

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

October 19, 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 request that your office conduct an emergency review of recent actions by the Department of Justice (DOJ) that raise serious concerns about whether they were intended to influence the upcoming presidential election to benefit the reelection campaign of President Donald Trump. These actions include public statements by David Freed, the U.S. Attorney for the Middle District of Pennsylvania, and recent changes to DOJ's longstanding election non-interference policy.

We are concerned that these actions by the Department are contrary to important longstanding policy and may violate the Hatch Act. These actions are also contrary to the recommendations put forth by the Inspector General's Office in its review of the Department's actions related to the 2016 election and represent a failure by the Department, despite a written commitment to your office, to implement changes that would prevent its actions from interfering in our elections.

**I. The Actions of the U.S. Attorney for the Middle District of Pennsylvania**

On September 22, 2020, the Office of District Attorney for Luzerne County issued a public statement indicating that the office had been notified "regarding issues with a small number of mail-in ballots which were received by the Luzerne County Board of Elections" and that, after consulting with the U.S. Attorney's Office, federal authorities would lead an inquiry at her request.<sup>1</sup>

Two days later, on September 24, 2020, U.S. Attorney David Freed announced that his office had begun investigating issues with mail-in ballots at the Luzerne County Board of Elections. His initial public statement on September 24<sup>th</sup> went into an unusual amount of detail about an ongoing investigation, stating that nine military ballots had been discarded and recovered, and that all had been cast for President Trump.<sup>2</sup>

Later that same day, Freed's office issued a revised statement, noting:

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<sup>1</sup> Press Release, Office of the District Att'y, Luzerne County, PA, Sept. 22, 2020, <https://twitter.com/salavantis/status/1308531277168082946>.

<sup>2</sup> See Devlin Barrett, *Justice Dept. statement on mail-in ballot investigation appalls election law experts*, WASH. POST, Sept. 24, 2020; Zach Montellaro, *DOJ announcement on Pennsylvania ballot investigation baffles election experts*, POLITICO, Sept. 24, 2020.

Investigators have recovered nine ballots at this time. Some of those ballots can be attributed to specific voters and some cannot. Of the nine ballots that were discarded and then recovered, 7 were cast for presidential candidate Donald Trump. Two of the discarded ballots had been resealed inside their appropriate envelopes by Luzerne elections staff prior to recovery by the FBI and the contents of those 2 ballots are unknown.<sup>3</sup>

Also on that same day, U.S. Attorney Freed sent a letter to the Luzerne County Board of Elections, which was then made public by the Department, stating that “the inquiry remains active” but that “based on the limited amount of time before the general election and the vital public importance of these issues, [he would] detail the investigators’ initial findings.”<sup>4</sup> Attorney General Barr reportedly briefed President Trump on the matter before the Department issued its statements publicly announcing the inquiry’s existence.<sup>5</sup>

Despite the preliminary nature of the investigation in Luzerne County, President Trump’s re-election campaign seized upon the upcoming public announcement of an investigation as a campaign issue. In fact, before U.S. Attorney Freed made his public statement on September 24, President Trump appeared to reveal the existence of the investigation on Fox News saying “They found six ballots in an office yesterday in a garbage can. ... [T]hey had Trump written on it, and they were thrown in a garbage can.”<sup>6</sup>

On September 30, 2020, Pennsylvania Secretary of State Kathy Boockvar confirmed the investigation was ongoing but said that the discarding of the ballots did not appear to be the result of fraud.<sup>7</sup>

The Department’s conduct with respect to this investigation is concerning and may violate several Department policies:

- U.S. Attorney Freed publicly announced the existence of an ongoing criminal investigation contrary to longstanding, general Department policy.<sup>8</sup>

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<sup>3</sup> Press Release, U.S. Dep’t of Justice, U.S. Att’y’s Office for the M.D. Pa, Sept. 24, 2020: “Revised Statement of U.S. Attorney Freed On Inquiry into Reports Of Potential Issues With Mail-In Ballots.”

<sup>4</sup> Letter to Shelby Watchilla, Director of Elections, Luzerne County Bureau of Elections, from David J. Freed, U.S. Att’y M.D. Pa, U.S. Dep’t of Justice (Sept. 24, 2020). The findings detailed in the letter do not much go beyond those mentioned in the U.S. Attorney’s statement, mainly that nine military ballots had been discarded and recovered; that seven of the ballots “when discovered by investigators were outside of any envelope” and that “[t]hose ballots were all cast for presidential candidate Donald Trump”; that two of the military ballots “that had been discarded were previously recovered by elections staff, reinserted into what appeared to be their appropriate envelopes, and then resealed”, and that “the votes cast on those two (2) ballots are unknown”; and that lastly “it appears that three (3) of the nine (9) recovered ballots can be potentially attributed to specific voters. Six (6) of the ballots were simply removed and discarded, and cannot be attributed to a specific voter at this time.”

<sup>5</sup> Christina A. Cassidy & Mark Scoloro, *Probe into ‘discarded’ ballots becomes campaign outrage fuel*, AP, Sept. 26, 2020.

<sup>6</sup> Michael S. Schmidt, Katie Benner, and Jim Rutenberg, *Trump Pushed False Claims of Voter Fraud as Justice Dept. Moved to Investigate Matter*, N.Y. TIMES, Oct. 9, 2020; Philip Bump, *What we know about those discarded Trump ballots in Pennsylvania*, AP, Sept. 25, 2020.

<sup>7</sup> Mark Scoloro, *9 discarded military ballots weren’t fraud, state election chief says*, AP, Sept. 30, 2020.

<sup>8</sup> See U.S. Dep’t of Justice, *Justice Manual*, Rule, 1-7.610 (Confidentiality and Media Contacts Policy – Concerns of Prejudice) *last revised* Apr. 2018.

- When U.S. Attorney Freed made this announcement, he misstated key facts.
- U.S. Attorney Freed revealed specific investigative measures and factual details of the case, such as the voter preferences on the ballots, contrary to Department policy.<sup>9</sup>
- U.S. Attorney Freed’s statements suggest his office may have taken possession of documents relevant to the administration of an ongoing election.
- The President was briefed by the Department on the details of an ongoing investigation *before* any conclusions had been reached, and the President attempted to use this information to benefit his campaign.

These actions have already drawn widespread criticism from former Department officials across the political spectrum.<sup>10</sup> The actions of U.S. Attorney Freed and Attorney General Barr in relation to the Luzerne County investigation are startling breaches of Department policy and we urge you to investigate these and additional announcements by the Department that may raise similar concerns.<sup>11</sup>

## **II. Changes to DOJ’s Election Non-Interference Policy and Disregard of Previous Findings and Recommendations of the Office of the Inspector General**

Of greater concern, it appears that Attorney General Barr and U.S. Attorney Freed have acted against a backdrop of worrying broader changes to Department policy. In an email obtained by *ProPublica*, officials in the Public Integrity Section informed U.S. Attorneys’ offices of a new blanket “exception to the [Department’s] general non-interference with elections policy.”<sup>12</sup> According to the email, the new exception applies to instances in which:

[T]he integrity of any component of the federal government is implicated by election offenses within the scope of the policy including but not limited to misconduct by federal officials or employees administering an aspect of the voting process through the United States Postal

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<sup>9</sup> See William Barr, Attorney General, U.S. Dep’t of Justice, Memorandum for all Department of Justice Employees, Election Year Sensitivities, May 15, 2020 at 1 (“[p]artisan politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges. Law enforcement officers and prosecutors may never select the timing of public statements (attributed or not), investigative steps, criminal charges, or any other action in any matter or case for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party”).

<sup>10</sup> See e.g., Michael S. Schmidt, Katie Benner, and Jim Rutenberg, *Trump Made Claims of Voter Fraud as Justice Department Moved to Investigate*, N.Y. TIMES, Oct. 9, 2020 (former Acting Attorney General Stuart M. Gerson stated, “I’ve never seen anything like this before, and I was a federal prosecutor during Watergate. The administration of justice is not supposed to occur with any political bias”).

<sup>11</sup> On October 7, 2020, the U.S. Attorney for New Jersey, Craig Carpenito issued a press release regarding the arrest and charging of a mail carrier from Hudson County who had illegally discarded nearly 2,000 pieces of mail. The press release specifically highlighted the presence of “99 general election ballots.” Press Release, U.S. Dep’t of Justice, U.S. Att’y’s Office, D.N.J., Oct. 7, 2020: “Postal Employee Arrested for Dumping Mail, Including Election Ballots Sent to West Orange Residents.”

<sup>12</sup> Robert Faturechi & Justin Elliot, *DOJ Frees Federal Prosecutors to Take Steps That Could Interfere With Elections, Weakening Long-standing Policy*, PROPUBLICA, Oct. 7, 2020.

Service, the Department of Defense or any other federal department or agency.<sup>13</sup>

Historically, in order to avoid potential mischaracterization and abuse of Department investigations, U.S. Attorneys are required to consult with the DOJ Criminal Division's Public Integrity Section before bringing election fraud related charges.<sup>14</sup> In addition, DOJ's longstanding election non-interference policy states:

[O]vert criminal investigative measures should not ordinarily be taken in matters involving alleged [election] fraud in the manner in which votes were cast or counted until the election in question has been concluded, its results certified, and all recounts and election contests concluded."<sup>15</sup>

This general non-interference policy is justified on several grounds, including that an election fraud investigation conducted prior to the conclusion of the election "runs the significant risk of interjecting the investigation itself as an issue, both in the campaign and in the adjudication of any ensuing election contest."<sup>16</sup>

We are deeply concerned that the Department's recent change to longstanding policy is intended to permit U.S. Attorneys to take actions that could aid President Trump's re-election campaign, in violation of other longstanding DOJ policy and in a manner that is inconsistent with the Hatch Act. The new exception announced by the Public Integrity Section appears tailor-made for federal prosecutors to take overt prosecutorial steps—and publicize them—that may then be used by President Trump for his campaign, as occurred with U.S. Attorney Freed's in the Luzerne County investigation.

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<sup>13</sup> *Id.* This new exception also appears to comport with an August 2020 memorandum issued by the chief of the Public Integrity Section summarizing "certain Department policy guidance on handling matters, during an election year." The memorandum cites the policy described in *Federal Prosecution of Election Offenses*, but it also articulates practically out of whole cloth an exception to the election non-interference policy similar to that announced in the email obtained by *ProPublica*. The memorandum states that "[a]n exception may also be appropriate where a federal official entrusted to facilitate the voting process, such as a postal carrier, allegedly engages in election fraud using his or her official position." See Corey R. Amundson, Chief, Public Integrity Section, Criminal Division, U.S. Dep't of Justice, Memorandum to Attorney General Advisory Committee, Summary of Significant Election Related Policies, Aug. 20, 2020 at 1-2.

<sup>14</sup> DOJ's *Justice Manual* states that "[c]onsultation with the Public Integrity Section of the Criminal Division is required in all federal criminal matters that focus on violations of federal or state campaign financing laws, federal patronage crimes, and corruption of the election process." U.S. Dep't of Justice, *Justice Manual*, Rule 9-85.210, last revised Apr. 2018. The rule further states that "[w]ith regard to all other election crime matters...namely, alleged election fraud or patronage offenses, United States Attorneys shall consult with the Public Integrity Section before an investigation beyond a preliminary inquiry is requested or conducted." *Id.* It should also be noted that Rule 9-85.200 provides that "[n]o prosecution of an offense described in 18 U.S.C. § 245 (Federally Protected Activities) may be undertaken by the United States except upon the certification of the Attorney General or Deputy Attorney General that in his or her judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice." *Id.* at Rule 9-85.200.

<sup>15</sup> *Federal Prosecution of Election Offenses* (8th ed., 2017) at 84. The guidance document further notes that "[t]he Department views any voter interviews in the pre-election and balloting periods, other than interviews of a complainant and any witnesses he or she may identify, as beyond a preliminary investigation. A United States Attorney's Office considering such interviews must therefore first consult with the Public Integrity Section. This consultation is also necessary before any investigation is undertaken near the polls while voting is in progress." *Id.* (citation omitted).

<sup>16</sup> *Id.* The *Federal Prosecution of Election Offenses* further observes that "[e]xceptions to this general rule of course exist" but also notes "[a]ll such exceptions require consultation with the Public Integrity Section, as they involve action beyond a preliminary investigation." *Id.* at 85.

We have previously written to you requesting a review of Attorney General Barr and U.S. Attorney Durham's conduct regarding Mr. Durham's ongoing investigation and whether it violated longstanding DOJ policy and the Hatch Act.<sup>17</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>18</sup> and the Department has specifically warned DOJ employees not to use their authority "for the purpose of affecting election results."<sup>19</sup> A DOJ memorandum also 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>20</sup> U.S. Attorney Freed's actions create the appearance that they had the purpose of benefitting President Trump's reelection campaign and may violate both the Hatch Act and the Department's own practice.

As 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>21</sup> In particular, two recommendations from your June 2018 report appear relevant to U.S. Attorney Freed's actions:

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 announcements, or other actions that could impact an election.<sup>22</sup>

On June 11, 2018, the Department responded to your office that it "concur[s]" in those

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<sup>17</sup> Letter to Michael E. Horowitz, Inspector General, U.S. Dep't. of Justice, from Rep. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Rep. Carolyn B. Maloney, Chair, H. Comm. on Oversight and Reform, Rep. Adam B. Schiff, Chair, H. Select Committee on Intelligence, Zoe Lofgren, Chair, H. Comm. on Administration (Sept. 18, 2020). As that letter observed, 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>18</sup> 5 U.S.C. § 7323(a)(1) (2020).

<sup>19</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>20</sup> William Barr, Attorney General, U.S. Dep't of Justice, Memorandum for all Department of Justice Employees, Election Year Sensitivities, May 15, 2020 at 1. *See also* Loretta Lynch, Attorney General, U.S. Dep't of Justice, Memorandum for all Department Employees, Election Year Sensitivities, Apr. 11, 2016 at 1; 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>21</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>22</sup> *Id.* at XIV.

recommendations.<sup>23</sup> However, as of July 31, 2020 those recommendations remain open because of an apparent failure by DOJ to act on them. The Department, despite its commitment, has failed to adhere to your office’s recommendations and implement changes that would prevent its actions from impacting another presidential election. Instead, the Department is attempting to do the opposite.

Federal prosecutorial power should never be used to influence an upcoming election or to provide fuel for others to question the legitimacy of its results. For these reasons, we ask that you conduct an emergency review examining:

1. Whether the actions taken by U.S. Attorney Freed in the Luzerne County investigation violate the Hatch Act or Department policy;
2. Conduct of any DOJ officials who may have been involved in or consulted on U.S. Attorney Freed’s actions in this investigation;
3. Changes to the DOJ election non-interference policy;
4. Conduct of any DOJ officials who may have been involved in or consulted regarding the policy change; and
5. Conduct in any other related election fraud cases brought after the policy change that may be relevant.

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 again for your prompt attention to this urgent matter.

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>23</sup> *Id.* at Attachment A.

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