

The Honorable Merrick Garland
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

September 8, 2021

Dear Attorney General Garland:

On behalf of the Presidential Reform Project, we write to urge you to adopt several reforms within the Justice Department in order to reaffirm and strengthen “the norms that will ensure the Department's adherence to the Rule of Law,” as you put it in your confirmation hearing. Merrick Garland, *Testimony before the U.S. S. Comm. on the Judiciary* (Feb. 22, 2021). These proposed reforms summarize a much longer treatment of each of these reform issues in our book, *After Trump: Reconstructing the Presidency* (2020). We recognize that it is possible that the Department may already be considering, or has already implemented, reforms in some of the areas we discuss below.

1. *Justice Department Independence*

In your confirmation hearings, you discussed the importance of “policies that protect the independence of the Department from partisan influence in law-enforcement investigations.” *Id.* Yet if one peruses the many Justice Department policies and regulations, it is hard to find a clear written statement of the Department’s commitment to non-partisan law enforcement. We urge you to rectify this by adopting into written Department policy the principles that the Department communicated to Congress in 2009 upon concluding its investigation into allegations of politically motivated firings of U.S. attorneys during the George W. Bush administration. *See* Letter from Ronald Welch, Assistant Attorney General, Department of Justice, to the Honorable John Conyers, Jr., Chairman of the House of Representatives Committee on the Judiciary (July 21, 2010). Specifically, we urge you to revise the *Supplemental Standards of Ethical Conduct for Employees of the Department of Justice*, and the “Principles of Federal Prosecution” and “Federal Prosecution of Election Offenses” sections in the Department’s *Justice Manual*, to specify that, as the letter stated, Department lawyers are required to “answer not to partisan politics but to principles of fairness and justice.” We also urge you to take steps to amend 5 C.F.R. § 2635.702, which applies to all executive branch officials, to include an “improper partisan political purpose of influencing an election to public office” within the prohibition on federal misuse of official authority.

2. *Investigations of Prior Investigations*

Former Connecticut U.S. Attorney John Durham is currently investigating matters related to the origins of the FBI’s investigation into possible ties between Russia and Donald Trump’s 2016 presidential campaign. Durham was appointed during the Trump administration to assess Department decisions (and decisions in other Departments) made during the Obama administration. The Durham matter began when Attorney General Barr asked Durham in his capacity as the U.S. Attorney in Connecticut to do a review of the origins of the Russia investigation. Durham eventually opened a criminal investigation, and Barr later made Durham a special counsel.

It is important that the Department sometimes be able to examine investigations that began under a prior administration. However, when the Department of one administration investigates the conduct of a prior administration, the investigation is potentially fraught with concerns about political motivations for the investigation. These concerns of politicization are heightened when the investigation is conducted in the

first instance by a prosecutor, especially when that prosecutor conducts a criminal investigation (as opposed to a mere “review,” which is how Durham began).

To avoid these problems, and however the Durham investigation concludes, the Department should adopt a policy that any probe into a department investigation or conduct by a prior administration should presumptively be conducted by the Inspector General of the Justice Department (or by several agency inspectors general working together), and not in the first instance by a prosecutor. Inspectors general are quasi-independent agencies that conduct these types of investigations all the time. They have concluded many such investigations with success and bipartisan support. *See, e.g., Offices of the Inspectors General, Unclassified Report on the President’s Surveillance Program* (2009). The policy should specify that if the inspector general uncovers evidence of criminal wrongdoing, he or she should refer the matter to the Attorney General. At that point, depending on what the inspector general uncovered, it might be appropriate for the Attorney General to invoke the procedures of the special counsel regulations.

3. Pre-Inauguration Investigations of Presidential Candidates or Campaigns

Related concerns about politicization arise whenever the Department investigates a presidential candidate or campaign. The Inspector General of the Department of Justice wrote several lengthy critical reports related to (i) the FBI’s investigation of the Hillary Clinton email matter when she was a presidential candidate, and (ii) the FBI’s investigation of the Trump campaign for its alleged ties with Russia. *See Office of the 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* (2018); *Office of the Inspector General, U.S. Dep’t of Justice, Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation* (2019). Together these reports revealed that the FBI and the Department lacked adequate written guidance related to these sorts of investigations, and that many controversies arose at least in part from the lack of such guidance.

In our book, we outline several concrete proposals about how both pre-inauguration criminal and counterintelligence investigations of presidential candidates or presidential campaigns should be conducted. The central idea of these reforms is to clarify the criteria for opening these investigations; to place responsibility for the decision in the Attorney General, with written advice from relevant executive branch officials; and to ensure that the Attorney General is apprised throughout and responsible for approval of the conduct of the investigation.

4. Important Norms Should Be Translated into Written Policies

In inspector general reports and other contexts in the last five years, it has become apparent that there are important Department norms that are not, but should be, clearly reflected in written Department policy. The following, in our view, are the most important.

First, Department regulations should make clear that the Attorney General is presumptively bound by the department’s media comment policy and its rules that limit prosecutors from publicly discussing a pending case.

Second, Department regulations should prohibit in clear terms any investigating agency, including the FBI, from announcing recommended charging decisions related to presidential candidates or campaigns. The regulations should also prohibit Justice Department officials from discussing the conduct of uncharged presidential candidates or campaign officials, except for the Attorney General and Deputy Attorney General, who should be able to do so only in exceptional circumstances, as the public interest requires.

Third, the Department should formally incorporate the “sixty-day rule” against the taking of investigative steps related to electoral matters or the return of indictments against a candidate within sixty days of a primary or general election.

5. *Special Counsel*

The Mueller investigation was the first lengthy experience with the 1999 Special Counsel Regulations. Those regulations worked well in most respects, but also revealed ways in which they should be reformed. We make several specific proposals in our book to achieve the general aims of (1) specifying that the Attorney General maintains supervisory control of the investigation and the final decision on prosecution or declination; (2) protecting the independence of the Special Counsel’s factfinding function and, upon conclusion of the investigation, ensuring appropriate transparency; and (3) imposing various reporting requirements to Congress as a check against failures to comply with the Special Counsel regulations. We urge you to consider these proposals.

We appreciate your consideration of these matters.

Sincerely,



Bob Bauer



Jack Goldsmith