

**Congress of the United States**  
**Washington, DC 20515**

September 18, 2020

The Honorable Michael E. Horowitz  
Inspector General  
Department of Justice, Office of the Inspector General  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Dear Inspector General Horowitz:

We write to ask that you open an emergency investigation into whether U.S. Attorney General William Barr, U.S. Attorney John Durham, and other Department of Justice (“DOJ”) political appointees are following DOJ’s longstanding policy to avoid taking official actions or other steps that could improperly influence the upcoming presidential election. We also request that you evaluate the authority and scope under which U.S. Attorney Durham is operating, as Attorney General Barr has only provided vague and shifting statements about the purpose and scope of the investigation.

We are concerned by indications that Attorney General Barr might depart from longstanding DOJ principles to take public action related to U.S. Attorney Durham’s investigation that could impact the presidential election. Under longstanding DOJ policy, the Attorney General is expected to refrain from commenting on an ongoing investigation. Attorney General Barr and U.S. Attorney Durham have made several public comments that could violate this Department policy and related guidelines.<sup>1</sup> Attorney General Barr has signaled repeatedly that he is likely to allow DOJ to take prosecutorial actions, make public disclosures, and even issue reports before the presidential election in November. Such actions clearly appear intended to benefit President Trump politically. Specifically, Attorney General Barr has indicated that he would consider taking such steps in the Durham investigation—including the issuance of a report or other summary—within 60 days of the upcoming election. These concerns are even more pressing in light of the resignation of Assistant U.S. Attorney Nora Dannehy, who reportedly resigned

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<sup>1</sup> In April 2020, for example, Attorney General Barr characterized the investigation into Russian interference in the 2016 presidential election—an investigation conducted initially by the FBI and subsequently by Special Counsel Robert Mueller III and that led to the indictment or conviction of 34 people and three companies—as “one of the greatest travesties in American history.” *See* Attorney General Barr’s Fox News interview with Laura Ingraham (Apr. 10, 2020). These and other impermissible comments on an open criminal investigation followed Attorney General Barr and Mr. Durham’s public rejection in December 2019 of some of the central findings of your report concerning certain aspects of the FBI’s investigation of Russian interference in the 2016 election. In a striking break with precedent, the Attorney General publicly mischaracterized your conclusion that the decision to open the investigation was properly predicated, claiming “[t]he Inspector General’s report now makes clear that the FBI launched an intrusive investigation of a U.S. presidential campaign on the thinnest of suspicions that, in my view, were insufficient to justify the steps taken.” *See* Statement by Attorney General William P. Barr on the Inspector General’s Report of the Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation (Dec. 9, 2019). Mr. Durham, in a serious breach of protocol for a U.S. Attorney, also sought to undermine your report, stating “we advised the Inspector General that we do not agree with some of the report’s conclusions as to predication and how the FBI case was opened.” *See* Statement of U.S. Attorney John H. Durham (Dec. 9, 2019).

due to political pressure from Attorney General Barr on the investigative team to produce a report before the election.<sup>2</sup>

DOJ's *Justice Manual* states that "DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations," and further provides that "DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed."<sup>3</sup> The Hatch Act prohibits a federal employee from using "official authority or influence for the purpose of interfering with or affecting the result of an election."<sup>4</sup> At DOJ, the law has been understood to prohibit DOJ employees from using their authority "for the purpose of affecting election results."<sup>5</sup>

A DOJ memorandum provides that "prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party."<sup>6</sup> As you noted in your June 2018 report reviewing various actions by the Federal Bureau of Investigation ("FBI") in advance of the 2016 election, the Department has a longstanding practice "to avoid overt law enforcement and prosecutorial activities close to an election, typically within 60 or 90 days of Election Day."<sup>7</sup> Attorney General Barr himself had previously strongly supported a strict interpretation of this policy.<sup>8</sup>

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<sup>2</sup> Edmund H. Mahony, *Nora Dannehy, Connecticut Prosecutor Who Was Top Aide to John Durham's Trump-Russia Investigation, Resigns Amid Concern About Pressure From Attorney General William Barr*, Hartford Courant (Sept. 11, 2020).

<sup>3</sup> U.S. Dep't of Justice, *Justice Manual*, Rule 1-7.400, last revised Apr. 2018. Paragraph C contains an exception for public comment "[w]hen the community needs to be reassured that the appropriate law enforcement agency is investigating a matter, or where release of information is necessary to protect the public safety" subject to the approval of the appropriate U.S. Attorney or Assistant Attorney General, neither of which would appear applicable in the present instance.

<sup>4</sup> 5 U.S.C. §7323(a)(1) (2020).

<sup>5</sup> Eric Holder, Attorney General, U.S. Dep't of Justice, Memorandum for all Department Employees, Election Year Sensitivities, Mar. 9, 2012 at 2.

<sup>6</sup> Loretta Lynch, Attorney General, U.S. Dep't of Justice, Memorandum for all Department Employees, Election Year Sensitivities, Apr. 11, 2016 at 1. See also Michael Mukasey, Attorney General, U.S. Dep't of Justice, Memorandum for all Department Employees, Election Year Sensitivities (Mar. 5, 2008); Eric Holder, Attorney General, U.S. Dep't of Justice, Memorandum for all Department Employees, Election Year Sensitivities (Mar. 9, 2012).

<sup>7</sup> Office of Inspector General, U.S. Dep't of Justice, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, Jun. 2018 at 16.

<sup>8</sup> During his nomination hearing, Mr. Barr testified he "completely" agreed with the conclusions reached by then Deputy Attorney General Rod Rosenstein in the memo justifying the firing of former FBI Director Comey which cited his violation of the guidance laid out by previous Attorneys General regarding investigations during an election season. See *Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Attorney General of The United States: hearing before the S. Comm. on the Judiciary*, 116th Cong (2019); See also Ryan Goodman, *Bill Barr's Hidden Truths About Justice Department's Rule of Forbearance in an Election*, Just Security (Aug. 31, 2020). Attorney General Barr also supported the policy when he served as Attorney General under President George H.W. Bush. At that time, Mr. Barr agreed that it would be improper for a U.S. Attorney's Office to take any overt step prior to the 1992 presidential election in connection with the Whitewater Savings and Loan investigation, even though Bill Clinton—then a candidate for President—was not at that time considered a target. When Independent Counsel Lawrence Walsh supplemented a previous indictment against then Defense Secretary Caspar Weinberger shortly before the 1992 presidential election in the Iran-Contra matter, Mr. Barr even went so far as to refer Mr. Walsh's actions to the criminal division for possible prosecution. Mr. Barr's concerns were shared by Senate

A series of high ranking former Department officials have also confirmed that prosecutors should not take overt investigative and prosecutorial actions or disclosures in the run up to an election if there is a possibility the action could impact the election, even if a candidate or a proxy is not the subject or target.<sup>9</sup>

With potentially devastating consequences for our democracy, Attorney General Barr appears to have changed his position and no longer supports the longstanding DOJ policy of refraining from taking overt actions or disclosures in the run up to an election if there is a possibility the action could impact the election. During an April 2020 interview, Attorney General Barr explained that he now interprets election sensitivity policies only to apply to investigative or prosecutorial actions specifically targeting candidates or their close proxies.<sup>10</sup>

The Attorney General's vague answers and apparent departure from precedent come in the context of DOJ's apparent failure to follow your 2018 report's recommendations. In particular, two recommendations appear relevant to Attorney General Barr's conduct, as well as any report that Mr. Durham may issue:

- We recommend that the Department and the FBI consider adopting a policy addressing the appropriateness of Department employees discussing the conduct of uncharged individuals in public statements.
- We recommend that the Department consider providing guidance to agents and prosecutors concerning the taking of overt investigative steps, indictments, public

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Judiciary Committee Republicans, including Senator Chuck Grassley, who formally requested an independent counsel investigation into Mr. Walsh's actions. *Id.*

<sup>9</sup> See *inter alia* interviews with Chris Mattei, former Chief of the Financial Fraud & Public Corruption Unit, U.S. Attorney's Office, Dist. of Conn. ([b]ecause this [forbearance] policy aims to steer DOJ clear of elections generally, it does not apply only to DOJ actions towards candidates and their inner circle.); Jennifer Rodgers, former Deputy Chief Appellate Attorney, U.S. Attorney's Office for Southern Dist. of NY (forbearance policy "encompass[es] any actions that would affect an election, not just actions against a candidates personally" citing a series of legal actions that were brought well in advance of relevant elections). Ryan Goodman, *Bill Barr's Hidden Truths About Justice Department's Rule of Forbearance in an Election*, Just Security (Aug. 31, 2020).

<sup>10</sup> Hugh Hewitt, *Attorney General William Barr on the Crisis*, Hugh Hewitt Show (Apr. 21, 2020). The Attorney General's new view even surprised his interviewer.

Hewitt: And so it would not matter, in your view, if there is an investigation, and the day before the election, someone is indicted?

Barr: Well, you know, I think in its core, the idea is you don't go after candidates. You don't indict candidates or perhaps someone that's sufficiently close to a candidate, that it's essentially the same, you know, within a certain number of days before an election. But you know, as I say, I don't think any of the people whose actions are under review by Durham fall into that category.

Hewitt: That's big news to me. I had assumed that they would be in the category of people that could not be indicted given the obvious connection to President Trump, but I'll take the news and I'll put it away.

announcements, or other actions that could impact an election.<sup>11</sup>

On June 11, 2018, the Department responded to your office that it “concur[s]” in those recommendations.<sup>12</sup>

For these reasons, we ask that you conduct an emergency review examining the following issues related to Attorney General Barr’s actions and U.S. Attorney Durham’s work:

1. Whether the statements, any directives given, or other actions taken by Attorney General Barr related to U.S. Attorney Durham’s investigation comply with Department policy, procedures, guidance, or other practice, including with the *Justice Manual*, relevant memoranda by Attorney General Barr and predecessors, and the practices identified in your 2018 report regarding DOJ and FBI actions preceding the 2016 presidential election relating to an ongoing investigation or election year sensitivities;
2. Whether the Department implemented the recommendations on election year sensitivities in your 2018 report regarding DOJ and FBI actions preceding the 2016 presidential election;
3. If U.S. Attorney Durham issues a report in advance of the 2020 election, how this report and any statements or other actions by U.S. Attorney Durham comply with Department policy, procedures, guidance, or other practice, including with the *Justice Manual*, relevant memoranda by Attorney General Barr and predecessors on election year sensitivities, and the practices identified in your 2018 report regarding DOJ and FBI actions preceding the 2016 presidential election;
4. Whether and to what extent the Department has implemented the recommendations from your 2018 report regarding DOJ and FBI actions preceding the 2016 presidential election, and to what extent the implementation of—or failure to implement—those recommendations has impacted the actions of Attorney General Barr and U.S. Attorney Durham related to U.S. Attorney Durham’s investigation;
5. The legal authority under which U.S. Attorney Durham has operated in this investigation, including complying with any scoping memorandum or similar documents, and whether such legal authority, if any, allows any future actions that U.S. Attorney Durham takes pursuant to the investigation, including issuance of a report or any criminal or civil legal proceedings; and
6. Whether, apart from regulations authorizing the public release of a report by a duly-appointed Special Counsel,<sup>13</sup> a Department prosecutor has the authority to issue a public report about a subject who has not yet been charged in a federal court and the basis for

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<sup>11</sup> Office of Inspector General, U.S. Dep’t of Justice, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, Jun. 2018 at XIV.

<sup>12</sup> *Id.*, at Attachment A.

<sup>13</sup> *See* 28 CFR § 600.8-9.

such authority.

Our request that you investigate these matters while Mr. Durham's investigation remains ongoing falls well within the ambit of past Office of Inspector General precedent. In 1997, the Office of Inspector General investigated allegations of wrongdoing within the FBI laboratory in the midst of the prosecution and then trial of Oklahoma City bomber Timothy McVeigh.<sup>14</sup> And when terminating U.S. Attorney Geoffrey Berman in the Southern District of New York, Attorney General Barr himself authorized your office to investigate any claims of improper interference in ongoing SDNY investigations.<sup>15</sup>

Few actions would prove more damaging to public confidence in the integrity of the DOJ and our democratic process than the perception that federal prosecutorial power can be used to prejudice a pending investigation or influence an upcoming election. As such, we believe it is imperative that this matter be immediately investigated, that you inform our Committees of your decision to open an investigation, and that you report the results promptly to our Committees.

Thank you for your prompt attention to this urgent matter and your continuing commitment to transparency and accountability on behalf of Congress, the Department of Justice, and the American people.

Sincerely,



Jerrold Nadler  
Chair  
House Committee on the Judiciary



Adam B. Schiff  
Chair  
House Permanent Select Committee on Intelligence



Carolyn B. Maloney  
Chair  
House Committee on Oversight and Reform



Zoe Lofgren  
Chair  
House Committee on House Administration

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<sup>14</sup> Richard A. Serrano, *FBI Issued Flawed Bombing Analysis, U.S. Probe Finds*, L.A. Times, Mar. 22, 1997.

<sup>15</sup> Letter to Geoffrey S. Berman, from William Barr, Attorney General, U.S. Dep't of Justice, Jun. 20, 2020.

cc: The Honorable Jim Jordan, Ranking Member, House Committee on the Judiciary

The Honorable Devin Nunes, Ranking Member, House Permanent Select Committee on Intelligence

The Honorable James Comer, Ranking Member, House Committee on Oversight and Reform

The Honorable Rodney Davis, Ranking Member, House Committee on House Administration