to a jury trial?

Mr. ZELINSKY. He did.

Mr. SWALWELL. Was he convicted at trial?

Mr. ZELINSKY. He was.

Mr. SWALWELL. Was he also found to have lied to the judge during pretrial proceedings?

Mr. ZELINSKY. Yes.

Mr. SWALWELL. You made a recommendation with your team as to what the sentence should be. The President tweeted, and the sentence was ultimately lowered. Is that correct?

Mr. ZELINSKY. That is accurate.

Mr. SWALWELL. So, we have a pattern here. President Trump tweets. Friends are protected. We saw that with National Security Advisor Flynn. He had secret conversations with the Russians before he was national security advisor, lied to Vice-President Pence, lied to the FBI, and twice admitted that he had lied, and pleaded guilty.

Then comes Trump. He tweets repeatedly that this never should have happened and, Mr. Zelinsky, the Flynn case has been dropped by the recommendation of the DOJ. Is that right?

Mr. ZELINSKY. That is my understanding from what I have read in the press.

Mr. SWALWELL. Donald Trump does not only protect his friends, he actually punishes his enemies. Michael Cohen, former lawyer to President Trump, charged with counts of tax fraud and false statements.

Pleads guilty early in the proceedings. Testifies to Congress, and nine days before his sentencing, Donald Trump tweets that Cohen wants zero days in prison. He should serve his full and complete sentence. Michael Cohen was sentenced to three years. Is that correct?

Mr. ZELINSKY. I don't remember Mr. Cohen's precise sentence. I have no reason to doubt what you are saying.

Mr. SWALWELL. So, Mr. Zelinsky, you are a career prosecutor. You just want to follow the evidence.

How does it make you feel as a prosecutor and how does it make your colleagues feel when you see that your hard work and the evidence is being sidelined for political preferences?

Mr. ZELINSKY. Congressman, in the wake of the Stone sentencing motion, I heard from many Assistant United States Attorneys throughout the country, many of whom I did not know, about how disappointed they were with what had happened.

Mr. SWALWELL. Why were you disappointed?

Mr. ZELINSKY. I was disappointed because we took an oath to do our job, to follow the law, to follow the department's policy and to do what is right, and what happened here was wrong.

Mr. SWALWELL. Has Attorney General Barr ever publicly mischaracterized findings from the Mueller report?

Mr. ZELINSKY. I can speak to the Special Counsel's office's report. I have not been authorized by the department to characterize the Attorney General's comments on it.

I can ask the Department of Justice whether or not I will be given authority to answer that question, and if permitted I will come back to you and answer.

Mr. SWALWELL. Mr. Zelinsky, you give us hope. You have come forward. You are currently working in the Administration, and you are doing it in the spirit of people like David Holmes, who testified during the impeachment inquiry, currently working as a political officer. People like Bill Taylor, people like Lieutenant Colonel Vindman, and, of course, former officials like Fiona Hill and Marie Yovanovitch.

I hope that your courage today to talk about the political preferences shown in this prosecution inspires and begets future witnesses to come forward. You did, ultimately, withdraw from the case and leave the D.C. office. Can you tell us why you did that?

Mr. ZELINSKY. I did that because what had happened was wrong and I did not want to be a part of what had happened, and so I withdrew.

Mr. SWALWELL. Thank you.

Mr. Chair, I would ask unanimous consent to enter into the record a bipartisan letter from 159 former Southern District of New York prosecutors expressing their extreme concern about the resignation/firing of Mr. Berman in the Southern District.

I would yield back.

Chair NADLER. Without objection.

[The information follows:]

MR. SWALWELL FOR THE RECORD

Former AUSA Statement 6.20.20

We, all former U.S. Attorneys and Assistant U.S. Attorneys for the Southern District of New York, deplore the recent actions of President Trump and Attorney General Barr in summarily firing U.S. Attorney Geoffrey Berman without cause.

Founded in 1789, the U.S. Attorney's Office for the Southern District of New York was the first federal attorney's office in the young country and for over 200 years has stood for the independence of the administration of Justice—independent of political and personal interests of the Executive branch of the Government and independent of other special interests. It was, for example, a Republican-appointed U.S. Attorney who prosecuted former members of Richard Nixon's cabinet and a Democratic-appointed U.S. Attorney who prosecuted one of the most powerful Democrats in the State. The impartial administration of Justice is what distinguishes the United States from authoritarian regimes around the world and is fundamental to our democracy. The President and the Attorney General have put this long and important tradition at risk.

The actions of the President and the Attorney General are an attack on the concept that investigations should be conducted in a nonpartisan manner. They are politicizing an office that for more than 200 years has remained apolitical, and are undermining confidence in our criminal justice system. We call on our elected officials—Republicans and Democrats alike—to take all appropriate action to protect the administration of justice in the Southern District of New York and elsewhere from this kind of political interference.

Signatories as of June 22, 2020

#	Name
1	Jonathan S. Abernethy
2	Elkan Abramowitz
3	Robin E. Abrams
4	Nick Akerman
5	Daniel S. Alter
6	Rich Appel
7	Antonia M. Apps
8	Robin L. Baker
9	Celia Goldwag Barenholtz
10	Lisa Baroni
11	James J. Benjamin Jr.
12	Richard Ben-Veniste
13	Kim Berger
14	Neil S. Binder
15	Christina Paglia Bischoff

16	Barry A. Bohrer
17	Megan L. Brackney
18	Alvin Bragg
19	David E. Brodsky
20	Stacey Brodsky
21	Alan J. Brudner
22	Jacob W. Buchdahl
23	George S. Canellos
24	Katherine Choo
25	John Clopper
26	Steven M. Cohen
27	Jonathan Cohen
28	Glenn Colton
29	William Craco
30	Jenna Dabbs
31	Frederick T. Davis
32	Richard Davis
33	Michael Devorkin
34	Cynthia Keeffe Dunne
35	Amie N. Ely
36	Christian R. Everdell
37	Ira M. Feinberg
38	Zachary Feingold
39	Edward T. Ferguson
40	Michael Ferrara
41	Harris Fischman
42	Stephen Fishbein
43	Eric B. Fisher
44	Robert B. Fiske Jr.
45	Thomas Fitzpatrick
46	Robert W. Gaffrey
47	Margaret Garnett
48	Michael Gilbert
49	Joshua A. Goldberg
50	Daniel Goldman
51	Andrew Goldstein
52	Katherine R. Goldstein
53	Christine Gray
54	Marc Greenwald
55	Nicole Gueron

56	Samidh Guha
57	Jason P.W. Halperin
58	Kenneth V. Handal
59	Nola B. Heller
60	Mark R. Hellerer
61	Jason Hernandez
62	Brian Jacobs
63	Elliott B. Jacobson
64	Douglas Jensen
65	Hon. Barbara Jones (Ret.)
66	Nancy Kestenbaum
67	Edward Y. Kim
68	David Koenigsberg
69	William C. Komaroff
70	Karen Konigsberg
71	Glen A. Kopp
72	Amanda K. Kramer
73	Paul M. Krieger
74	Debbie Landis
75	Douglas M. Lankler
76	Mark Lanpher
77	Christopher LaVigne
78	Alan Levine
79	Nick Lewin
80	Jon Liebman
81	Sarah E. Light
82	Andrea Likwornik
83	Robin Linsenmayer
84	Marc Litt
85	Jeffrey E. Livingston
86	Ellen London
87	W. Cullen MacDonald
88	Daniel Margolis
89	Richard W. Mark
90	Kathy S. Marks
91	John S. Martin
92	Rebecca C. Martin
93	David B. Massey
94	Marvin Mayell
95	Sarah Thomas Mayhew

96	Douglass Maynard
97	Glen McGorty
98	Brendan McGuire
99	Robert McGuire
100	Amy E. Millard
101	Julian J. Moore
102	Ross Morrison
103	Sara Moss
104	Jay K. Musoff
105	Daniel Nardello
106	Jaimie L. Nawaday
107	Kan M. Nawaday
108	Lynn Neils
109	Peter Neiman
110	Rosemary Nidiry
111	Michelle Parikh
112	Tai Park
113	James J. Pastore
114	Allison Penn
115	Danya Perry
116	Guy Petrillo
117	Ryan Poscablo
118	Henry Putzel III
119	Pablo Quiñones
120	Kevin S. Reed
121	Emily Reisbaum
122	Lee Renzin
123	Lee S. Richards III
124	Rebecca Ricigliano
125	Mimi Rocah
126	Jennifer Rodgers
127	Virginia Romano
128	Marc Rosenbaum
129	Daniel Ruzumna
130	Elliot G. Sagor
131	Ross Sandler
132	Edward Scarvalone
133	Kenneth I. Schacter
134	Andrew W. Schilling
135	Wendy Schwartz

136	William J. Schwartz
137	Paul L. Shechtman
138	Sarah L. Shudofsky
139	Peter M. Skinner
140	Deitrich L. Snell
141	Michael Sommer
142	Alexander H. Southwell
143	Shane Stansbury
144	Charles A. Stillman
145	Jonathan R. Streeter
146	Daniel B. Tehrani
147	K. Chris Todd
148	Jeffrey A. Udell
149	Niketh Velamoor
150	Franklin B. Velie
151	Peter Vigeland
152	Hadassa R. Waxman
153	Justin S. Weddle
154	Andrea Likwornik Weiss
155	Avi Weitzman
156	Jonathan A. Willens
157	Milton Williams
158	Frank H. Wohl
159	Russell Yankwitt

Chair NADLER. The gentleman yields back.

Mr. Reschenthaler?

Mr. RESCHENTHALER. Thank you, Mr. Chair, and I want to thank all the witnesses for being here today, especially those who had the decency to do so in person. So, thank you.

I am once again just absolutely disappointed but not surprised that my colleagues across the aisle are continuing to waste our time chasing ghosts rather than working for the American people.

To assert that AG Barr, who is a serious law enforcement officer—he has a sterling reputation—to run around and say that he is interfering, he is running political interference for the President, it is absolutely laughable.

AG Barr is cleaning up what are the ruins of the Obama/Biden DOJ. In particular, he is cleaning up from Jim Comey, who weaponized and politicized the FBI.

If you doubt me, just look at the treatment of former National Security Advisor Michael Flynn. Those were political abuses. That was political gamesmanship that was orchestrated by FBI Director Comey and what I call his merry band of Never Trumpers.

Comey's FBI used the Logan Act. For those of you that don't know, the Logan Act is highly problematic and, frankly, it is likely unconstitutional.

The Logan Act makes it illegal for U.S. citizens to engage in unauthorized foreign diplomacy and, despite this, the FBI used it, this archaic act, to set up General Flynn, even though they knew that he would never be charged with the obscure offense.

In fact, since its enactment, the Logan Act has only been used twice to prosecute individuals, one in 1802 and one in 1852, and both were acquitted.

So, then why use this to go after Flynn? Well, according to the handwritten notes, the FBI's goal was, quote, "Truth/admission or to get him to lie so we can prosecute him or get him fired," end quote.

Around the same time the FBI was doodling these notes to set up Michael Flynn, around that same time former Secretary of State John Kerry was holding meetings with the Palestinian Authority. Senator Dianne Feinstein had dinner with the Iranian foreign minister. Yet, neither of those individuals were even questioned about Logan Act violations.

So, clearly, the charges against Flynn were politically motivated, and I should note that just this morning an appeals court ruled that General Flynn—the appeals court ruled in General Flynn's favor, ordering the dismissal of that case.

So, even if the DOJ recognized Logan Act's futility, informing the FBI that it was not in support of using the law to entrap—still use the law to entrap General Flynn.

An FBI lawyer, in fact, testified before Congress and said the DOJ viewed the Logan Act as, quote, "untested" and that the Logan Act would leave the DOJ vulnerable to, quote, "substantial litigation risk," unquote.

That didn't stop Director Comey from using it to attempt to sabotage the Trump transition team.

So, if my Democrat colleagues want to accuse someone of politicizing the DOJ, they should start with Director Comey.

Mr. Zelinsky, what is your view of the Special Counsel's office toward the Logan Act?

Mr. ZELINSKY. Congressman, I am sorry to sound like a broken record, but I have been told by the Department of Justice that there are deliberative process concerns with the discussion in the Special Counsel's office and what transpired there outside the confines of the report.

I am happy to discuss the Special Counsel's office's report and I am happy to go to the department and ask them—

Mr. RESCHENTHALER. All right, Mr. Zelinsky. I am going to reclaim my time.

How do you explain the discrepancy then between the treatment of General Flynn and that of Secretary Kerry and Senator Feinstein?

Mr. ZELINSKY. Congressman, I would need to consult with the Department of Justice before answering that question. If you would like I can ask—

Mr. RESCHENTHALER. All right. I am going to reclaim my time.

Let us just switch gears and talk about Mueller's probe. I was following it in the news and it seemed like there were a lot of leaks during that time.

Did you talk to the press during the Mueller investigation?

Mr. ZELINSKY. Never.

Mr. RESCHENTHALER. Do you know anybody that talked to the press?

Mr. ZELINSKY. I am sorry. I am not quite sure I heard your question. Do I know of any person that has ever talked to the press or do I know anyone in the Special Counsel's office?

Mr. RESCHENTHALER. That was working on—yeah, that was working on the investigation. Did you know anybody on that team that was talking to the press?

Mr. ZELINSKY. Aside from our press relations professional, no.

Mr. RESCHENTHALER. Judge, in your time at the DOJ, did you ever use the Logan Act?

Mr. MUKASEY. I am sorry?

Mr. RESCHENTHALER. Did you ever use the Logan Act?

Mr. MUKASEY. No.

Mr. RESCHENTHALER. Why not?

Mr. MUKASEY. I was never aware of any situation that could conceivably have been covered by it and had I been, I would have been hesitant to use it because, number one, I believe it is unconstitutional.

Mr. RESCHENTHALER. Thank you.

Mr. Chair, I yield my time. My time has expired.

Chair NADLER. The time of the gentleman has expired.

Mr. Lieu?

Mr. LIEU. Thank you, Chair Nadler.

Let me set context for why we are even here today. We are here because the Russians sweepingly and systematically hacked our elections in 2016. Roger Stone coordinated with Wikileaks, who had the emails that Russian hackers stole from the Hillary Clinton campaign.

Roger Stone also coordinated with Members of the Trump campaign and spoke to Donald Trump himself. The Trump campaign

embraced the stolen emails, planned their campaign messaging based on the Russian hack, and then, after Roger Stone was convicted of multiple crimes, Bill Barr's Department of Justice intervened to lower the sentencing recommendation.

That is a perversion of justice. I am a former prosecutor, and it is clear to me that the only reason we are able to take the extraordinary step of locking people in prison is because the people believe our processes are fair and based on the facts.

One of the greatest dangers to democracy is when the people start believing that prosecutions are tainted based on who the defendant happens to know and, unfortunately, under Bill Barr's Department of Justice, friends of Donald Trump get breaks and special favors from the Department of Justice that no ordinary American could ever get.

So, my questions are for Mr. Zelinsky.

Mr. Zelinsky, before you worked at the Department of Justice you clerked for Judge Thomas Griffith of the D.C. Circuit. He was nominated by a Republican president, correct?

Mr. ZELINSKY. That is correct. He was nominated by President George W. Bush.

Mr. LIEU. Then you clerked also for Chief Justice Anthony Kennedy, who also was nominated by a Republican president, correct?

Mr. ZELINSKY. President Reagan. That is correct.

Mr. LIEU. Before you could become a United States Attorney, you had to take an oath and that oath was to the United States Constitution, correct?

Mr. ZELINSKY. When I became an Assistant United States Attorney, as required by law I took that oath. I actually had to take a similar oath on a number of occasions for various federal jobs that I have held, including the clerkships you just mentioned, Congressman.

Mr. LIEU. So, your client is not Donald Trump or Bill Barr. It is the Constitution of the United States and the American people. Isn't that right?

Mr. ZELINSKY. That is correct.

Mr. LIEU. On behalf of the American people, you and other career prosecutors submitted a sentencing memo of seven to nine years for Roger Stone. Is that right?

Mr. ZELINSKY. That accurately describes the sentencing memorandum, yes.

Mr. LIEU. When Judge Jackson reviewed that recommendation, did she think it was supported by the record?

Mr. ZELINSKY. She did. She said that the sentencing memo that we had filed complied with all law, relevant DOJ policy and practice, and was supported by the record.

Mr. LIEU. After you submitted that sentencing recommendation, the President of the United States went nuts and said it was horrible, unfair, and then another memo was submitted by people above you.

Were you told why they submitted that memo of a lower sentencing recommendation?

Mr. ZELINSKY. I was told that the U.S. Attorney was taking action because he was afraid of the President. As I discussed, I was told that earlier. Then I was told that there was heavy political

pressure from the highest levels of the Department of Justice to cut Roger Stone a break.

Mr. LIEU. Did any career line Assistant U.S. Attorney sign that lower sentencing recommendation?

Mr. ZELINSKY. None.

Mr. LIEU. In the memo you had submitted initially, were you asked to remove portions about Roger Stone's misconduct?

Mr. ZELINSKY. We were.

Mr. LIEU. Is that unusual?

Mr. ZELINSKY. I have never had it before in my experience.

Mr. LIEU. Okay. Now, Mr. Mukasey has said that an attorney general can certainly ask for a sentence below the sentencing guidelines.

To be clear, that is not your problem with what happened. It is not that something was asked below the sentencing guidelines.

It was the process, right, where the reason it was done was because Roger Stone was a friend of Donald Trump, and the acting U.S. Attorney was scared of the President. Isn't that right?

Mr. ZELINSKY. That is one of the problems. There were also flaws in the sentencing—second sentencing memorandum that I believe should not have been submitted as well besides the recommendation itself.

Mr. LIEU. Do you believe those flaws were done because Roger Stone is a friend of Donald Trump?

Mr. ZELINSKY. I was told that the acting United States Attorney was taking the actions that he was because he was afraid of Donald Trump.

I was not told why the second sentencing memorandum was done the way it was because by the time it was filed, I had withdrawn from the office and I was not given the ability to review the materials nor was I told who was writing it.

Mr. LIEU. Thank you.

My last question, "In United States of America we do not prosecute people because of their politics." That is what you wrote. You also wrote, "And we don't cut them a break because of their politics either."

Was Roger Stone cut a break because of his connection to Donald Trump?

Mr. ZELINSKY. That is what I was told and that is what appears to have happened, to me.

Mr. LIEU. Thank you, and I yield back.

Chair NADLER. The gentleman yields back.

Mr. Raskin?

[No response.]

Chair NADLER. Mr. Raskin?

[Pause.]

Chair NADLER. Unmute your microphone.

[Pause.]

Chair NADLER. Okay. Ms. Jayapal?

Ms. JAYAPAL. Thank you, Mr. Chair.

Mr. Zelinsky, let us make this very simple for the American people. You testified today that you were told that the motivation for lessening the sentence for Roger Stone, the President's long-time

friend, was because the U.S. Attorney was afraid of President Trump.

Is that correct?

Mr. ZELINSKY. Correct, among other things.

Ms. JAYAPAL. In other words, sir, the Justice Department leadership based a sentencing recommendation not on the rule of law, not based on whether Roger Stone deserved the recommended sentence, but simply to appease the President.

Is that right?

Mr. ZELINSKY. That is what I was told.

Ms. JAYAPAL. Thank you, Mr. Zelinsky.

I can see why the U.S. Attorney was afraid to go against the President. U.S. Attorney Geoffrey Berman said that his investigations, including the President's close inner circle, would continue without fear or favor, and now he is gone.

The rules are clear. The rules of this President and Attorney General Barr are clear—that is, give the President's friends special treatment, keep your job. Dare to pursue justice, dare to follow the law, dare to hold the President's friends accountable and you will be removed.

Mr. Zelinsky, you went ahead with your sentencing recommendations in spite of these pressures and threats. Can you tell us why?

Mr. ZELINSKY. Because it was the right thing to do.

Ms. JAYAPAL. You were there to do the right thing, and I appreciate that and your coming forward to discuss this.

Mr. Elias, I would like to switch topics and go back to the department's investigation of at least 10 cannabis companies to make sure we understand why you consider these to be sham investigations, investigations predicated on the personal interests of the Attorney General and the President rather than the facts or a desire to protect American consumers.

Approximately how many DOJ staff were pulled to work on these sham investigations?

Mr. ELIAS. Congresswoman, there were dozens of staff—attorneys, paralegals, economists, and others who worked on these various cases.

Ms. JAYAPAL. These companies produced 1.3 million documents from the files of 40 employees at the DOJ's request. Is that correct?

Mr. ELIAS. That was just from the first of the 10 mergers, yes.

Ms. JAYAPAL. So, potentially, 10 times that if the same numbers were applied.

When the DOJ received these documents, is there any evidence that the entirety of these documents were even reviewed?

Mr. ELIAS. I think a very small number of the documents were reviewed.

Ms. JAYAPAL. A very small number. In one of the reviews some documents were never even uploaded. Is that correct?

Mr. ELIAS. They were uploaded after the closing process had been initiated as if they were irrelevant to the investigation and its process.

Ms. JAYAPAL. So, there were requested enormous resources. Taxpayer dollars were used. These documents were never really looked at. They weren't relevant to the investigations.

So, to be clear, at Attorney General Barr's direction, the department expends countless taxpayer resources to force companies to ultimately produce millions of pages of evidence and then doesn't even look at or upload some of that evidence before admitting there is a violation.

Now, Mr. Elias, given your experience in public service, have you ever seen anything this extreme, using taxpayer dollars to conduct an investigation over the course of months on an entire industry and not even uploading evidence before admitting that there is no violation?

Mr. ELIAS. In my experience, which includes 14 years at the Justice Department at many different levels of the Antitrust Division, no, I have never seen anything like that.

Ms. JAYAPAL. Can you explain to the American people why is that so concerning?

Mr. ELIAS. It is concerning because the investigations and the work of the Antitrust Division need to be done in good faith.

They need to be done evenhandedly both for the sake of everybody involved and for the sake of the public's perception of the rule of law and that the Justice Department is being above board with everything calling balls and strikes as they truly are.

So, for it to disregard the usual standards in the law on what counts for an antitrust investigation is improper and an abuse.

Ms. JAYAPAL. Mr. Elias, you are just saying that the Justice Department should be pursuing justice.

Mr. ELIAS. Yes.

Ms. JAYAPAL. I want to thank you for your bravery in coming here today.

We all have to ask ourselves what this means for what we do not even know. This is a pattern that has been consistent.

Bill Barr lied to the American people about the Mueller report. He ordered the military to tear gas peaceful protestors just so the President could have a photo-op and now is using the power of the Justice Department for corrupt purposes in these instances that we are investigating today.

If he is doing all these things, what else is happening that we don't even know about? Bill Barr appears to be a henchman for the President's likes and dislikes, not the Attorney General of the United States pursuing equal justice under the law.

He has abandoned his responsibility to uphold the Constitution. He is no longer working for the American people, and we must stop that.

Thank you, Mr. Chair, and I yield back.

Chair NADLER. The gentlelady yields back.

Mr. Raskin?

[No response.]

Chair NADLER. Okay. Ms. Demings?

Ms. DEMINGS. Thank you so much, Mr. Chair.

Mr. Chair, I care about the rule of law. I care about the oath of office that I have taken and that we have all taken, and what it means to take that oath of office to heart.

Mr. Zelinsky, first, congratulations on the birth of your child. I also want to thank you for being a nonpartisan career prosecutor who treats people equally and fairly.

Now, I believe that those would be welcome words, especially during this time in our Nation when we are seeing civil unrest in all 50 states, a Justice Department that treats people equally and fairly.

We know that most people in our country don't have a fixer with the title Attorney General.

Mr. Zelinsky, in your testimony, I think it is so important that we keep our eye on the ball. We have heard so many distractions here today, but I am committed to keeping my eye on the ball, to work hard to make sure that we do create a more perfect system of justice.

Mr. Zelinsky, in your testimony you stated that political pressure resulted in the virtually unprecedented decision to override the original sentencing recommendation and the filling of a new sentencing memorandum that included statements and assertions at odds with the record and contrary to the Department of Justice policy.

You went on to say that in the Fraud and Public Corruption Section of the United States Attorney's Office for the District of Columbia, you could never recall—you couldn't even recall a case where the government did not seek a guideline sentence after trial.

Mr. Zelinsky, is that correct?

Mr. ZELINSKY. That is correct. Nor could anyone else in the U.S. Attorney's Office recall such a situation.

Ms. DEMINGS. So, to be clear, that you could not recall it and nor could anybody else in that office recall it either. Is that what you just said?

Mr. ZELINSKY. Yes.

Ms. DEMINGS. Thank you, Mr. Zelinsky.

Mr. Mukasey, during your confirmation hearing you said, and I appreciate these words, quote "I served in the department and the U.S. Attorney's Office in SDNY 35 years ago. I was never asked what my politics were. I did not know the politics of the men and women there and still do not. And it did not matter. It had nothing to do with our job, nothing to do with the way we did it and could not have anything to do with the—and cannot have anything to do with the jobs of the people in the Justice Department today."

As we find ourselves in this very critical moment, Mr. Mukasey, do you stand by your statement?

Mr. MUKASEY. I do.

Ms. DEMINGS. Could you please explain to me why you do not feel that the Roger Stone case has anything—the decisions that have been made in that case have nothing to do with politics and have nothing to—do not compromise your position here today and the statement that you made during your confirmation?

Mr. MUKASEY. Because the initial sentencing recommendation was wildly inappropriate, notwithstanding that it resulted from a mechanical application of the guidelines.

The only person who determined the sentence in that case was the judge. She could have sentenced the defendant to any term of imprisonment or no term of imprisonment.

She chose to sentence him to a term of 40 months, which was within the second recommendation. That second recommendation

changed nothing so far as the bottom-line result because the judge is the only person who determines the sentence.

Ms. DEMINGS. Do you believe that the President nor the Attorney General, who has been acting more like the President's personal bodyguard and his fixer, have not engaged in politics as it pertains to the President's friends?

Mr. MUKASEY. I can't speak for the President. The President is, by definition, a political—

Ms. DEMINGS. Based on your professional decision, political or professional experience, do you believe the President has engaged in a political way as it pertains to sentences or what happens to his friends?

Mr. MUKASEY. The Attorney General himself criticized the President for tweets that he—

Ms. DEMINGS. So, that is a yes?

Mr. MUKASEY. It is a maybe. Go ahead.

Ms. DEMINGS. Do you believe the Attorney General has engaged in politics in carrying out the President's wishes?

Mr. MUKASEY. Short answer is no.

Ms. DEMINGS. Mr. Chair, I yield back. Thank you very much.

Chair NADLER. The gentlelady yields back.

Mr. Raskin?

Mr. RASKIN. Thank you, Mr. Chair.

This is the most devastating testimony I have ever seen, an Attorney General of the United States corrupting the rule of law in pursuit of a political agenda for the President of the United States.

All of America can right now see exactly what is going on. The Attorney General, acting not as a champion of the rule of law or the Constitution but, rather, as a sycophant and a consigliere for Donald Trump, has decided to go out and undermine cases, derail cases, and kill cases that affect Donald Trump's chosen ones, despite overwhelming evidence against them and despite guilty pleas by some of them.

Now, it is going to take us a long time to sort out the full litany of unregistered foreign agents and liars and felons and frauds who have gotten a "get out of jail free" card by Attorney General William Barr at the behest of Donald Trump, and we should track all of that down.

More immediately, America faces two problems where Attorney General Barr is, again, threatening the rule of law and justice, and one is the public health response to the pandemic, which has now cost more than 120,000 Americans their lives, and the other is the fall election, which is the people's opportunity to speak if allowed to do so without election interference by foreign powers or by the government of the United States itself in an effort to intimidate and repress the vote.

So, I want to come to Mr. Ayer. In your testimony, you testified that Attorney General Barr has worked to, quote, "create an authoritarian president," and I wrote down some of your basic points here.

We, obviously, don't have time to get into all of them. You say he undermined the work of independent fact finders, such as the FBI. He ignored and trampled Congress's powers under the appropriations clause.

He categorically stonewalled congressional oversight and State criminal subpoenas. He attacked and undermined the inspectors general. He used political cronies to review and decide issues of special interest to the President.

He reversed government positions in the Stone and Flynn prosecutions. He used the DOJ as a tool of the President's reelection campaign. He directed law enforcement forces to violate the First amendment rights of peaceful protestors in Lafayette Square, and on and on, all the way to sacking Geoffrey Berman just a day or two ago.

Among these things you mentioned almost in passing, that the Attorney General had tried to provide an echo to the President by likening public health orders by legitimate politically elected authorities in America, governors and mayors, to house arrest, and he said that he would work to jawbone the governors into rolling back public health orders put in place as the only mechanism we have to try to lower the death count and control this out of control pandemic, which is now ravaging Florida, Texas, South Carolina, Louisiana, Arkansas, large areas of the South and the West right now.

What is the problem with the Attorney General deciding he wants to jawbone the governors and likening their policies to house arrest, which we all know is completely phony?

Mr. AYER. Thank you for that.

Chair NADLER. Your microphone, sir.

Mr. AYER. The whole issue of how you deal with public health problems, obviously, there is a role for the Federal Government and one that has not been performed terribly well in terms of coordinating overall supplies.

The basic decision-making with regard to how you are going to make the particular decisions of what people need to do, they are very local and they are very unique to local areas.

The judgments I think everybody recognizes, basically, are to be made at the State and the local level in terms of when to open, how much, in what ways, *et cetera*.

What appears to have happened here, and it didn't just happen once, it appears to have happened several times—is that Mr. Barr, and he really does appear to be echoing statements that the President has periodically tweeted and made about opening up.

Obviously, the President has been very intense about wanting to get everything opened up. So, Barr has echoed that and essentially threatened—he has threatened to jawbone.

He has also, in connection with the question about churches and whether churches are going to be treated in a certain way and are they somehow being treated less favorably than others, they have actually gone to court in some of those instances.

Now, the Supreme Court rejected a challenge a couple of weeks ago regarding one restriction on a church in California, and I have not heard anything about the Justice Department actually filing anything in connection with opening up issues concerning churches.

He continues to talk about the need to open up. Fundamentally, it is ironic to have a Republican Administration intruding so far into such a sensitive core local government, State government,

question as local public health regulations dealing with the particularities of a case.

So, that is really—

Mr. RASKIN. Thank you, Mr. Ayer.

I want to ask you one other question, if I might, which is simply he has also provided an echo for the President, who has voted himself by mail in New York and in Florida and whose party encourages its Members to go out and vote by mail, but he has echoed the President in saying there is something wrong with voting by mail and he has alleged that voting by mail makes us vulnerable to foreign influence by counterfeit ballots.

Is that an appropriate role for the Attorney General of the United States?

Mr. AYER. Well, I think it is not and especially it is not because it appears to be something that there is absolutely no truth in at all.

There are five states that do nothing but vote by mail and every other State—I think virtually every other State uses vote by mail somewhat substantially.

So, the idea that we are going to throw cold water on the notion that we should use vote by mail it is just disreputable, and it is entirely inappropriate. It really isn't his job anyway. If there were some law enforcement function, there it might be.

Basically, he is just echoing the President, which is something he does more and more, and, frankly, my worry is that he is going to do it more and more in the weeks and months ahead as we get closer to the election.

Mr. RASKIN. Do you think he is acting more like a campaign operative than like the Attorney General of the United States?

Mr. AYER. Well, as I said in my opening statement, I think he is, in fact, acting as an advocate for whatever fantasies the President wants to advance, one of which is this Obamagate nonsense that the Members of this Committee spew out as well, and he is now doing this.

The worst thing about it is he is doing it with the backdrop of an investigation which he has in his pocket, and nobody knows what that investigation is supposedly going to come up with.

He is hinting that he has terribly incriminating things that he has found, and no one else is in a position to say he is wrong. He is wrong.

Chair NADLER. The gentleman's time has expired.

Ms. Lesko?

Ms. LESKO. Thank you, Mr. Chair, and I apologize. I was in the Rules Committee hearing and I am here physically. So, unlike Members that are on both committees that are virtual, I have to actually physically come down here.

Just from the short time I have been here, boy, it sure does sound like this is political speech going on here, but I yield my time to Mr. Jordan, the rest, the balance of my time.

Thank you.

Mr. JORDAN. I thank the gentlelady for yielding.

Mr. Mukasey, I want to read a statement to you from January of 2017 and get your response to it. It says, well I am going to ask you a couple of questions about it.

What is our goal: Truth, admission, or to get him to lie so we can prosecute him or get him fired?

First, Mr. Mukasey, do you happen to know who wrote that?

Mr. MUKASEY. The name escapes me at the moment, but it was a senior FBI official.

Mr. JORDAN. Yeah, right. The director of FBI's Counterintelligence Division, Mr. Priestap, wrote that wrote this just prior to the interview of General Flynn and what I want to know is, is that the kind of motivation that typically exists with investigators? Is their goal to get someone fired, to prosecute them? I thought the goal was to get to the truth.

Mr. MUKASEY. That is supposed to be the goal.

Mr. JORDAN. Do you have concerns about that, Mr. Ayer just said it was nonsense to be concerned about things like this. I think the term he used was, we were spewing out things that were nonsense.

This doesn't seem to me to be nonsense to be concerned about a senior official at the Justice Department, an important player in the investigation that was going on at the time that Peter Strzok was leading, it doesn't seem to me to be nonsense.

Mr. MUKASEY. You're asking me whether I agree?

Mr. JORDAN. I am asking you to comment. Go right ahead.

Mr. MUKASEY. Okay. If that wasn't the—the point is that wasn't an isolated example; it was one example among many and that phenomenon of it being one among many, it is the many parts that I think is the real concern.

Mr. JORDAN. Yeah, the many parts. Couple that with the statements we just talked about a few minutes ago that I asked you about, that the two people in the FBI working under Mr. Priestap, one of them under Mr. Priestap, one under from Mr. McCabe, the statements they had relative to the investigation, two important investigations. So, it is the combination of all of that.

How about this fact that 38 people unmasked Michael Flynn's name 49 times? Just the volume and the number of different people, does that concern you, Mr. Mukasey?

Mr. MUKASEY. Well, people who unmask are supposed to State the reasons and I don't know what reasons they stated, but the sheer number is, would be of some interest.

Mr. JORDAN. In any of your time in working in government, did you ever see anything like that in your experience?

Mr. MUKASEY. I did not. I was actually, truthfully not involved in unmasking decisions or discussions, so I can't say whether it, whether and to what extent it happened, but it's supposed to happen only when it's necessary.

Mr. JORDAN. Your first impression as a former Attorney General of the United States, you see 49 different times, 38 people in a short time span. You get 6 people at Treasury, for goodness' sake, 6 people at Treasury Department unmasking Michael Flynn's name, not just Clapper, Comey, Brennan, Biden, not just those individuals.

Mr. MUKASEY. I want to know more about what the nature of their interest is and why it was necessary to disclose the identity of a U.S. citizen.

Mr. JORDAN. I do, too. I do, too.

Mr. ELIAS, have you ever disclosed internal Department of Justice documents, including documents that might be privileged or confidential to anyone outside of the department?

Mr. ELIAS. I don't believe I have done that. I did produce my Inspector General complaint to this Committee in response to its subpoena to appear here today, but that was a document that was my words and not—

Mr. JORDAN. Why the hesitation? I mean it is fine if you have got the complaint relative to a so-called whistleblower, but what, is there a hesitation because there are other documents you have disclosed?

Mr. ELIAS. I am hesitating only because I want to be absolutely sure that I am being truthful, and I cannot—

Mr. JORDAN. Did you give any documents to United States senators, Democrat senators?

Mr. ELIAS. I am fairly confident that I have not done, that other than my whistleblower complaint. I don't believe that I've given other, I don't believe I've given internal documents to—

Mr. JORDAN. Have you ever worked at the White House?

Mr. ELIAS. I was on detail as a career Justice Department Attorney to the White House.

Mr. JORDAN. What years? What time frame?

Mr. ELIAS. It was 2015, the first half of 2015.

Mr. JORDAN. Okay.

Thank you, Mr. Chair.

I yield back.

Chair NADLER. Does the gentleman yield?

Mr. JORDAN. Oh, I have unanimous consent. I apologize, Mr. Chair.

Chair NADLER. The gentleman yields back.

Mr. Correa?

Mr. JORDAN. Can I do a unanimous consent?

Chair NADLER. Oh, the gentleman will State his unanimous consent letter.

Mr. JORDAN. Thank you, Mr. Chair.

I have a letter from the Justice Department to Senator Whitehouse from Assistant Attorney General Boyd, dated June 19th, 2020.

Chair NADLER. Without objection.

[The information follows:]

MR. JORDAN FOR THE RECORD



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 19, 2020

The Honorable Sheldon Whitehouse
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Whitehouse:

This responds to your letter to the Assistant Attorney General for the Antitrust Division (Division) dated June 9, 2020. Your letter explains that you are withholding consent from expediting consideration of the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, S. 3377 (the “Act”) pending our response to your letter. The Department supports the Act because it will allow the original ACPERA to continue to strengthen criminal antitrust enforcement, which has long been a bipartisan priority. In enacting ACPERA, Congress recognized that, “[c]ooperation obtained through the leniency program has led to the detection and prosecution of massive international cartels that cost businesses and consumers billions of dollars.”¹ The Act has received bipartisan support from antitrust subcommittee leadership in both chambers of Congress,² but needs to be enacted before June 22, 2020, to prevent the sunset of the legislation.

Your letter asks in particular for supplemental information about an investigation by the Division into “agreements four automakers made with the State of California” regarding automobile emissions.³ To be clear, the Division did not seek to investigate bilateral agreements

¹ 150 Cong. Rec. S3614 (Apr. 2, 2004) (statement of Sen. Hatch).

² See Cosponsors, Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, S.3377, 116th Cong. (2020) (Senator Lindsay Graham, sponsor, with Senators Dianne Feinstein, Mike Lee, and Amy Klobuchar cosponsors), <https://www.congress.gov/bills/116/congress/senate/bills/3377/cosponsors>; Cosponsors, H.R.7036, 116th Cong. (2020) (Representative Joe Neguse sponsor, with Representatives Jerrold Nadler, David Cicilline, Jim Jordan, James Sensenbrenner, and Jamie Raskin cosponsors), <https://www.congress.gov/bills/116/congress/house/bills/7036/cosponsors>.

³ You have asked for additional information about the automaker investigation to supplement the responses provided to the questions for the record from Assistant Attorney General Delrahim’s appearance before the Senate Judiciary Committee’s Antitrust Subcommittee on September 17, 2019. As you note, although the Department’s responses referenced an ongoing investigation, the investigation was reportedly closed prior to their transmission, as confirmed to members of the press by a Ford spokesperson. See, e.g., Coral Davenport, Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions, NEW YORK TIMES, Feb. 7, 2020, <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>. I should underscore that the Division’s responses to your questions were prepared prior to the investigation’s close, although a final document was not transmitted to your office until afterwards. We are now in a better position to provide additional details about the investigation.

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between individual automakers and the State of California. Rather, it undertook an investigation of whether competing automakers had entered an agreement with each other—a key distinction for antitrust purposes, even if the State of California were a participant. The Division closed the investigation after finding that, contrary to initial reports, the automakers had not entered into an agreement with each other.

Your letter emphasizes concerns that the Division's investigation could appear to be the result of political interference and improper use of the Department of Justice's legal authority. We share the view that political interference from outside the Department must never govern law enforcement efforts. As such, we investigate and pursue only matters with a legitimate legal basis for the belief that an antitrust violation may have occurred, as we did in the automakers matter.

The evaluation of a potential horizontal automaker agreement began in early August, 2019, consistent with section III.A. of the Division Manual, with an evaluation of press reports and other publicly available materials. This initial evaluation suggested that competing automakers may have entered into a horizontal agreement between and among themselves. Therefore, the Division's opening of an investigation was consistent with section III.B.'s requirement that there be "reason to believe that an antitrust violation may have been committed." The investigation continued with the issuance of a preliminary investigation memorandum, a request to the FTC for clearance to investigate, and other steps consistent with conducting a preliminary investigation.

The Division's inquiry was premised on examining whether competing automakers entered into a horizontal agreement with each other. This inquiry was, based on the information known to it at the time, entirely reasonable. The announcement of the agreement contained only a single signature block signed by four competing automobile manufacturers.⁴ Moreover, it explicitly stated that "we all agree" to the framework, to which "the undersigned companies have agreed."⁵ In the course of the investigation, the Division learned, and confirmed using appropriate investigative steps, that each automaker had merely bilaterally agreed with California to the framework. Accordingly, the investigation fruitfully, and expeditiously, resolved a critical factual element, as our investigations often do.

If the automakers had in fact entered into a horizontal agreement, it would have given rise to a potential antitrust violation. This is the case irrespective of whether the subject matter of an agreement involved a current political topic like emissions—such considerations are irrelevant to

⁴ "Terms for Light-Duty Greenhouse Gas Emissions Standards," <https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf>

⁵ *Id.*

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our prosecutorial judgment. As Assistant Attorney General Makan Delrahim has made clear, declining to investigate potentially collusive conduct because the collusive objectives might be politically popular would itself reflect inappropriate political consideration in antitrust enforcement.⁶ The Department values public trust in law enforcement, which is reflected in time-tested policies to guard against political interference from outside the Department, whether from other Executive Branch offices, from Capitol Hill, or elsewhere. Maintaining public trust, and more fundamentally enforcing the rule of law, also requires that the Department review possible anticompetitive conduct even if it would be politically unpopular to do so. Indeed, declining to investigate potentially anticompetitive collusive conduct purely out of support for certain policy goals would reflect inappropriate political consideration.

During the September 17, 2019 hearing, you questioned whether the involvement of the State of California in negotiating the terms of an agreement among automakers would exempt it from the antitrust laws. Under well-settled precedent, however, state or federal government involvement in a collusive agreement does not, in and of itself, provide a defense to anticompetitive behavior. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940) (“Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.”). Rather, a state’s involvement would only resolve any otherwise anticompetitive conduct if either the state-action doctrine or the *Noerr-Pennington* doctrine applies.

Both the state-action doctrine and the *Noerr-Pennington* doctrine have limits, and their application will necessarily depend on the particular facts. As the Supreme Court has recognized, the state-action doctrine is not boundless, and does not allow states merely to “cast[] a ‘gauzy cloak of state involvement’ over what is essentially private anticompetitive conduct.” *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985). Indeed, “given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored.” *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (internal quotation mark omitted). Meanwhile, while the *Noerr-Pennington* doctrine protects First Amendment lobbying activities, as the Supreme Court has explained, it does not immunize “private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.” *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

⁶ Makan Delrahim: Popular ends should not justify anti-competitive collusion, USA Today, Sept. 12, 2019, <https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/>

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As you know, antitrust matters raise fact-specific and nuanced questions. That is precisely what investigations are intended to accomplish—answer questions in order to determine whether the antitrust laws have been violated. Through its investigation of the automakers matter, the Division concluded that the facts did not demonstrate a violation of the antitrust laws and accordingly, it closed the matter.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "S. Boyd", with a stylized flourish extending to the right.

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Lindsey Graham
The Honorable Dianne Feinstein

Chair NADLER. Ms. Scanlon?

Ms. SCANLON. Thank you.

Mr. Elias, we have talked a lot about the politicization of the DOJ to serve the President's interests instead of—

Chair NADLER. Your microphone?

Ms. SCANLON. Oh, I am sorry. I am just not close enough.

You testified you believe the DOJ initiated certain investigations of the cannabis in California car industries because those industries were unpopular with the Attorney General Barr and the President and that you believed that this improper targeting undermines the public's perception of the DOJ as a fair administrator of justice.

So, this is essentially an allegation that instead of using the Justice Department to protect the rule of law and the American people, the Attorney General is using the DOJ to pursue the political whims of the President and expending public resources to retaliate against the President's enemies.

Did you try to report those concerns to anyone and, if so, what happened?

Mr. ELIAS. So, I've reported those concerns to the Office of Special Counsel, the Office of the Inspector General, and to Congress and there was a referral by the Office of Special Counsel to the Department. They found the initial review of the facts to be concerning enough that they thought the agency should investigate.

I should clarify, as a technical matter, there's a second whistleblower here and it was her complaint that came in just before mine that was referred, and the Department sent it to the Office of Professional Responsibility which conducted a review and it came back with a report that, to my knowledge, was first circulated last night that I have read and that had a number of issues that I was questioned about by Mr. Collins, Representative Collins earlier.

What's curious about that report is it says that even if the allegations are true, even if these investigations were motivated by animus and not by bona fide law enforcement reasons, then there's still no problem, that that's not a violation of rules or regulations. That's very concerning to me because it seems so self-evident that if your sole motivation is animosity, that is impermissible.

If there is no Rule or regulation, then there's sort of one missing because it's obviously wrong.

Ms. SCANLON. So, essentially, the investigation that occurred didn't address your underlying complaint, which was that these investigations were politically motivated; it just found that no other laws were violated?

Mr. ELIAS. I think that's more or less correct, but it did say that even assuming they were politically motivated, that that's not a problem, which is perplexing to me coming from the Office of Professional Responsibility.

Ms. SCANLON. So, it is kind of like the argument that if the President has the power to pardon someone, it doesn't matter why he has pardoning someone, even if it is an improper use of that power.

Mr. ELIAS. I think that's a great analogy.

Ms. SCANLON. Thank you.

Mr. Zelinsky, you testified about another way that President Trump had weaponized the Department of Justice at the expense of Americans by using the Attorney General to help save his friends from punishment. You referred specifically to the case of Roger Stone, who was convicted on 7 counts of obstructing justice, making false statements to investigators, and tampering with witnesses.

When you reported your concerns that the Department was letting the President's political considerations interfere in the Stone sentencing, what were you told?

Mr. ZELINSKY. As I said in my statement, we reported our concerns on multiple occasions, but we were told that we could be fired if we didn't go along with it and that we were told that this is not the hill to die on.

Ms. SCANLON. Okay. Our U.S. Attorneys take an oath to protect and defend the Constitution and to prosecute without fear or favor, but we have been hearing testimony about attorneys like Mr. Zelinsky and others resigning, rather than violate those principles. I think it is important that the American public know that this is not normal.

Mr. Ayer, you have served in Democratic and Republican Administrations. Have you ever seen this many career officials express alarm about the politicization of the Department with no actions taken? Why is this such a problem?

Mr. AYER. I have not ever seen the number of letters that have been filed by—and I think we're up, we're certainly in the thousands now of people protesting—I've never seen anything remotely like it in my entire life. That's one of the reasons, that's one measure, it's only one. It's one of the reasons I say, I think, I've never in my lifetime been in as great of fear for the future of our rule of law as I am now because it is happening across the board in a lot of areas and the people who know that system and are part of it realize how serious this problem is.

Ms. SCANLON. I mean, I think it is worth noting that where political corruption of the Department of Justice is coming from the top, from the President and the Attorney General, that resignation is the only way that career attorneys can ring the alarm bells and we have to them.

I yield back.

Chair NADLER. The gentlelady yields back.

Mr. Correa?

Ms. Garcia?

Ms. GARCIA. Thank you, Mr. Chair.

The Flynn and Stone case both seem to follow a pattern. Attorney General Barr gives special treatment to the President's friends who break the law.

Mr. Zelinsky, your colleague Jonathan Kravis, who was also assigned to the Roger Stone case, resigned from the Department after 10 years because he said, quote, "he believed that the Department had abandoned its responsibility to do justice in the Roger Stone case."

Mr. Zelinsky, do you agree with that assessment?

Mr. ZELINSKY. I do.

Ms. GARCIA. So, Mr. Kravis wrote that after the Stone case, the Department did the same thing with Michael Flynn; again, putting, quote, "political patronage that hindered the Department's commitment to the rule of law."

Mr. Kravis went on to say that prosecutors are not trained to comment on the sentencing, and it was, quote, "not easy for him to do so."

You also have said it pains you to have to describe these events. As a former judge, I can sympathize. Public servants are trained not to speak out, to let investigations and facts speak for themselves, but the Department's actions were so shocking, such an affront to impartial justice that all of you have been brave enough to come forward and we thank you.

Mr. Kravis explained why, because if Barr is able to get away with all of this, it will, quote, "have lasting damage to our institutions."

I would like to read a copy of his op-ed, which, Mr. Chair, I would like unanimous consent to enter into the record.

[The information follows:]

MS. GARCIA FOR THE RECORD

I left the Justice Department after it made a disastrous mistake. It just happened again.

 [washingtonpost.com/opinions/2020/05/11/i-left-justice-department-after-it-made-disastrous-mistake-it-just-happened-again/](https://www.washingtonpost.com/opinions/2020/05/11/i-left-justice-department-after-it-made-disastrous-mistake-it-just-happened-again/)

Opinion by Jonathan Kravis

Jonathan Kravis was a federal prosecutor for 10 years.

Three months ago, I resigned from the Justice Department after 10 years as a career prosecutor. I left a job I loved because I believed the department had abandoned its responsibility to do justice in one of my cases, *United States v. Roger Stone*. At the time, I thought that the handling of the Stone case, with senior officials intervening to recommend a lower sentence for a longtime ally of President Trump, was a disastrous mistake that the department would not make again.

Last week, the department again put political patronage ahead of its commitment to the rule of law, filing a motion to dismiss the case against former national security adviser Michael Flynn — notwithstanding Flynn's sworn guilty plea and a ruling by the court that the plea was sound.

Since my resignation, I have not commented on the Stone sentencing; it is not easy for me to do so now. Prosecutors are trained to make their cases in the courtroom and let the results speak for themselves.

But I feel compelled to write because I believe that the department's handling of these matters is profoundly misguided, because my colleagues who still serve the department are duty-bound to remain silent and because I am convinced that the department's conduct in the Stone and Flynn cases will do lasting damage to the institution.

First, Roger Stone. He was tried and convicted of obstruction of Congress, false statements and witness tampering, based on evidence that he had lied repeatedly to a congressional committee investigating Russian interference in the 2016 election, and then threatened a witness who could have exposed those lies.

In February, the Justice Department filed a sentencing memorandum, signed by all four prosecutors in the case, recommending a sentence of seven to nine years, within the range set by the U.S. sentencing guidelines. In my experience, the Justice Department staunchly defends sentences within the guidelines range, particularly for defendants (such as Stone) who are convicted at trial, and especially for defendants (such as Stone) who repeatedly demonstrate disrespect for the judicial system.

The next morning, the president posted a tweet criticizing the sentencing recommendation as a “miscarriage of justice.” Later that day, the Justice Department submitted a revised memo revoking the original recommendation and proposing that Stone receive a much shorter sentence. All four career prosecutors who had tried Stone withdrew from the case. I resigned because I was not willing to serve a department that would so easily abdicate its responsibility to dispense impartial justice.

Last week came an equally appalling chapter: the department’s motion to drop the Flynn case. Flynn pleaded guilty to the crime of making false statements in connection with lies he told in an FBI interview about his contacts with the Russian ambassador. Flynn twice admitted under oath that he had committed this crime, and the trial judge issued a lengthy opinion upholding the plea.

Nevertheless, after public criticism of the prosecution by the president, the department moved to dismiss Flynn’s case, claiming that new evidence showed that the plea had no basis. None of the career prosecutors who handled Flynn’s case signed that motion.

In both cases, the department undercut the work of career employees to protect an ally of the president, an abdication of the commitment to equal justice under the law. Prosecutors must make decisions based on facts and law, not on the defendant’s political connections. When the department takes steps that it would never take in any other case to protect an ally of the president, it betrays this principle.

Indeed, the department chose to assign these matters to a special counsel precisely to avoid the appearance of political influence. For the attorney general now to directly intervene to benefit the president’s associates makes this betrayal of the rule of law even more egregious.

The attorney general’s public comments worsened matters. William P. Barr gave nationally televised interviews in which he disparaged the work of prosecutors and agents who handled these cases, criticizing the Stone prosecutors for losing “perspective” and the Flynn team for becoming “wedded to a particular outcome.”

As the attorney general knows, those career prosecutors and agents cannot respond. The department prohibits employees from talking to the media about criminal cases without high-level approval. Department lawyers are ethically bound to protect the confidences of their client. Barr’s decision to excuse himself from these obligations and attack his own silenced employees is alarming. It sends an unmistakable message to prosecutors and agents — if the president demands, we will throw you under the bus.

The dedicated public servants who remain cannot respond publicly to those who claim that the department acted appropriately in these cases. But I can, and I say this. If the department truly acted because of good-faith commitments to legal positions, then where is the evidence of those commitments in other cases that do not involve friends of the

president? Where are the narcotics cases in which the department has filed a sentencing memorandum overruling career prosecutors? Where are the other false-statements cases dismissed after a guilty plea?

There are none. Is that because the only cases in the United States that warranted intervention by department leadership happened to involve friends of the president? Of course not.

The task of repairing this damage will fall to the department's career agents and prosecutors, and it is for them that I write this. Your work of investigating and prosecuting criminal cases is hard, and it becomes even harder when witnesses and jurors start to believe that the Justice Department's handling of these cases is infected by politics. Your service during these times is a credit to the department. And you will be at your posts, serving justice, long after this attorney general is gone.

Ms. GARCIA. He said in his op-ed that he found it so compelling that it echoes the testimony today, Mr. Zelinsky. He said, and I quote, "In the Stone and Flynn cases, the Department undercut the work of career employees to protect an ally of the President, an abdication of the commitment to equal justice under the law."

Prosecutors must make decisions based on facts and law, not on the defendant's political connections; in other words, when the Justice Department makes decisions based not on facts and law, but a defendant's political connections, it betrays our system of justice.

Mr. Zelinsky, do you agree with this assessment?

Mr. ZELINSKY. I agree with the assessment about what the Government needs to do, what it should do, and the acts of—I just want to be very clear, Congresswoman, I am not authorized to, nor do I seek to comment on the developments in the Flynn case.

Ms. GARCIA. Thank you.

Mr. Elias, do you agree with the assessment?

Mr. ELIAS. Would you repeat the question?

Ms. GARCIA. The question is: In the op-ed, Mr. Kravis says that in the Stone and Flynn cases, the Department undercut the work of career employees to protect an ally of the President, an abdication of the commitment to equal justice under the law. Prosecutors must make decisions based on facts and law, not on the defendant's political connections.

So, do you agree with that assessment?

Mr. ELIAS. I think with the general proposition that prosecutors have to make their cases based on their assessments of the facts and the law and not personal connections, yes, I agree with that.

Ms. GARCIA. Okay. Mr. Ayer, do you agree with that assessment?

Mr. AYER. Yes, I do.

Ms. GARCIA. Well, I do, as well, and that is, and what is worse is that what Attorney General Barr did the prosecutors who were brave enough to speak out, he publicly condemned them, despite knowing that they could not defend themselves. Mr. Kravis wrote that these actions, quote, "send an unmistakable message to prosecutors and agents. If the President demands, we will throw you under the bus."

Mr. Elias, what has been the effect on morale to think the Attorney General will, at the President's whim, throw employees under the bus?

Mr. ELIAS. Well, when you look at morale in the Antitrust Division, as reflected in the viewpoint survey, we are arranged 404 out of 420.

Ms. GARCIA. Four hundred and four out of 420?

Mr. ELIAS. Yes, for agency subcomponents.

Ms. GARCIA. So, you are down at the bottom?

Mr. ELIAS. Yes.

Ms. GARCIA. All right. Mr. Zelinsky, how unique is this for a Department to provide special treatment to a favorite friend and ally of the President over the recommendations of career attorneys?

Mr. ZELINSKY. It is, in my experience, unheard of.

Ms. GARCIA. It is unheard of.

Well, it is unheard of, and we have also seen what he has done recently to Berman. The President and this Attorney General have tried to send a warning to anyone who wants to speak out against

the President, to anyone who is willing to stand up to them: We will throw you under the bus.

Well, thanks to the brave testimony of some of our witnesses today, the President's tactics didn't work. The truth was exposed. The truth still matters.

Thank you, Mr. Chair.

I yield back.

Ms. MUCARSEL-POWELL. [Presiding.] Thank you.

Now, Mr. Neguse is now recognized for 5 minutes.

Mr. NEGUSE. Thank you, Madam Chair, and thank you to each of the witnesses for their testimony today.

I want to just first clear something for the record. Attorney General Mukasey, this is not your first time testifying before the House Judiciary Committee; is that correct?

Mr. MUKASEY. I believe that's correct, yes.

Mr. NEGUSE. In fact, when you were Attorney General under George W. Bush, you testified to the Judiciary Committee twice; is that your recollection?

Mr. MUKASEY. Yes, to at least two oversight hearings.

Mr. NEGUSE. If I am not correct—I believe it is correct and you can correct me if I'm wrong—but your predecessor Alberto Gonzales, when he was Attorney General, he testified before the House Judiciary Committee for an oversight hearing; is that correct?

Mr. MUKASEY. I have no idea and I—

Mr. NEGUSE. I can tell you—

Mr. MUKASEY. —I have no basis to challenge that, I just, I remember my own appearances. I don't know about his.

Mr. NEGUSE. I can tell you that it is accurate.

I can also tell you, Attorney General Mukasey, that Attorney General Ashcroft testified before the House Judiciary Committee 4 times for oversight hearings. Attorney General Holder, Attorney General Janet Reno, they all have testified before the House Judiciary Committee.

The only Attorney General who has not in modern times testified before this Committee for an oversight hearing is William Barr; are you aware of that?

Mr. MUKASEY. Yes, and I am also aware of the reason. He was supposed to testify, and that appearance was cancelled by the Chair, I believe, because of the onset of the COVID virus.

Mr. NEGUSE. Well, I will tell you that is not entirely accurate because there were prior requests for the Attorney General to appear before our Committee that declined, but nonetheless, I guess, I would tell you this, Attorney General Mukasey, do you know, or can you name the last Attorney General who declined to appear before the House Judiciary Committee before Bill Barr?

Mr. MUKASEY. No, I don't. I believe—

Mr. NEGUSE. I can tell you who it is. It is Bill Barr when he was Attorney General under President George H.W. Bush.

So, while I appreciate you being here and I certainly respect your service and I think, obviously, our friends on the other side of the aisle decided to call you here so that you could defend the Attorney General, is within their purview, but I think it is important for the Attorney General of the United States to come in before this Com-

mittee and testify. While I am appreciative of the fact that it appears, based on the news today, that the Attorney General will appear before the committee, I think this Committee needs to be prepared to use the compulsory process and inherent contempt, if necessary, to ensure that the Attorney General appears before this committee.

Now, I want to talk a little bit about something that we have not yet discussed today, which is the actions of the Attorney General regarding the peaceful protests in Lafayette Square.

Mr. Ayer, as you are aware, at the direction of the Attorney General, peaceful protesters were forcibly removed from Lafayette Square after federal officers in riot gear fired gas, pepper spray, and stun grenades into the crowd.

Now, Attorney General Barr has claimed this was all preplanned and unrelated to the President wanting a picture on the church steps, but the accounts of many officials contradict that, including the D.C. Police Chief, who stated, and I will quote, "We heard that there was going to be an unscheduled potential movement." Just a few minutes later, our teams on the ground learned that chemical munitions were going to be used. The munitions were deployed minutes later.

The timing, itself, makes clear this was no coincidence, as well. The clearing of the area began just after 6:30 p.m. and President Trump left the White House for the church around 7:02 p.m.

So, Mr. Ayer, would you agree—Ayer [sic], I am so sorry—would you agree, based on the facts that the Attorney General's order to forcibly remove the protesters was not to protect public safety or uphold the rule of law, but so the President could get a photo-op in front of the church on Lafayette Square?

Mr. AYER. Well, I obviously wasn't there and I didn't—I did watch it on TV. I guess I can't go quite that far, but I can go to the point of saying that Mr. Barr's several follow-up discussions have not covered him in glory. He's changed his story. The last thing that I understand is that he admits that he ordered the troop movement, but he said he did it, at least this is what I remember, he said he did it at 2:00 in the afternoon and that the photo-op wasn't until, like you said, early in the evening, and so he couldn't possibly have ordered it in order for the photo opportunity because he didn't know about it at the time; however, he was there at the time.

He obviously could have unordered if he had wanted to. He also made rather strange comments related to what sort of eye irritants were used. He tried to make some meaningful distinction between pepper balls or pepper spray or whatever it is and tear gas on the ground that one wasn't a chemical irritant.

The whole discussion of him, to me—what exactly he ordered when, I'm not sure, but the one thing I'm absolutely sure of is that (A) he was the one that ordered it and (B) his handling of it was such as to give us all enormous basis to distrust everything he says.

Mr. NEGUSE. Well, let me ask the question in this way. In all your years of public service, have you ever seen the Attorney General of the United States order the Park Police to violently clear with tear gas, peaceful protesters?

Mr. AYER. Well, I haven't seen it, but I can't tell you for sure it never happened, but I'm certainly not familiar with it, nor am I so familiar with instances where the Attorney General himself has assumed the role of sort of field marshal ordering police and troops around. I've never seen that. I'm not saying it necessarily hasn't happened, but I'd love someone to tell me.

Ms. MUCARSEL-POWELL. Thank you, Mr. Ayer. Your time is up.

Mr. NEGUSE. I yield back.

Ms. MUCARSEL-POWELL. Thank you.

Before I recognize Representative Buck, let me just remind every member of this Committee and people that are walking into this room, that the guidelines have been set forth by the Office of the Attending Physician and the House speaker, that Members need to be wearing masks, and Chair stated earlier very clearly that Members will not be recognized if they are not wearing masks.

Now, Mr. Buck, I will recognize you, but Mr. Jordan, I find it incredibly disrespectful that you have been sitting here next to Chair without wearing a mask. You are putting other people's lives and their families in danger.

Mr. JORDAN. Every time I speak with Chair, I put a mask on. I maintain social distance.

Ms. MUCARSEL-POWELL. Mr. Buck, you are now recognized.

Mr. JORDAN. The unmasking this Committee should be concerned about is the unmasking that took place at the end of the Obama Administration.

Ms. MUCARSEL-POWELL. Mr. Buck, would you like your 5 minutes?

Mr. BUCK. I yield to Mr. Jordan.

Mr. JORDAN. I thank the gentleman for yielding.

That is the unmasking we should be concerned about, 20–38 different people, 49 different times, 6 people at Treasury, 6 people at Treasury unmasking Michael Flynn makes no sense.

I do think it is important to get back on the record here, the Attorney General was scheduled. As Mr. Mukasey said, the Attorney General was scheduled to be here. The Attorney General was scheduled to be here in March, and I believe he is coming next month, so he will be here to answer all of our questions.

I wish the Committee would be as focused on getting Inspector General Horowitz here, as I said in my opening statement.

Let's go back to where I was earlier, Mr. Mukasey. I want to look at something we learned today and view it in the context of that statement from Mr. Priestap where he said, what is our goal, to get him fired, to get him prosecuted, to get him to lie?

I want to view it in light of what we have learned today that took place just a few weeks prior to that. January 4, 2017, we learned today that former President Obama, James Comey, Sally Yates, Joe Biden, and Susan Rice discussed the transcripts of Michael Flynn's calls and how to proceed further against him. Mr. Obama himself directed, quote, "the right people to investigate Flynn"—I am reading from the supplement that was in front of the Court last night, which helped them, make their decision—this, this caused former FBI Director Comey to acknowledge the obvious, General Flynn's phone calls with Ambassador Kislyak appear legitimate.

Together Peter Strzok's notes, it appears that the vice-president then personally raised the idea of the Logan Act. We have already discussed the Logan Act and how ridiculous that was and the vice-president raising that at the time that he did.

What I want to look at is this idea that Comey says there is nothing wrong with the phone calls between Mr. Flynn and Ambassador Kislyak and yet 20 days later, and then also, at that time, the FBI was ready to drop any proceedings, any case against General Flynn, but they decided not to. They decided to do basically what Mr. Priestap said, they decided to go after him, try to get him to lie, try to set him up.

20 days later, Jim Comey, again, his words, not ours, Jim Comey sneaks two guys into the White House, I think you referenced this in your opening statement, sneaks two guys into the White House, doesn't follow proper protocol, doesn't notify the White House counsel. That is the part that alarms me, and I think should alarm any citizen.

Your thoughts on all that?

Mr. MUKASEY. Well, I've seen the summary of the Strzok notes that you mentioned. That just came out today, I believe and the timing, as you say, is disturbing.

Mr. JORDAN. Yeah, it sure it. It sure is.

Mr. Zelinsky, you mentioned those two names, Mr. Cooney and then give me the other name one more time, because I want to ask you a few questions about these individuals.

Mr. ZELINSKY. Yes, sure, Congressman.

I believe the name that you're looking for is the former first assistant for the U.S. Attorney's Office. As I indicated earlier, his name is Alessio Evangelista.

Mr. JORDAN. Evangelista, okay.

Now, how many times, how many conversations did you have with these two individuals about the Stone case?

Mr. ZELINSKY. I just want to be clear before I answer that, these are not all the supervisors that I spoke with.

About the Stone case, I would say I spoke to them dozens, if not, 50 times.

Mr. JORDAN. How about the sentencing recommendation in the Stone case?

Mr. ZELINSKY. At least a dozen times.

Mr. JORDAN. After February 10th, after you filed it, or before?

Mr. ZELINSKY. Prior to February 10th—I'm sorry, you're asking prior to the filing—

Mr. JORDAN. No, no, no. Look, you filed it on the 10th, there is a supplement the next day, the judge decides the supplement is the right way to go, not your approach.

After February 10th, you said you spoke to Mr. Cooney and Mr. Evangelista about this, and they indicated that it was politics that were driving it.

I am asking you how many conversations did you have with these two individuals after the 10th about the sentencing issue?

Mr. ZELINSKY. Congressman, I want to be very careful because I want to truthfully answer your questions to the best of my abilities.

I did not have any conversations with Mr. Evangelista following the filing of our memo. The conversation that I outlined in my statement had, was with the head of the Fraud and Public Corruption Section.

Mr. JORDAN. Okay. That is when they told you that it was politics that was driving the decision to change the sentencing recommendation; is that right?

Mr. ZELINSKY. That was one of the times. I had previously been told—

Mr. JORDAN. Who did they get the information from that they passed on to you? Who told them that it was politics driving it?

Mr. ZELINSKY. I just want to be clear, again, Congressman, when you say, “them,” it was the head of the Fraud and Public Corruption Section—

Mr. JORDAN. Okay. Who told him or her?

Mr. ZELINSKY. —I talked to about the conversation.

Mr. JORDAN. Who told Mr. Cooney, whoever that person is?

Mr. ZELINSKY. I know that he was in meetings with senior leadership. I do not know the source of his information.

Mr. JORDAN. So, you don’t know where he got it. He told you. You didn’t talk to Barr, you didn’t talk to the DAG, you didn’t talk to Mr. Shea, but he told you and, therefore, it has to be true.

Chair NADLER. [Presiding.] The time of the gentleman has expired.

Ms. McBath?

Ms. MCBATH. Thank you, Mr. Chair.

I just have to say that I am extremely troubled by the events that occurred in our country and more so by what we have been hearing today. I am heartened that our Nation has decided that they want to come together, but to come together, we need trust and we need trustee in our justice system.

Some of my colleagues have suggested that you, our witnesses today, have come forward to testify for political reasons and I do not believe that to be the truth. I believe that you are brave, independent public servants who have stepped forward to simply tell the truth. So, I would like to give each of you an opportunity, very briefly, just to tell us why you are testifying today.

Mr. Elias, how long have you been a public servant and what other roles have you held?

Mr. ELIAS. Thank you, Congresswoman.

I have been a public servant since 2006 and I’ve held a variety of roles at the DOJ, including two stints as a trial attorney, a Special Assistant in the Office of Operations, I was in the associates office with a few different roles there, as well.

Ms. MCBATH. Thank you.

So, why did you feel after all your years of public service that it was so important for you to come and testify before us today?

Mr. ELIAS. I looked at what was happening, which was unlike anything I had ever seen before, and it didn’t feel like a good faith calling of balls and strikes that I had been used to seeing. I care very much about the antitrust laws, their even-handed enforcement protecting consumers, and also the Institution of the Antitrust Division, where I have spent my entire legal career.

When I saw these abuses, I thought that the public should get to know about them, so that's why I stepped forward.

Ms. MCBATH. Thank you, Mr. Elias. Thank you so much.

Mr. Zelinsky, I would like to ask the same questions to you. You have spent most of your career in the Department of Justice. Why did you feel so strongly about complying with our subpoena and coming before us today, as well?

Mr. ZELINSKY. Because I took an oath to do so.

Ms. MCBATH. Thank you.

Mr. Ayer, most of us are very familiar with your very extensive career in public service and we are grateful to you for your service, but can you briefly explain why you felt the need to come forward today.

Mr. AYER. Yes. So, in the 10 or 11 years that I was in the Department in 4 different positions, I was really inspired by the experience I had in a place where people really went to work to do the right thing and processes had been put in place, a system was working, people had a great deal of respect for each other and for the purpose and it worked very well.

In the time I was there, I kind of moved up through various positions and ended as Deputy Attorney General and it became clear fairly quickly really why it worked so well and it was because of everybody being dedicated and these procedures being in place.

I've known Bill Barr actually for about 4 years. I've never known him well, but I've always known that he was a person who had this idea that he really thought the President ought to be virtually an autocrat. I don't know where he got it, but that's his view.

Ms. MCBATH. Uh-huh.

Mr. AYER. I was fearful when he got nominated this time, given that President Trump would like to be an autocrat, too, and when he began doing the things he started doing, I became extremely concerned, so I—

Ms. MCBATH. Okay.

Mr. AYER. —have done what I could in terms of writing articles, and I will continue to.

Ms. MCBATH. Thank you so much for that.

What concerns me about the testimony that we have heard today is that career public servants are telling us, what they are telling us, they are supporting facts and evidence and corroborating testimony that the Attorney General is pursuing cases based on political vendettas and not to protect Americans.

I hope that the Attorney General would be here today and I hoped to be able to ask the Attorney General about his actions, attempting to reverse the ACA. I had hoped to ask him about what he plans to do to prevent gun violence from increasing during this crisis. I had hoped to ask him about the plans to ensure that all Americans have access to affordable health care.

He did not show up, so we need, now more than ever, we need to come together, but we also need answers. It is in times like these that when we are in crisis like this, these are the kinds of times that define us. These are the moments that define us.

So, Mr. Chair, I ask unanimous consent to submit a letter for the record from 33 former Antitrust Division employees who write that

Mr. Elias is, and I quote, “a person of integrity and a person who speaks the truth and fights to do what is right,” end quote.

They also State that Mr. Elias is, and I quote again, “respected throughout the Department of Justice for his candor and his commitment to justice,” end quote.

Chair NADLER. Without objection.

[The information follows:]

MR. McBATH FOR THE RECORD

June 24, 2020

The Honorable Jerry Nadler
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Nadler and Ranking Member Jordan:

We are former professionals of the Antitrust Division of the U.S. Department of Justice who write in support of John Elias. We know John to be a dedicated civil servant and a person who has committed his career to pursuing the mission of the Antitrust Division: protecting competition for the benefit of all Americans.

John is respected throughout the Department of Justice for his candor and his commitment to justice. We know John to be a person of integrity and a person who speaks the truth and fights to do what is right. We are sure he will carry these principles with him in his appearance before your Committee.

Sincerely,

David Altschuler, former assistant chief, Defense, Industrials & Aerospace Section
Juan Arteaga, former Deputy Assistant Attorney General
Bill Baer, former Assistant Attorney General
Belinda Barnett, former Deputy Chief Legal Advisor- Criminal
Michael Billiel, former trial attorney
Kathleen Bradish, former assistant chief, International Section
Christopher H. Casey, former Deputy Associate Attorney General
Jillian E. Charles, former attorney advisor, Competition Policy & Advocacy Section
Jade Eaton, former trial attorney
Susan Edelheit, former trial attorney
David Gelfand, former Deputy Assistant Attorney General
Caroline Holland, former Chief Counsel for Competition Policy and Intergovernmental Relations
Angela L. Hughes, former trial attorney
Donna Kooperstein, former chief, Transportation, Energy & Agriculture Section
J. Robert Kramer, former Director of Operations and General Counsel
Gail Kursh, former Deputy Chief, Competition Policy & Advocacy Section
Kristen Limarzi, former chief, Appellate Section
Creighton Macy, former chief of staff

Jeffrey Martino, former chief, New York Office
 Daniel McCuaig, former trial attorney
 Eric Meiring, former acting chief, Washington Criminal II Section
 Aviv Nevo, former Deputy Assistant Attorney General for Economic Analysis
 Anne Newton McFadden, former counsel to the Director of Civil Enforcement
 Ann O'Brien, former assistant chief, Competition Policy & Advocacy Section
 Nancy Olson, former Deputy General Counsel- Civil
 Sonia Pfaffenroth, former Deputy Assistant Attorney General
 Anant Raut, former counsel to the Assistant Attorney General
 Nancy L. Rose, former Deputy Assistant Attorney General for Economic Analysis
 Jonathan Sallet, former Deputy Assistant Attorney General
 Brent Snyder, former Deputy Assistant Attorney General
 John Snyder, former counsel to the Assistant Attorney General
 Gregory Werden, former Senior Economic Counsel
 Robert D. Young, former trial attorney

Chair NADLER. The gentlelady yields back.

Mr. Stanton?

Mr. STANTON. Thank you very much, Mr. Chair.

There is keep concern that the Attorney General is using the Department of Justice to punish the President's personal and political adversaries. Such actions are a blatant abuse of our constitutional system.

Perhaps even more troubling is that in doing so, the Department of Justice's resources are not being used to protect the American people. Our witnesses have provided evidence here today that the Attorney General is pursuing meritless investigations simply to appease the President.

Mr. Elias, in your testimony, you mentioned the Department of Justice's investigation into four automakers in California who was trying to implement stricter air-quality emission standards than those that the Environmental Protection Agency was going to adopt; in other words, you wanted to help clean our air.

Is it correct to State that the Department of Justice used immense resources, including dozens of attorneys and staff, to pursue these investigations, even when career staff told leadership that there was no need to further pursue these investigations?

Mr. ELIAS. So, the DOJ did use dozens of attorneys for the cannabis investigations that are also featured in my complaint. The emissions investigation was a smaller staff. Yes, public resources were used in pursuit of that investigation.

Mr. STANTON. Does that seem like an appropriate allocation of resources to you, to commandeer immense Department resources for investigations that career officials said were no longer necessary?

Mr. ELIAS. That appeared to be, to me, a gross misuse of resources between these various investigations and that's why I made that allegation to the Inspector General and asked him to investigate gross misuse of resources.

Mr. STANTON. Would it be fair to say that these investigations detracted from the legitimate work these attorneys could and should have been doing?

Mr. ELIAS. If these attorneys are working on that, that does take them away from anything else that they could be doing that would potentially further the mission of the Antitrust Division.

Mr. STANTON. Using Department resources to appease others' activities fails to protect American consumers; in fact, such actions actively harm Americans by weakening the Department's ability to prosecute legitimate antitrust claims.

The American people would much rather see the Department of Justice investigate issues of grave, grave concern to us all, for example, companies seeking to price gouge Americans by making them pay more for essential health products in the middle of a pandemic. Back in April, my colleague Congressman Ruben Gallego and I brought to light a price-gouging chain taking place in Arizona. The City of Phoenix Fire and Police Departments were being charged nearly 600 percent more than the usual prices for N95 masks during a pandemic.

Such egregious and completely unacceptable behavior requires the Department of Justice to use all its resources to enforce our

laws. What I find so troubling is that while the Department of Justice is spending time on illegitimate investigations, it could be working to fight real injustices in our system. Americans deserve a Department of Justice that serve the people and treats all of defendants equally under the law, regardless of who they know or their political affiliations, and above all, they deserve a Department of Justice that follows the law.

The testimony today continues to reiterate the urgent need for the Attorney General to appear before this committee. I look forward to having Attorney General Barr here in July because Congress and the American people have serious questions that need immediate answers.

I yield back.

Chair NADLER. The gentleman yields back.

Ms. Dean?

Ms. DEAN. Thank you, Mr. Chair.

I thank all the testifiers, all 4 of our testifiers for coming before us. I admire your sense of duty. I admire your giving of your time and your public service. America is counting on you. They are counting on Congress. They are counting on you. I thank you for coming before us.

Mr. Ayer, I would like to go into a little bit more, something that Jamie Raskin, Representative Raskin brought up. The testimony today that most of you have delivered has confirmed what we have feared; that the Department of Justice is being used by the President and the Attorney General as a partisan political tool. It appears that Attorney General Barr's actions towards States among the coronavirus pandemic is part of this perversion of justice. We are in a pandemic. We are in a political year, an election year.

On April 17th of this year, the President tweeted, and I quote, "Liberate Minnesota!" exclamation point. Quote, "Liberate Michigan!" exclamation point. In all caps, "LIBERATE VIRGINIA AND SAVE YOUR SECOND AMENDMENT; IT IS UNDER SIEGE," end quote.

Shortly thereafter, Attorney General Barr publishing a memo appointing the Assistant Attorney General for civil rights and the United States Attorney for the Eastern District of Michigan to investigate States stay-at-home. Needless to say, that broad order included Minnesota, Michigan, and Virginia; the states the President had politically targeted.

Mr. Ayer, Professor Ayer, is it standard practice for an Attorney General to bring action against states based on a President's political exclamations?

Mr. AYER. No, of course it's not, and I think in this instance, it's particularly unsuitable when the nature of the problem is really a genuine local problem that varies from place to place.

The patterns that you point out of Mr. Barr acting sometimes right after, but in any event, totally in a consonant manner with, somewhat intemperate at times, political expressions, usually tweets by the President, it doesn't just happen in this area. It's happening in a lot of different areas.

The one I'm the most concerned about is the one that relates to this Obama-gate nonsense that's being spewed by the President and Bill Barr is echoing it, now in TV appearances that are run-

ning about every 10 days. He goes on Fox News, and he talks about his investigation and how people are going to get charged, and I don't know what's next.

Ms. DEAN. I have seen that. I fear what is next.

Even more concerning is that AG Barr has made clear that he will use his powers to strong-arm states into doing what he wants, regardless of the law. White House health experts publicly emphasize that removing stay-at-home orders prematurely, these are the health experts, prematurely, could lead to avoidable death and suffering. Barr has, as my colleague raised, threatened to jawbone governors, that is his word, who follow these public health recommendations.

Mr. Ayer, in your written testimony you explain that quote, and I will quote you, "conduct limitations to protect the public safety in a health crisis is uniquely within the province of the State and municipal government and their choices that are highly local and tragically difficult."

Did you believe that the Department of Justice review of state's challenges, Attorney General Barr's challenges stay-at-home orders was motivated by a legitimate concern or constitutional overreach?

Mr. AYER. Well, I think it was constitutional overreach. I think it was a solution to a problem that didn't exist because the President wanted that interference to occur. That's what I think.

Ms. DEAN. It is certainly not my grandfather's Republican party who believed states' rights were very important to protect, particularly, in the area of public health.

You even said that Chief Justice Robert wrote that our Constitution principally entrusts the safety and health of the people to the politically accountable officials to the states to guard and protect; is that correct?

Mr. AYER. That is right.

Ms. DEAN. At the height of the global pandemic that shuttered 50 states, the President and the Attorney General conspired to use the might of the Department of Justice to punish states who took necessary actions.

With my remaining time, just very briefly, do you believe Mr. Barr is fit to continue serving as Attorney General, yes or no?

Mr. AYER. No, I absolutely don't.

I wrote an article about 6 or 8 months ago saying that and it is gotten nothing but worse.

Ms. DEAN. Finally, Mr. Zelinsky, I, too, thank you for being with us. I have to tell you it is not lost on me that in this Committee we have hit a new low when Members on the other side of the aisle, mostly Members who will refuse to wear a mask, attempt to paint you, they failed, but attempt to point you in some negative light for staying in a remote location to protect a newborn child.

I will say to you what we believe on this side of the aisle is thank you for your duty, for your service, for protecting your family and your newborn baby, and I think the only thing we should have in regard to your reason for not being here is congratulations on the birth of your baby.

With that, I yield back.

Chair NADLER. The gentlelady yields back.

Ms. Mucarsel-Powell?

Ms. MUCARSEL-POWELL. Thank you, Mr. Chair.

Mr. Ayer, I want to focus on Barr's handling of investigations into election interference. In Florida, we have serious concerns about the security of our elections.

The Russian Government hacked Florida's election system in 2016 and it is crucial that we ensure the integrity of the election process in November. Attorney General Barr is not doing anything to make this happen. He called the special counsel's investigation into Russia's interference, quote, "one of the greatest travesties in American history" and said that investigators were trying to, quote, "sabotage the presidency," end quote.

Let's be clear, the special counsel's investigation confirmed that Russia attacked our elections. Several people were indicted, including Members of the Trump campaign for lying about their involvement into Russia.

The intelligence community and the Senate Intelligence Committee also confirmed the Russian hacking. Even Attorney General Barr said, quote, "I am confident that Russians attempted to interfere in the election," end quote.

Mr. Chair, I would like to enter into the record this op-ed published in USA TODAY by Attorney General Barr on February 19, 2020.

Chair NADLER. Without objection.
[The information follows:]

MS. MUCARSEL-POWELL FOR THE RECORD



OPINION This piece expresses the views of its author(s), separate from those of this publication.

Barr, Wray and top security officials: Help us protect the 2020 elections and your vote

Our state-based system protects us from election disruption. You can help by being on guard against social media disinformation and divisive messages.

William Barr, Christopher Wray, Chad Wolf, Joseph Maguire and Christopher Krebs
Opinion contributors

Published 5:00 a.m. ET Feb. 19, 2020 | Updated 1:43 p.m. ET Feb. 19, 2020

Election season is in full swing, and Americans have already begun to cast their votes in the 2020 presidential primaries. As we exercise this precious right, we must be mindful that foreign interference and malign influence in our elections are still threats to our democracy.

Combating these threats requires a whole-of-society approach that deserves the attention of all Americans. While these threats to our elections are perennial, our efforts to defend our democracy are unwavering. As leaders of our government, we are committed to defending our democracy, but we need your help, too.

Safeguarding the sanctity of your vote is paramount. States have made significant progress since 2016, but as long as the threat remains, there is work to be done. We have yet to identify any activity designed to prevent voting or change votes. However, we remain watchful of any malicious activities from cybercriminals and from foreign actors like Russia, China and Iran.

The states' autonomy over elections makes our elections more resilient. The diversity of election systems among the states, multiple checks and redundancies in those systems, and post-election auditing all make it extraordinarily difficult for foreign adversaries to disrupt or change vote tallies.

States have plans in place, like provisional ballots, to enable a reliable election to proceed in the case that interference does occur. While the states have primary responsibility for administering elections under our Constitution, our agencies continue to provide them with support by identifying best practices for voting systems, sharing threat information and offering services and resources.

Several of our agencies are working directly with campaigns and candidates to educate them about ways to help keep their networks secure. We are mobilized and working with states to identify cybersecurity threats to their own systems and to campaigns, and we are better able to warn them about threats today than ever before.

You can play an important role, too:

► First, you can participate in the process. All Americans should be undeterred by concerns of attempted foreign interference and have full confidence that a vote cast is a vote counted. The best way to understand how your elections are secured is to engage with your state and local officials, or to volunteer to serve as a poll worker and help support the election process yourself. Don't fall prey to disinformation about your election — such as when, where or how to vote — from untrusted sources. State and local government websites are the authoritative sources for this information.

► Second, we encourage candidates, election officials, technology companies and others involved in elections to report suspicious cyber activity to us. The FBI and the Cybersecurity and Infrastructure Security Agency have set up election-focused websites that host additional information about election security and provide avenues to report concerns.

► Third, an informed and discerning public is a resilient public. As consumers of all types of media, you can help separate facts from falsehoods by seeking trustworthy sources for information and by evaluating what you read or watch with a critical eye. Some foreign governments have a track record of meddling in our affairs by attempting to shape public opinion and voter perceptions. Foreign actors have done this by hacking and dumping private campaign and candidate information on the internet and spreading disinformation and divisive messages on social media.

Often, we see foreign adversaries amplifying messages some Americans create and share with each other, in an effort to stoke hostility among us and make us appear more divided than we are. They seek to undermine our trust and confidence in each other, our democratic society and democracy itself.

To combat this threat, we continue to strengthen partnerships with technology and social media companies and share more information than ever before. Those companies are taking more responsibility for preventing foreign adversaries from weaponizing their platforms. Additionally, we must remain aware that foreign adversaries continue to spread disinformation to discredit politicians and views that are counter to their interests and ambitions.

We cannot prevent all disinformation, foreign propaganda or cyberattacks on our infrastructure. However, together, we can all help to mitigate these threats by exercising care when we share information and by maintaining good cyber hygiene to reduce the risks that malicious cyberattacks will succeed.

We can all play a role in sustaining our democracy and securing our elections from foreign interference. Americans can rest assured that our agencies' efforts to defend our republic are unwavering, and we will work diligently to secure our elections, both in 2020 and beyond.

William Barr is attorney general of the United States. Christopher Wray is director of the FBI. Chad Wolf is acting secretary of the Department of Homeland Security. Joseph Maguire is acting director of national intelligence. Christopher Krebs is director of the Cybersecurity and Infrastructure Security Agency.

Ms. DEAN. Thank you.

In the statement with FBI Director Wray, Barr lists Russia as a current threat. It says that an informed and discerning public is a resilient public, meaning we need to tell the public about Russia's threat.

AG Barr's words mean nothing because he is not here to tell the public anything. He and the President would rather attack the investigations into interference than protect our elections and prevent Russian interference.

In March, AG Barr dropped the two-year-long prosecution of a Russian company charged with conspiring to defraud the U.S. Government. The company was organizations a social media campaign to interfere in the Presidential election and is run by a man referred to as Putin's chef, because of his proximity to Vladimir Putin.

Mr. Ayer, does it concern you that the Attorney General is dropping investigations of Russian companies who have harmed us?

Mr. AYER. Well, I don't know the facts of the cases that you're talking about, so I can't comment specifically. It does bother me a lot that there—I'm not aware that there's very much being done to deal with the problem of Russian interference in our election and it seems to me there ought to be just an enormous priority on that, just as there should be an enormous priority on figuring out how people are going to be able to vote with the coronavirus.

Ms. DEAN. Thank you, Mr. Ayer.

So, I'd like to see the priorities somewhere other than the wrong direction, which is some of the areas he's talking about.

Ms. DEAN. Thank you.

The Attorney General knows that Russia is a threat, but he is dropping prosecutions against Russians who attacked us. What message does it send to other foreign threats like China or Iran if our Attorney General won't hold Russia accountable?

Mr. Ayer, you wrote in your written testimony that AG Barr was, quote, "actively undermining and subverting the role of independent fact-finders who were put in place precisely so that the public can have trust in our justice system."

Can you briefly explain this to us?

Mr. AYER. Well, it's a couple of different levels of activity. One is, you know, the statements he made with regard to the Muller investigation, basically whitewashing the findings with regard to obstruction; that was the biggest single part. He just misleads us about it.

In December when the IG investigation by Horowitz of the Russian-interference investigation came out and they found that it was properly predicated and there was no bias in the oversight of it, Barr immediately went public, and I think went on the media and announced he disagreed with that.

So, he actively intervenes and undermines conclusions, but he also acts to replace, to override, he has these processes that he's put in place, including his own investigation, duplicative investigation of the Russian interference, and then these little things that come along like doing intake of information from Rudy Giuliani; well, we'll just handle that in-house. We won't let the career people deal with that.

Ms. DEAN. Yes.

Mr. AYER. There's a bunch of those.

Ms. DEAN. I share your concern.

This should not be about party politics. The stakes are way too high, and we should all be focused on protecting the integrity of our elections, Mr. Ayer, but when the integrity of law enforcement is corrupted, when men place themselves above the rule of law, nations fail.

I can tell you that because I have witnessed it firsthand in Latin America; governments filed with corruption devolve into chaos when politics are injected into the justice system. People lose their faith in their leaders, and I don't want that to happen in the United States of America.

William Barr's actions has taken the Department of Justice down that path. His conduct is corrupt, dangerous, and it must be stopped.

I yield back.

Chair NADLER. The gentlelady yields back.

Ms. Escobar?

Ms. ESCOBAR. Thank you, Mr. Chair.

I want to close today by going back to what happened in Lafayette Square. On June 1st, Americans were shocked as they watched an incredible scene unfold. Here, in Washington, DC, peaceful protesters in Lafayette Square came together in protest, demanding change after watching graphic video of George Floyd's murder.

They came together in protest demanding change because of our country's horrific history of police brutality linked to racism, and on June 1st, while they peacefully stood in Lafayette Square, these peaceful protesters were overcome by mounted law enforcement and tear gas.

Protesters, Members of the media, Americans watching this at home were all stunned and wondered why. Moments later, as the President sauntered over to St. John's Episcopal Church, the story became clearer.

We now know that in Lafayette Square, Attorney General Barr's Department engaged in these tactics, forcibly removing protesters with tear gas and pepper spray, using stinger-ball grenades, not to uphold the rule of law, not to protect Americans, but because the President wanted to pose for a picture; in other words, Attorney General Barr used the powers of the Justice Department to help the President's campaign film an ad.

The President, rather than understand why he should feel shame for this, praised the horrific treatment of these protesters, tweeting, quote, "the protesters, agitators, anarchists, Antifa, and others were handled very easily by the Guard, D.C. Police, and SS, great job," end quote.

There was immediate nationwide outrage, including condemnation of this egregious abuse of power by Archbishop Wilton Gregory, General Jim Mattis, former Joint Chief of Staff Chair Martin Dempsey, and Chair Colin Powell, and a number of others.

It couldn't be clearer that Attorney General Barr, as the President's chief enabler is willing to lie and corrupt the Department so that he can protect and promote the President's personal and political interests at all costs.

We have heard today how Barr weaponized the Department of Justice to retaliate against states the President doesn't like.

We have also heard today how the Department is granting special favors to defendants who break the law, all because the U.S. Attorney was afraid of President Trump, and he has reason to be afraid.

We heard today what happens to prosecutors who stand up, like Mr. Zelinsky, and say, this is wrong. They are told to get in line, or you will lose your job, and we have seen how true that actually is.

U.S. Attorney Geoffrey Berman said his office would conduct its investigations without fear or favor; investigations that we know go to the heart of the President's inner circle, and what happened to him? He was fired.

We have confirmed today what we have known all along, the Attorney General is willing to corrupt our government, ignore our rule of law and do whatever it takes to keep Trump in power, including subverting the upcoming elections.

Barr will lie to the American people if it helps the President achieve his goals. He cannot and should not get away with this.

Mr. Ayer, I would like to end by asking you, with your decades in office as a public servant, what happens to our democracy if we do not hold Barr accountable? Can you describe what the effect is on the American people's perception of the Justice Department is our Attorney General is allowed to place the President's wishes above our rule of law?

Mr. AYER. Well, I don't want to get too apocalyptic, but I think if you want just a real-life microcosm of it, I think you go back and you look at what happened in Watergate. In Watergate, we had a real failure. We had, and I won't go through all the facts, and some of you remember it and some of you don't, but the Justice Department failed, and the government justice system failed and we were very, very lucky to have President Ford nominate Edward Levi as the Attorney General and he saw the problem.

The problem is one of trust. Not surprisingly when the Justice Department and the justice system becomes untrustworthy, and that's the problem that we're talking about here today, when it becomes untrustworthy, guess what? People don't trust it.

When people lose trust in the Government, and they lose trust in the law, then you don't have law, then you have lawlessness, and you go from there and you know what ends up happening. So, it's very important that we recognize what's happening now.

What's happening now is much worse than what happened in Watergate, much worse. It's across the board, it's a systematic effort to undo the checks that were put in place in Watergate and others that existed in the Constitution, and we need to do something about it. People need to stand up now and demand that something be done about it.

This guy has got to go, and we need to get back on the track of having a system of justice where we care about doing it right and being fair even-handed.

Ms. ESCOBAR. Thank you, Mr. Ayer.

Sadly, this hearing demonstrates that Mr. Barr isn't the only enabler of President Trump. He, unfortunately, has way too many. Thank you.

Mr. Chair, I yield back.

Chair NADLER. The gentlelady yields back.

This concludes today's hearing. We thank all our witnesses for participating.

Without objection, all Members will have 5 legislative days to submit additional written records, written questions for the witnesses, or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 4:29 p.m., the Committee adjourned.]

APPENDIX

10 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Barr—and Office of Professional Responsibility’s Opinion

by Ryan Goodman

June 26, 2020

On Wednesday, the House Judiciary Committee heard from a whistleblower inside the Department of Justice’s Antitrust Division alleging serious abuses committed by Attorney General William Barr. To blunt the force of the whistleblower’s complaint, Rep. Doug Collins (R-Ga) entered into the record a [letter](#) from the Office of Professional Responsibility (OPR), which investigates allegations of misconduct by employees and which, in this case, rejected the whistleblower’s complaint. The letter had been circulated just the evening before, according to the testimony by the whistleblower, John Elias.

But OPR’s explanation for why it rejected the complaint is “not an exoneration; it’s an indictment,” a former Antitrust Division attorney told *Just Security*. That assessment is consistent with other leading antitrust experts who responded to an inquiry I sent them. Indeed, I was surprised to find that *every one of the ten* experts was alarmed by the underlying allegations and several were highly critical of the OPR’s handling of the matter. Bill Baer, who served as assistant attorney general in charge of the Antitrust Division, wrote that the OPR memo is “neither persuasive nor conclusive.” Douglas Melamed, professor of law at Stanford Law School, wrote, “The short and conclusory OPR opinion, signed by an official appointed by Mr. Barr, does not come close to justifying the alleged conduct.” Jonathan Baker, professor of law at American University, Washington College of Law, detailed why “OPR’s cursory analysis and conclusions threaten to undermine merger enforcement specifically and antitrust enforcement more broadly.”

In addition to the congressional inquiry, the Department of Justice’s Inspector General and the Office of Special Counsel are engaged in [ongoing investigations](#) into Elias’s allegations.

Here is the basic prompt I sent to each expert whose answers are provided in full below.

The prompt:

A career employee of the Justice Department John Elias, in a whistleblower complaint and in testimony to Congress, [alleges](#) that the Antitrust Division (ATR) opened investigations against the cannabis industry at the direction of Attorney General William Barr without a sufficient factual basis and “centered not on an antitrust analysis,” but instead due to the attorney general’s “personal dislike of the industry.”

During the House Judiciary Committee hearings on Wednesday, Rep. Doug Collins (R-Ga) entered into the record a 2-page [letter](#) from the Justice Department’s Office of Professional Responsibility (OPR) which rejected the complaints by Mr. Elias and another unnamed whistleblower.

The OPR described the factual allegations to include:

“Specifically, two anonymous whistleblowers made allegations that the Antitrust Division (ATR) ... conduct[ed] pretextual investigations of, and placing onerous demands on, merging companies in the cannabis industry through the issuance of Second Requests, even though such mergers presented no competitive concerns.”

“The submissions added an allegation that ATR, at the direction of the Attorney General’s Office, placed these demands on merging cannabis companies in order to slow the growth of the cannabis industry due to DOJ leadership’s animosity towards the industry.”

The OPR and Antitrust Division concluded that even if the allegations were all true, those alleged facts would not violate any relevant laws, regulations, rules, policies, or guidelines. The OPR letter states:

“ATR responded with a categorical denial of the allegations, and argued that even if those allegations were true, there would be no violation of any laws, regulations, rules, policies, or guidelines.”

“OPR agrees with ATR’s interpretation of the latitude it has in issuing Second Requests. Accordingly, even if the whistleblowers’ allegations were true, OPR finds that ATR’s Second Requests would not have violated any relevant laws, regulations, rules, policies, or guidelines.”

On the substance of the allegations, the OPR writes:

“[1] it was reasonable for ATR to seek additional information from the industry through its Second Request process. [2] In addition, contrary to the whistleblowers’ allegations, the documents provided by ATR reflect significant, and successful, negotiations among ATR and the cannabis companies concerning narrowing the scope of the Second Requests. [3] Furthermore, the internal memoranda recommending the closure of the investigations reflect that ATR staff conducted a significant amount of analysis regarding the competitive impact of the proposed mergers, and often explained how the actions of state regulators offset any competitive concerns.”

I asked some of the most highly respected antitrust law experts across the country for their views on Mr. Elias’s allegations compared to the OPR letter. Here’s what they said.

Former Antitrust Division attorney:

The OPR letter falls far short of exonerating Department of Justice leaders from the whistleblowers' claims that they opened antitrust investigations for political, as opposed to legitimate law enforcement, reasons. First, John Elias testified about political interference into investigations concerning the cannabis and automotive industries, but the OPR letter does not even mention the automotive investigation, much less conclude that it was handled properly. Second, the letter describes an OPR investigation that appears to have been limited to reviewing written submissions from the whistleblowers and the Antitrust Division, without any interviews of the witnesses who could best explain why the antitrust investigations were opened, namely Attorney General Barr and Assistant Attorney General Delrahim, or other officials who participated in the decision-making process. Third, while the Antitrust Division's stated reason for conducting in depth investigations into the cannabis industry – a need to become more familiar with a part of the economy with which it had no prior experience – might justify opening a few of the investigations, Mr. Elias claims that Second Requests were issued in ten different investigations, and it is hard to understand why the Antitrust Division would not have gained enough experience from reviewing the first few transactions to recognize quickly that the later ones raised no serious competitive concerns, especially if the early investigations involved “a significant amount of analysis regarding the competitive impact of the proposed mergers,” as the OPR asserts. Fourth, OPR's conclusion that “even if the whistleblowers' allegations were true,” the cannabis investigations would not have violated any relevant policies ignores the parts of the Antitrust Division Manual instructing that Second Requests should be issued only when “a transaction might raise competitive problems and more information is needed to evaluate it” and then should be “tailor[ed] . . . to the transaction and its possible anticompetitive consequences.” Finally, and most troubling of all, the OPR's reasoning gives the Antitrust Division carte blanche to investigate any future transaction for political reasons, essentially green-lighting the weaponization of Second Requests for political purposes. That's not an exoneration; it's an indictment.

Bill Baer (@billbaer50), visiting fellow at the Brookings Institution, served as assistant attorney general in charge of the Antitrust Division of the Justice Department from 2013 to 2016 and as director of the Bureau of Competition at the Federal Trade Commission from 1995 to 1999:

I found the Office of Professional Responsibility memo to the Deputy Attorney General's office about the John Elias whistleblower allegations less than satisfying. Here are a few of my concerns and questions. First, OPR states that the Antitrust Division had wide latitude to use the Second Request merger review process to understand an industry – cannabis – about which it knew little. But as I recall, the Division's operating manual demands that before opening even a preliminary investigation the staff must determine whether there is reason to believe there is an antitrust violation worth looking at. Indeed, in my years at DOJ and FTC I never saw a Second Request recommended, much less issued, without some demonstration of an underlying antitrust risk. OPR doesn't tell us whether that front-end standard was met here. Did they even ask? Second, even if "understanding an industry" might justify the first detailed investigation, what about the next nine, each of which consumed significant Antitrust Division resources and reportedly found no legitimate antitrust concern with any of the proposed transactions? Doesn't that fact pattern reinforce the whistleblower's evidence that DOJ leadership's animus toward the cannabis industry motivated this unprecedented series of investigations? Third, how can you evaluate Elias' claims of improper motive without talking to the people involved? The OPR two-page memo doesn't address that issue at all. It is, sad to say, neither persuasive nor conclusive.

Jonathan B. Baker (@jbbecon), Research Professor of Law, American University, Washington College of Law:

Whistleblower John Elias alleged that DOJ's Antitrust Division launched ten in-depth investigations (nine second requests and one civil investigative demand) into proposed cannabis industry mergers—not because the Division had concerns about a potential reduction in competition in the industry (in other words, concerns that prices would go up and output would go down) but because Attorney General Barr does not like the industry and wanted to impede its growth. DOJ's Office of Professional Responsibility says that even if the allegations are true, doing so was justified because the Antitrust Division has wide (apparently almost limitless) latitude to issue second requests under the HSR Act. OPR's conclusion that launching second request investigations solely on the basis of an Attorney General's animus toward an industry is somehow consistent with the rules of professional responsibility cannot be correct. Even if it were, the Antitrust Division's actions are indefensible and embarrassing as a matter of public policy.

DOJ leadership defended the in-depth investigations in part by claiming that they needed to learn more about the cannabis industry. Yet the Antitrust Division staff frequently is called upon to investigate new industries without issuing burdensome second requests. In fact, Division policy requires staff to identify potential theories of competitive harm from a merger, based on a preliminary investigation, before recommending a second request. Here, though, DOJ political leadership insisted upon in-depth investigations of not one but ten proposed mergers of firms with trivial market shares, apparently without any plausible theory of competitive harm. In two cases, the merging firms did not even compete.

If what Elias alleges is correct, these second requests were not good faith efforts to enforce the antitrust laws. Rather, they inappropriately imposed substantial burdens on firms simply because of the Attorney General's personal animus, and the Attorney General and Assistant Attorney General did not fulfill the executive branch's constitutional responsibility to faithfully execute the law. OPR's two-page memo steers clear of these issues.

OPR's cursory analysis and conclusions threaten to undermine merger enforcement specifically and antitrust enforcement more broadly. If the Antitrust Division can misuse its compulsory process authority by targeting firms for reasons other than a good faith belief that the antitrust laws may have been violated, firms are more likely to force the Division to defend second requests in court instead of

complying voluntarily. If the Attorney General can instruct the Antitrust Division to issue second requests to target disfavored firms in this case, what is to stop the Justice Department from issuing abusive second requests simply because their CEOs contributed to the campaigns of the president's political rivals or the merger threatened his financial interests? And if it is acceptable that the cannabis merger decisions were made in bad faith, how can the public trust that any of the Antitrust Division's enforcement actions serve the public interest?

Michael A. Carrier (@profmikecarrier), Distinguished Professor, Rutgers Law School:

This is not the first time that claims of politics in antitrust have been raised. But the breadth of cases implicated seems to be unique. Until now, the most concerning mergers—those receiving “second requests”—have raised the greatest competitive concern, typically reflected in high market shares. Issuing a disproportionate number of second requests to mergers that, based on longstanding bipartisan antitrust principles, do not threaten competitive harm (like one resulting in a market share of 0.35 percent!) but that are in an industry the Attorney General “did not like” is concerning. (And the same goes for an investigation into automakers that entered into an arrangement with California on emissions standards).

The acknowledgment of political interference raises questions about past decisions like the [challenge](#) of the AT&T/Time Warner merger and [refusal to challenge](#) the Disney/Fox merger. And, looking to the future, it raises questions about “[mature investigations](#)” of Google and Amazon, as contrasted with an inquiry into Facebook that “[is not real at all](#).”

Andrew Chin, Paul B. Eaton Distinguished Professor of Law, University of North Carolina School of Law:

The DOJ's merger guidelines ensure that the scarce time and attention of its staff attorneys are focused on the industry consolidations that most threaten the efficient functioning of the nation's economy. They also allow business leaders to predict and plan for the range of structural changes they may face in the marketplace. As John Elias's testimony demonstrates, the President's tweeting of winners and losers has progressed from destabilizing short-term stock prices to drowning out the DOJ's deliberations about how companies grow through competition and acquisition, and creating crises of confidence among those business leaders who just want to play by the rules.

Harry First, Charles L. Denison Professor of Law, NYU School of Law:

In his written statement, John Elias, a former acting Chief of Staff to the head of the Antitrust Division, Makan Delrahim, described two actions by the Antitrust Division that are both unusual and disturbing. One involved the use of the Division's authority to pursue costly investigations of mergers in the cannabis industry; the other, an investigation of a group of automakers with less than 30% of the market for an agreement with California on a framework to reduce vehicle greenhouse gas emissions. The former got rolling (sorry!) because Attorney General Barr doesn't like the marijuana industry; the latter, because President Trump didn't like what the auto companies were doing (they were undercutting his own plan to allow for increased emissions).

As is well known, the Antitrust Division makes "second requests" for merger information in very few cases, just about 2% of all notified mergers in 2018—45 in all. Once it makes a request, it will likely challenge the merger. A recent study shows that in 2018, the Division challenged 82% of the 45 mergers that received a second request. But in the cannabis merger investigations, the Division made 10 second requests and challenged not a one. The OPR report does not mention these data and provides no explanation for this aberrant enforcement behavior except to say that the behavior broke no "laws, regulations, rules, policies, or guidelines." The fact that the Division has the legal discretion to investigate a target, though, does not tell us that this discretion has been properly exercised.

Not included in the OPR report is any investigation of the auto emissions agreement. But the timing of the investigation was obvious, coming a day after the President tweeted his displeasure, and the lack of legal merit in the investigation was as well. Even if the auto makers acted together (which it turned out they didn't), the conduct was most likely protected because it was part of an approach to a government regulator; even if not protected, there would likely have been an efficiency argument; and even if that argument were not availing, the parties likely lacked sufficient market power to cause a rise in price, the touchstone for antitrust liability. Predictably, the investigation was finally terminated, nearly five months after it started, but not before Delrahim wrote an [op-ed](#) in USA Today trumpeting his investigation.

I was an attorney in the Antitrust Division during the Nixon Administration's investigation of a series of acquisitions that ITT made in the late 1960s. On orders from President Nixon, the Division dismissed its pending Supreme Court petitions in those cases. Part of Nixon's motivation seemed to be a disagreement on policy, but part apparently stemmed from a contribution that ITT made to the Republican National Committee. When this conduct became public it was widely condemned and formed part of the argument for Nixon's impeachment.

Elias's story is worse. This is not the normal politics that sometimes crops up in antitrust enforcement. It's the politics of grudge and personal preference. In the ITT case, the head of the Antitrust Division did not willingly bend to the president's whim; in these cases, it looks like the head of the Antitrust Division has. Unfortunately, the cost of this conduct—beyond the cost to the parties and the diversion from needed enforcement efforts—is to cast doubt on all the Antitrust Division has done or will do in this administration.

Eleanor Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law:

The testimony of John W. Elias before the US House Committee on the Judiciary revealed two matters in which the Justice Department's Antitrust Division opened and conducted lengthy antitrust investigations against firms that apparently did not violate the antitrust laws. In both matters the staff reportedly opposed the investigation or had no time to consider its merits, and the Chief Executive of the United States had political reasons to bully the targets. In the one case, the Antitrust Division undertook full scale reviews of 10 proposed mergers in the cannabis industry, although the mergers were of very small firms in a very fragmented market and there was no way they could create market power. These investigations comprised 29% of all full scale reviews in year 2019 and were so extensive that the Division had to pull in staff from other vital areas. The other matter concerns California's announcement that four automakers had agreed with it to meet emission standards stricter than the EPA was expected to adopt. President Trump was enraged by the deal, as he tweeted. The next day the Antitrust Division opened an investigation without a staff recommendation. After investigations the cases were dropped.

These incidents are a facial affront to the rule of law and to the integrity of our judicial system. The Department of Justice is literally supposed to be a department of justice. That means that litigation decisions are expected to be made on their merits and not to serve the personal political ends of politicians. The United States has prided itself on due process values. It preaches the values to the rest of the world. The Antitrust Division preaches the values to the antitrust community of the world. Bringing litigation for political ends tarnishes reputations.

Politically-motivated investigations not only amount to harassment of innocent targets and disguised surveillance of them. It undermines trust going forward even when there is a good case against the defendant. When the Trump Justice Department sued to stop AT&T's acquisition of Time Warner, many progressives heralded the lawsuit as one that should be brought; yet a cloud hung over the lawsuit, for the decision to sue did not align with the administration's business-friendly philosophy and President Trump seemingly had a vendetta against CNN for its unfavorable coverage of him, and CNN was owned by Time Warner. The Trump Justice Department is now investigating big tech platforms. Trump has condemned certain of the platforms, and one in particular whose owner runs major media. If antitrust lawsuits are brought the firms are sure to cry: Foul politics —

even if experts find the antitrust concerns real and urgent. Politicization and its appearance can turn a department of highest reputation into one of questionable legitimacy.

Douglas Melamed (@dougmelamed), Professor of the Practice of Law, Stanford Law School:

Mr. Elias' allegations regarding investigations of proposed mergers in the cannabis industry at the behest of Attorney General Barr, if correct, describe conduct that constitutes a corrupt and impermissible use of the power of the US Government. Law enforcement agencies may properly use their powers to investigate only if there is a reasonable basis to believe that the investigation will uncover violations of the laws the agencies are authorized to enforce, and the scope and burdens of the investigation should be limited to those reasonably necessary for that purpose. The short and conclusory OPR opinion, signed by an official appointed by Mr. Barr, does not come close to justifying the alleged conduct.

Christopher Sprigman (@CJSprigman), Professor of Law, New York University School of Law:

Used properly, antitrust law can help maintain fair, competitive markets. But antitrust can also be misused as a political cudgel, with governments launching investigations of politically-disfavored companies and even industries. John Elias's testimony yesterday alleges that the Trump Administration has misused antitrust law to mete out political retribution. Specifically, Elias alleges that Attorney General William Barr directed the Antitrust Division to launch investigations of a series of mergers in the cannabis industry. Because the cannabis industry was known to be de-concentrated and competitive, these investigations were not expected to turn up evidence that any of the mergers would create the kind of market power that could lead to competitive harm. Elias says that the real reason for the investigations was to penalize and distract firms in an industry William Barr personally dislikes.

I've read Elias's testimony and a letter from the DOJ Office of Professional Responsibility (OPR) finding that no wrongdoing had occurred. Given the esteem in which both the Antitrust Division and the OPR has previously been held within the DOJ—and I am a former DOJ Antitrust Division lawyer myself—I would ordinarily be inclined to discount Elias's allegations. But here, I am forced to admit that there is at least some black smoke and possibly a fire. Let me try to explain why.

First is the fact that the Antitrust Division launched *ten* merger investigations in the cannabis industry over just a couple of years. The Division suggests that one reason it was investigating these mergers was to learn about the industry. That does not ring true. You don't do ten investigations, and issue burdensome "Second Requests" for information to the merging firms in almost all of them, just to get your bearings. Perhaps I would not be too surprised if the Division issued a narrow Second Request in one cannabis industry merger, confirmed the understanding of the Division staff that the industry was unconcentrated, and then stopped there. But all these investigations in a short time, and all of them apparently initiated by Antitrust Division political appointees and without either initiative or buy-in from the Division's career antitrust lawyers, smells really fishy.

Second is the fact that the Antitrust Division does not appear at any time to have formulated a possible theory of how these mergers would harm competition. Complying with Second Requests is burdensome, and the Division as I knew it

would *never* issue one without some significant competitive concern already in mind. Note that during my time at the Division (during the Clinton and G.W. Bush administrations), we initiated many more merger investigations, and issued a significantly larger number of Second Requests, compared with Trump’s Antitrust Division. But we did not send Second Requests until we’d satisfied ourselves that a merger created the potential for competitive harm, and that our account of how that harm might occur was at least plausible.

Finally, I’m also confused, and a bit alarmed, by OPR’s conclusion that “[e]ven if the whistleblowers’ allegations were true, OPR finds that ATR’s Second Requests would not have violated any relevant laws, regulations, rules, policies, or guidelines.” That conclusion is at odds with everything I know about how merger investigations, and, in particular, the Second Request process, is supposed to work. And it’s not just me saying this. Look at the [Antitrust Division Manual](#), page III-39. That page is where the description of the Second Request process begins. You’ll see that the entire thing is premised on the idea that *staff* drives the Second Request process, and that Second Requests are issued only where there is some chance that a proposed merger would cause competitive harm in a well-defined antitrust market.

When I worked at the Division that is how I understood the process. And, as the Manual suggests, before we would issue a Second Request *we would develop a theory—at least a working theory—of possible competitive harm*. I should say that I was an appellate lawyer, and not directly responsible for issuing Second Requests. But I worked for the Division’s “front office” and was assigned on a number of occasions to investigative teams to help them work out their initial theories of possible competitive harm that would precede issuing a Second Request, so I have direct experience with this process.

I fear that OPR’s letter might be yet another example of what we’re seeing a lot these days: the use of narrow legalism to excuse serious violations of the norms of governance. Even in a place as rule-bound as the Department of Justice, you just cannot distill every important norm into a rule. But if Elias’s allegations are true, then the Antitrust Division’s conduct in the cannabis investigations has been exactly the opposite of what every Antitrust Division staff lawyer would understand an honest antitrust investigation to be.

I hope Congress will conduct a thorough investigation of Elias's allegations. One thing they might look at is the Antitrust Division/Federal Trade Commission "clearance process"—i.e., the process that decides whether the Antitrust Division or FTC is going to take the wheel for a particular merger investigation. There is no mention in either Elias's testimony or the OPM letter of how the cannabis investigations were routed to DOJ, but, it would be helpful to know if the Federal Trade Commission saw any real competitive concern with the mergers. It would be telling if the FTC staff, like the Antitrust Division staff in Elias's account, felt that the mergers posed no real antitrust concern.

Randy M. Stutz (@randallstutz), Vice President of Legal Advocacy, American Antitrust Institute:

The rabbit goes into the hat when the OPR memo applies the proper standard for issuing Second Requests to the whistleblower's allegations of pretextualism. It is true, and critically important, that the agencies must have wide latitude in issuing Second Requests, including (and sometimes especially) when a competitive threat is still nascent or incipient. But obviously this latitude does not extend to issuing pretextual Second Requests. When pretextual antitrust enforcement has been uncovered in the past, it has always been greeted as a scandal.

The most infamous example of this is the Nixon DOJ's antitrust case against the International Telephone & Telegraph Corporation (IT&T), which was resolved with a notoriously weak settlement that looked more like a giveaway than a serious effort to address competitive problems. It later came to light that, shortly before the settlement, IT&T donated \$400,000 to the Republican National Committee that helped reelect Nixon in 1972. The episode wasn't written off as an exercise of agency discretion; instead Congress passed the Tunney Act, which, to this day, requires the DOJ to submit to federal judicial review when it files an antitrust complaint in federal court and opts to settle instead of litigate.

When the OPR memo concludes that no policies would be violated even if the whistleblower allegations are true, it is best read as speaking to the issuance of Second Requests in circumstances where competitive concerns may appear to be remote. If the memo were read to suggest that *pretextual* Second Requests are perfectly okay, that would be antithetical to the agency's basic mission. As Assistant Attorney General Delrahim put it in [a 2018 speech](#), "the Department of Justice is the only the only agency in the federal government with a moral imperative in its name."

Image: John Elias, a career official in the Justice Department's antitrust division, is sworn in before the House Judiciary committee hearing on "Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence", on Capitol Hill on June 24, 2020 in Washington DC. (Photo by SUSAN WALSH/POOL/AFP via Getty Images)

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