THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia V. Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813

Colorado Office:
1624 Market St., Ste. 226 #19008
Denver, Colorado 80202-2523

May 17, 2019

VIA FACSIMILE TRANSMISSION AND USPS

Becky A. Neal
Senior Assistant Disciplinary Counsel
District of Columbia Court
Office of Disciplinary Counsel
515 5th Street NW, Building A, Room 117
Washington, DC 20001

Re: Barr/Bennett
Undocketed No. 2019-U101

Thank you for your letter of April 30, 2019, in response to my request that your Board immediately direct the recusal of D.C. Bar Member United States Attorney General William P. Barr from any involvement whatsoever in any matter relating to any accusations against or any investigation of President Donald J. Trump or any of his executive or administrative officials, campaign employees or family members. A copy of your April 30 letter is attached for your easy reference.

Your letter states, **"We are sensitive to the possibility that a complaint might be motivated by political opposition to the policies that such public figures advocate or carry out and that our investigation might interfere in the political or governmental process."**

First, my complaint is not motivated by **"political opposition to the policies that [William Barr] advocate[s] or carr[ies] out."** My complaint is only motivated by the fact that "my" and "your" attorney [general] should not be permitted to represent "me" and "you" and "the citizens of our country" with respect to any matter involving any concern about the propriety of President Trump's conduct in office when "my" and "your" attorney [general] has specifically admitted that he has prejudged the propriety of such conduct - the classic "conflict of interest" - which would automatically disqualify any member of our profession from participating in any investigatory or decision-making process which forbids such conflicted predilection - regardless of political views or policy preferences. Even if my complaint was motivated by "political opposition," does that mean that Mr. Barr therefore has a pass from the D.C. Bar to violate its ethical standards with impunity?

Second, with respect to your comment that **"our investigation might interfere in the political or governmental process,"** are you saying that the D.C. Bar automatically abdicates its responsibility to insure that its bar members do not violate the Code of Professional Responsibility if the ethical violations are committed by the bar member while engaged in a "political or governmental process?"

So, if William Barr, while performing his role as the Attorney [General], providing legal representation for the citizens of our country (you and me included among his "clients"), deliberately violates his, yours and my Code of Professional Responsibility, then the D.C. Bar will do nothing because your "investigation might interfere in the political or governmental process," **even if such political or governmental process is being leveraged by the unethical misconduct of your bar member?** Really? I thought Mr. Barr's job was to be the country's lawyer, not a political hack. Your job is to make him be a good lawyer for his client, the country, not to be the President's personal lackey, which includes his full compliance with the Lawyer's Code of Professional Responsibility while he is representing his client, our country - you and me.

Your letter goes on to state, **"If the complainant has no personal knowledge of the matter of if the evidence in the complaint seems insufficient to us, we may decline to docket the matter."**

First, I, as do you and every citizen in this country who has eyes and ears and can hear or read, do, in fact, have **"personal knowledge of the matter,"** because William Barr has published, and testified in public confirming, his legal viewpoint, which plainly and unequivocally sets forth his conflict of interest with respect to any investigation of the president or of his office, and he continues to flaunt his conflict openly by lying and by refusing to comply with congressional requests. Therefore, my "personal knowledge" does form the basis for my complaint, and my "personal knowledge" is now well-documented in the public record. So, the complaint that I have lodged with your office is legitimate, well-documented and well-founded, requiring your office to act immediately and decisively.

Second, with respect to your statement **"... if the evidence in the complaint seems insufficient to us, we may decline to docket the matter,"** are you really saying that I have failed to state a complaint that is supported by "sufficient evidence?" If this is indeed what the Board is relying on to justify its failure to act, please let me know why my evidence is "insufficient" and what more evidence would you need to act upon, other than the blatant conflict of interest expressed by Mr. Barr himself, in writing, in public statements and in sworn testimony. I am ready and willing to clear up any doubt the Board may have so that it can do its duty and enforce the ethical rules of our profession - before the ethical violation that is still playing out in front of us brings our profession, and our country, to unredeemable shame.

For now, I point to the following violations of your Bar's Rules of Professional Conduct:

Rule 1.7 - **Conflict of Interest. "(b) ... a lawyer shall not represent a client [here, the people of the United States] with respect to a matter if: ... (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by ... the lawyer's own ... personal interests."** (Mr. Barr has previously expressed his personal opinion in writing that President Trump is above the law.)

Rule 4.1 - **Truthfulness in Statements to Others. "In the course of representing a client [here, the people of the United States], a lawyer shall not knowingly: (a) Make a false statement of material fact or law to a third person."** (Mr. Barr has lied to Congress.)

Rule 8.4 - **"It is professional misconduct for a lawyer to ... (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentaton; [and] (d) Engage in conduct that seriously interferes with the administration of justice."** (Mr. Barr has been dishonest with Congress, and such dishonesty constitutes serious interference with the administration of justice.)

In addition, please see the attached letter addressed to Mr. Hamilton Fox of your Bar Association, dated May 2, 2019, from the Honorable Ted W. Lieu and the Honorable Kathleen Rice, Members of the Congress of the United States, *citing* Mr. Barr's violations of Rules 3.3, 8.4(c) and 3.4, which further violations are incorporated herein by reference thereto.

I look forward to receiving your considered response to my plea for action. Better yet, please en"courage" your colleagues to muster some "courage" - this is not about politics, it is about maintaining the ethical stature and legacy of our profession. Since your Board is required by its ethical standards to direct the Attorney General of the United States to recuse himself from his self-declared conflict, then so be it - do it. The rules should be applied to every lawyer in our profession, especially when their job is to practice law and therefore be held to the account of his peers sworn to regulate his conduct.

Please act now, before our profession stands for nothing.

Sincerely,

Merit Bennett

cc: Hamilton P. Fox, III, Disciplinary Counsel
Jennifer P. Lyman, Senior Assistant
Dolores Dorsainvil, Assistant Counsel
Sean P. O'Brien, Assistant Counsel
H. Clay Smith, III, Assistant Counsel
Jerri U. Dunston, Assistant Counsel
Joseph C. Perry, Assistant Counsel
Traci M. Tait, Assistant Counsel
Sheryl C. Cline, Case Management
Angela Walker, Case Manager
Christina M. Spears, Office Manager
Julia L. Porter, Deputy Disciplinary Counsel
Joseph N. Bowman, Assistant Counsel
Ebtehaj Kalantar, Assistant Counsel
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Hendrik R. DeBoer, Assistant Counsel
Jelani C. Lowery, Assistant Counsel
Clinton R. Shaw, Jr., Assistant Counsel
Lawrence K. Bloom, Senior Staff Attorney
Carol Threlkeld, Case Manager
Helen I. Severson, Executive Assistant

Honorable Ted W. Lieu, Member of Congress
Honorable Kathleen Rice, Member of Congress

Enclosures

OFFICE OF DISCIPLINARY COUNSEL

April 30, 2019

CONFIDENTIAL

Merit Bennett, Esquire
460 Saint Michaels Drvie
Suite 703
Santa Fe, NM 87505-7646

Re: Barr/Bennett
Undocketed No. 2019-U101

Dear Mr. Bennett:

We have reviewed the disciplinary complaint that you filed against William P. Barr, Esquire. Many members of the D.C. Bar are involved in electoral politics and governmental affairs. From time to time, this Office receives complaints about these public figures. We are sensitive to the possibility that a complaint might be motivated by political opposition to the policies that such public figures advocate or carry out and that our investigation might interfere in the political or governmental process.

If the complainant has no personal knowledge of the matter or if the evidence in the complaint seems insufficient to us, we may decline to docket the matter. In those circumstances, the matter is not a matter of public record. Under the rules of the D.C. Court of Appeals, it becomes public only if we actually bring charges.

Therefore, although we appreciate the information you provided, a full investigation will not be opened based upon your complaint.

Sincerely,

Becky Neal
Senior Assistant Disciplinary Counsel

BN:AW:asw

Congress of the United States
Washington, DC 20515

May 2, 2019

Mr. James C. Bodie
Intake Office
Office of Bar Counsel
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, Virginia 23219

Mr. Hamilton Fox
Office of Disciplinary Counsel
Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

Dear Mr. Bodie and Mr. Fox:

We write regarding the disturbing conduct of William P. Barr, Attorney General of the United States, who is a member of the state bars in Virginia and the District of Columbia. As Members of Congress and former prosecutors, we believe that respect for the rule of law and duty to honor the truth are of utmost importance. Given the recent release of a document written by Special Counsel Mueller to the Attorney General objecting to his severe mischaracterization of the Special Counsel's report, it appears the Attorney General has at best misled Congress and the American people, and at worst perjured himself before the Senate and House. As such, we formally request an ethics investigation by the Virginia State Bar and the District of Columbia Bar into Mr. Barr's conduct for review and possible disbarment.

In a letter to Congress on March 24th, 2019 characterizing the Special Counsel's report, Mr. Barr stated: "In cataloguing the President's actions, many of which took place in public view, the report identifies no actions that, in our judgement, constitute obstructive conduct, had a nexus to a pending or contemplated proceeding, and were done with corrupt intent..."[1] The Attorney General reiterated this sentiment during a press conference on the day the Special Counsel's report was released to the public. In short, he peddled the President's oft-repeated line, "No obstruction, no collusion."

In reality, we know that Special Counsel Mueller found "substantial evidence" of criminal intent and nexus to a specific proceeding as it relates to at least four, if not more, obstructive acts taken by the President of the United States.[2] We know he directed aides to fabricate internal documents, lie about their actions, attempted to fire the Special Counsel, get then-Attorney General Sessions to "un-recuse" himself so as to exert greater control over the investigation's direction, and likely tamper with witnesses.

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[1] Attorney General William P. Barr, March 24, 2019.
[2] Special Counsel Robert S. Mueller, III, "Report on the Investigation into Russian Interference in the 2016 Presidential Election," March 22, 2019.

While it would be despicable enough if the Attorney General had thus mischaracterized the report, we now have evidence he appears to have lied to Congress twice about the extent of his knowledge of the Special Counsel's reaction to Barr's mischaracterization and support – or lack thereof – for his conclusions. As the *Washington Post* reports:

> "In back-to-back congressional hearings on April 9 and 10, Attorney General William P. Barr disclaimed knowledge of the thinking of special counsel Robert S. Mueller III and members of his team of prosecutors investigating Russian interference in the 2016 election.
>
> "No, I don't," Barr said, when asked by Rep. Charlie Crist (D-Fla.) whether he knew what was behind reports that members of Mueller's team were frustrated by the attorney general's summary of their top-level conclusions.
>
> "I don't know," he said the next day, when asked by Sen. Chris Van Hollen (D-Md.) whether Mueller supported his finding that there was not sufficient evidence to conclude that President Trump had obstructed justice.[3]

On Wednesday, May 1st, the House Judiciary Committee obtained a letter dated March 27, 2019 from Special Counsel Mueller to Attorney General Barr. In his letter, Special Counsel Mueller first requested that the Attorney General, rather than summarize the Special Counsel's report, immediately release executive summaries crafted by *Mueller's team*. Second, he wrote that Barr's summary sent to Congress "did not fully capture the context, nature, and substance of this Office's work and conclusions. We communicated that concern to the Department on the morning of March 25. There is now public confusion about critical aspects of the results of our investigation."[4]

We agree with Robert Mueller when he says this behavior "threatens to undermine a central purpose for which the Department appointed the Special Counsel."

Furthermore, Attorney General Barr has willfully disobeyed a valid Congressional subpoena seeking the full, unredacted report produced by the Special Counsel – the deadline for which was May 1st. That subpoena was issued in furtherance of legitimate Congressional oversight, although Mr. Barr disregarded the Committee's request. We note here that the Third Article of Impeachment against President Nixon reads:

"[The President] has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives."[5]

As you know, the Virginia State Bar and D.C. Bar Rules of Professional Conduct Rule 3.3 "Candor Toward the Tribunal" prevents a layer from making "a false statement of fact or law to a tribunal." Furthermore, Rule 8.4 (c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects

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[3] Isaac Stanley-Becker, "'I don't know': Barr's professed ignorance prompts calls for his resignation after Mueller letter, *Washington Post*, May 1, 2019.

[4] Robert S. Mueller, III, Letter to Attorney General Barr RE: Report of the Special Counsel on the Investigation Into Russian Interference in the 2016 Presidential Election and Obstruction of Justice (March 2019)," *Office of the Special Counsel, U.S. Department of Justice.* March 27, 2019.

[5] Deschler's Precedents, Volume 3, Chapters 10 – 14 Sec. 15 Impeachment Proceedings Against Richard Nixon, "Article III," *Government Publishing Office,* Pages 2167-2195.

adversely on the lawyer's fitness to practice law." Finally, Rule 3.4 "Fairness to Opposing Party and Counsel" states that "a lawyer shall not (a) obstruct another party's access to evidence."[6]

By deceiving Congress and the American people, who vested their trust in both the Office of the Attorney General and the Department of Justice at large, Attorney General Barr must be subject to a professional review for the sake of the legal profession and the public.

We appreciate your attention to these critical matters and look forward to hearing from you. You can contact our offices at 202-225-3976 or 202-225-5516 should you have any questions.

Sincerely,

Ted W. Lieu
Member of Congress

Kathleen Rice
Member of Congress

TWL:mdc

[6] "Rule 3.3," "Rule 8.4," "Rule 3.4," Virginia State Bar Professional Guidelines, D.C. Bar Amended Rules of Professional Conduct. Accessed May 1, 2019.

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia V. Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813

Colorado Office:
1624 Market St., Ste. 226 #19008
Denver, Colorado 80202-2523

May 1, 2019

VIA FEDERAL EXPRESS

Office of Disciplinary Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street NW, Building A, Suite 117
Washington, DC 2001

Hamilton P. Fox, III, Disciplinary Counsel
Jennifer P. Lyman, Senior Assistant
Joseph N. Bowman, Assistant Counsel
Dolores Dorsainvil, Assistant Counsel
Ebtehaj Kalantar, Assistant Counsel
Sean P. O'Brien, Assistant Counsel
William R. Ross, Assistant Counsel
H. Clay Smith, III, Assistant Counsel
Traci M. Tait, Assistant Counsel
Sheryl C. Cline, Case Management
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Hendrik R. DeBoer, Assistant Counsel
Jerri U. Dunston, Assistant Counsel
Jelani C. Lowery, Assistant Counsel
Joseph C. Perry, Assistant Counsel
Clinton R. Shaw, Jr., Assistant Counsel
Caroll Donayre Somoza, Assistant Counsel
Lawrence K. Bloom, Senior Staff Attorney
Carol Threlkeld, Case Manager
Helen I. Severson, Executive Assistant

Re: Directing the Recusal of Attorney General William Barr From Any Matter Involving or Connected in Any Way With Donald Trump

Sirs/Madams:

Time's up!

What else does your bar member have to do, besides openly lie to the American people, before you direct him to recuse himself from any involvement with any aspect of any investigation of Donald Trump or his campaign or of any of Trump's businesses, affiliated organizations or family members.

All of the evidence requiring you to act NOW has been clearly laid out before you - in full public view.

There can be no good reason for your inaction - for your failure to immediately rid this growing cancer from our profession.

Please do your job before there is no respect left for any of us or for what our profession used to stand for - our country.

Finally, seize the day! Be the first to take action - before Congress or history does - to vindicate and elevate our profession to champion the rule of law.

Sincerely,

Merit Bennett

Enclosure

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia V. Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813

Colorado Office:
1624 Market St., Ste. 226 #19008
Denver, Colorado 80202-2523

April 22, 2019

VIA FEDERAL EXPRESS

Office of Disciplinary Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street NW, Building A, Suite 117
Washington, DC 2001

Hamilton P. Fox, III, Disciplinary Counsel
Jennifer P. Lyman, Senior Assistant
Joseph N. Bowman, Assistant Counsel
Dolores Dorsainvil, Assistant Counsel
Ebtehaj Kalantar, Assistant Counsel
Sean P. O'Brien, Assistant Counsel
William R. Ross, Assistant Counsel
H. Clay Smith, III, Assistant Counsel
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Christina M. Spears, Office Manager

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Becky A. Neal, Senior Assistant
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Caroll Donayre Somoza, Assistant Counsel
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Carol Threlkeld, Case Manager
Helen I. Severson, Executive Assistant

Re: Directing the Recusal of Attorney General William Barr From Any Matter Involving or Connected in Any Way With Donald Trump

Sirs/Madams:

Why haven't you acknowledged receipt of my ethics complaint(s)?

Why are you so afraid of doing your job when our profession is being humiliated and degraded by William Barr, who is repeatedly displaying his admitted, open and obvious conflict of interest that is in direct violation of our profession's ethical standards?

Isn't it your duty to take action on behalf of your bar association to ensure the ethical integrity of each and every lawyer your bar association licenses? Especially when the lawyer's admitted conflict has now been broadcast on national TV?

Does your Bar Association's Code of Professional Responsibility not apply to William Barr? If not, please cite for me the exception appearing in your Code that exempts Mr. Barr from your oversight - is it the "national TV" exception?

Is it the "I'll let the political system somehow do my job for me" exception? (As you know, there is no reliable likelihood that will happen.)

Don't you understand that your "politically-correct" failure to direct Barr's recusal from any involvement in any matter connected with Donald Trump is a separate and distinct breach of your own oath to our profession and, for good measure, is also a breach of your duty to our country to require our nation's attorney general, your fellow bar member, to serve the American people without a conflicted allegiance to our president, Mafia Don(ald Trump).

If your conflicted view disables you from doing your job, shouldn't you recuse yourself and let other members of your bar do what your code of conduct so obviously requires of you?

Do you understand that William Barr is still overseeing other related investigations of Donald Trump, his family and his "organizations" that can still be affected by Mr. Barr's conflicted interests? And that the cancer still needs to be exorcised?

Are you afraid, or are you just weak? Either way, you have a job to do. You can no longer ignore the responsibility you chose to assume. Mr. Barr's disqualifying conflict exists now and requires you to act now.

If you fail to act now, shame on you for bringing shame to our profession.

Our nation is waiting to see if our profession has any meaningful principles and, if so, will they be applied equally to your bar member before he further disgraces us all?

Let's hope so.

Sincerely,

Merit Bennett

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia V. Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813

Colorado Office:
1624 Market St., Ste. 226 #19008
Denver, Colorado 80202-2523

April 9, 2019

VIA FEDERAL EXPRESS

District of Columbia Office of Disciplinary Counsel
The Board on Professional Responsibility
515 5th Street NW, Building A, Room 117
Washington, DC 20001

Hamilton P. Fox, III, Disciplinary Counsel
Jennifer P. Lyman, Senior Assistant
Joseph N. Bowman, Assistant Counsel
Dolores Dorsainvil, Assistant Counsel
Ebtehaj Kalantar, Assistant Counsel
Sean P. O'Brien, Assistant Counsel
William R. Ross, Assistant Counsel
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Clinton R. Shaw, Jr., Assistant Counsel
Caroll Donayre Somoza, Assistant Counsel
Lawrence K. Bloom, Senior Staff Attorney
Carol Threlkeld, Case Manager
Helen I. Severson, Executive Assistant

Re: HAVE YOU DIRECTED WILLIAM BARR'S RECUSAL YET?

Sirs/Madams:

The tea leaves should have clearly communicated to everyone by now:

"WILLIAM BARR'S CONFLICT OF INTEREST HAS NOW FULLY MATURED IN PLAIN SIGHT AND THEREFORE MANDATES THAT HIS BAR ASSOCIATION ORDER HIS PUBLIC RECUSAL FROM ANY INVOLVEMENT WITH THE MUELLER REPORT, TO INCLUDE WITH ITS REDACTION OR WITH ITS RELEASE TO CONGRESS."

Remember, in his June 2018 memo, Mr. Barr stated that the Mueller Investigation was **"FATALLY CONCEIVED."**

Now he is refusing to release the report to Congress without significant redaction.

There can no longer be any doubt whatsoever that the very core of our professional values as attorneys serving our communities, our bar associations and our country **REQUIRES** that Mr. Barr be immediately directed to recuse himself.

If we want the ethical standards of our profession to have any meaning whatsoever to our fellow attorneys and to the general public they purportedly serve, and if our profession is to avoid becoming another meaningless gesture in time and space, **YOU MUST ACT NOW!**

Please don't be political. Please be professional. And demand the highest and best of **ALL** of our licensed professionals, **ESPECIALLY** of our country's Attorney General.

We all know that, in any other circumstances, you would have acted by now - and any other lawyer in your jurisdiction, saddled with the conflict of a William Barr, would have long ago been directed by you to recuse him/herself.

You now have a chance to show the nation what our profession stands for - that our profession will not tolerate conflicted representation. You must therefore seize this one last chance to save our good name - your good name, my good name and the legal profession's good name.

Please - I don't want to be remembered when I pass, **"Oh, he was just another one of those lawyers." Do you?**

Sincerely,

Merit Bennett

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia V. Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813

Colorado Office:
1624 Market St., Ste. 226 #19008
Denver, Colorado 80202-2523

March 25, 2019

VIA FEDERAL EXPRESS

District of Columbia Office of Disciplinary Counsel
The Board on Professional Responsibility
515 5th Street NW, Building A, Room 117
Washington, DC 20001

Hamilton P. Fox, III, Disciplinary Counsel
Jennifer P. Lyman, Senior Assistant
Joseph N. Bowman, Assistant Counsel
Dolores Dorsainvil, Assistant Counsel
Ebtehaj Kalantar, Assistant Counsel
Sean P. O'Brien, Assistant Counsel
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Clinton R. Shaw, Jr., Assistant Counsel
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Lawrence K. Bloom, Senior Staff Attorney
Carol Threlkeld, Case Manager
Helen I. Severson, Executive Assistant

Re: YOUR LAST CHANCE TO ENFORCE THE ETHICAL STANDARDS OF OUR PROFESSION TO SAVE OUR DEMOCRACY

Sirs/Madams:

As you know, Robert Mueller has "apparently" deferred to Attorney General Barr, **"leav[ing] it to the Attorney General to determine whether the conduct described in the [Mueller] report constitutes a crime."** *See* page 3 of Barr's March 24, 2019, letter to Congress, the first three pages of which are attached hereto as **Exhibit A**.

And, as a result of exercising such authority, Barr states in the same paragraph, **"I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense."** *Id.*

However, as reported on June 17, 2017, **"Barr also called the [Special Counsel's] obstruction investigation 'asinine' and warned that the special counsel [Robert Mueller] risks 'taking on the look of an entirely political operation to overthrow the president."** June 17, 2017. *See* The Hill news report found at:

https://thehill.com/homenews/administration/338210-trump-allies-hit-mueller-on-relationship-with-comey. And attached hereto as **Exhibit B**. *See also* Barr's June 8, 2018, memorandum, "Mueller's 'Obstruction' Theory," attached hereto as **Exhibit C**, wherein Barr among his other conflicted views, states, **"Mueller's obstruction theory is fatally misconceived."**

Barr's self-admitted conflict of interest is an open and obvious violation of our profession's code of conduct and is therefore disqualifying *per se.*

Besides the fact that the decision whether or not to pursue an obstruction of justice violation is solely left to the discretion of Congress, Mr. Barr, by proof of his own conflicted statements, should definitely not be permitted to draw any official conclusions nor to make any official decisions regarding the Mueller investigation, and he should also be directed to immediately rescind his so-called "conclusion" referenced above.

(*See attached* copy of all previous correspondence regarding this matter.)

No pressure; only the survival of our (yours and mine) democracy is at stake.

I know you are being called upon to take an extraordinary step, but these are not ordinary times; and, because our President controls the Senate, our Attorney General's licensing Bar Association may be the only institution left that can help block our headlong tumble into autocracy.

Sincerely,

Merit Bennett

Enclosures

Mueller report: Read William Barr's summary sent to Congress

24 March 2019

Russia-Trump inquiry

US Attorney General Bill Barr spent the weekend poring over the Special Counsel's report before sending a summary to Congress with his verdict on its main conclusions. Here is his letter in full.

Dear Chairman Graham, Chairman Nadler, Ranking Member Feinstein, and Ranking Member Collins:

As a supplement to the notification provided on Friday, March 22, 2019, I am writing today to advise you of the principal conclusions reached by Special Counsel Robert S. Mueller III and to inform you about the status of my initial review of the report he has prepared.

The Special Counsel's Report

On Friday, the Special Counsel submitted to me a "confidential report explaining the prosecution or declination decisions" he has reached, as required by 28 C.F.R. 600.8(c). This report is entitled "Report on the Investigation into Russian Interference in the 2016 Presidential Election." Although my review is ongoing, I believe that it is in the public interest to describe the report and to summarize the principal conclusions reached by the Special Counsel and the results of his investigation.

The report explains that the Special Counsel and his staff thoroughly investigated allegations that members of the presidential campaign of Donald J. Trump, and others associated with it, conspired with the Russian government in its efforts to interfere in the 2016 U.S. presidential election, or sought to obstruct the related federal investigations. In the report, the Special Counsel noted that, in completing his investigation, he employed 19 lawyers who were assisted by a team of approximately 40 FBI agents, intelligence analysts, forensic accountants, and other professional staff. The Special Counsel issued more than 2,800 subpoenas, executed nearly 500 search warrants, obtained more than 230 orders for communication records, issued almost 50 orders authorizing use of pen registers, made 13 requests to foreign governments for evidence, and interviewed approximately 500 witnesses.

The Special Counsel obtained a number of indictments and convictions of individuals and entities in connection with his investigation, all of which have been publicly disclosed. During the course of his investigation, the Special Counsel also referred several matters to other offices for further action. The report does not recommend any further indictments, nor did the

Special Counsel obtain any sealed indictments that have yet to be made public. Below, I summarize the principal conclusions set out in the Special Counsel's report.

Russian Interference in the 2016 U.S. Presidential Election

The Special Counsel's report is divided into two parts. The first describes the results of the Special Counsel's investigation into Russia's interference in the 2016 U.S. presidential election. The report outlines the Russian effort to influence the election and documents crimes committed by persons associated with the Russian government in connection with those efforts. The report further explains that a primary consideration for the Special Counsel's investigation was whether any Americans including individuals associated with the Trump campaign — joined the Russian conspiracies to influence the election, which would be a federal crime. The Special Counsel's investigation did not find that the Trump campaign or anyone associated with it conspired or coordinated with Russia in its efforts to influence the 2016 U.S. presidential election. As the report states: "[T]he investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities. "I

The Special Counsel's investigation determined that there were two main Russian efforts to influence the 2016 election. The first involved attempts by a Russian organization, the Internet Research Agency (IRA), to conduct disinformation and social media operations in the United States designed to sow social discord, eventually with the aim of interfering with the election. As noted above, the Special Counsel did not find that any U.S. person or Trump campaign official or associate conspired or knowingly coordinated with the IRA in its efforts, although the Special Counsel brought criminal charges against a number of Russian nationals and entities in connection with these activities.

The second element involved the Russian government's efforts to conduct computer hacking operations designed to gather and disseminate information to influence the election. The Special Counsel found that Russian government actors successfully hacked into computers and obtained emails from persons affiliated with the Clinton campaign and Democratic Party organizations, and publicly disseminated those materials through various intermediaries, including WikiLeaks. Based on these activities, the Special Counsel brought criminal charges against a number of Russian military officers for conspiring to hack into computers in the United States for purposes of influencing the election. But as noted above, the Special Counsel did not find that the Trump campaign, or anyone associated with it, conspired or coordinated with the Russian government in these efforts, despite multiple offers from Russian-affiliated individuals to assist the Trump campaign.

1.*In assessing potential conspiracy charges, the Special Counsel also considered whether members of the Trump campaign "coordinated" with Russian election interference activities. The Special Counsel defined "coordination" as an "agreement—tacit or express—between the Trump Campaign and the Russian government on election interference."*

Obstruction of Justice

The report's second part addresses a number of actions by the President — most of which have been the subject of public reporting — that the Special Counsel investigated as potentially raising obstruction-of-justice concerns. After making a "thorough factual investigation" into these matters, the Special Counsel considered whether to evaluate the

conduct under Department standards governing prosecution and declination decisions but ultimately determined not to make a traditional prosecutorial judgment. The Special Counsel therefore did not draw a conclusion — one way or the other — as to whether the examined conduct constituted obstruction. Instead, for each of the relevant actions investigated, the report sets out evidence on both sides of the question and leaves unresolved what the Special Counsel views as "difficult issues" of law and fact concerning whether the President's actions and intent could be viewed as obstruction. The Special Counsel states that "while this report does not conclude that the President committed a crime, it also does not exonerate him."

The Special Counsel's decision to describe the facts of his obstruction investigation without reaching any legal conclusions leaves it to the Attorney General to determine whether the conduct described in the report constitutes a crime. Over the course of the investigation, the Special Counsel's office engaged in discussions with certain Department officials regarding many of the legal and factual matters at issue in the Special Counsel's obstruction investigation. After reviewing the Special Counsel's final report on these issues; consulting with Department officials, including the Office of Legal Counsel; and applying the principles of federal prosecution that guide our charging decisions, Deputy Attorney General Rod Rosenstein and I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense. Our determination was made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president.

In making this determination, we noted that the Special Counsel recognized that "the evidence does not establish that the President was involved in an underlying crime related to Russian election interference," and that, while not determinative, the absence of such evidence bears upon the President's intent with respect to obstruction. Generally speaking, to obtain and sustain an obstruction conviction, the government would need to prove beyond a reasonable doubt that a person, acting with corrupt intent, engaged in obstructive conduct with a sufficient nexus to a pending or contemplated proceeding. In cataloguing the President's actions, many of which took place in public view, the report identifies no actions that, in our judgment, constitute obstructive conduct, had a nexus to a pending or contemplated proceeding, and were done with corrupt intent, each of which, under the Department's principles of federal prosecution guiding charging decisions, would need to be proven beyond a reasonable doubt to establish an obstruction-of justice offense.

Status of the Department's Review

The relevant regulations contemplate that the Special Counsel's report will be a "confidential report" to the Attorney General. See Office of Special Counsel, 64 Fed. Reg. 37,038, 37,040-41 (July 9, 1999). As I have previously stated, however, I am mindful of the public interest in this matter. For that reason, my goal and intent is to release as much of the Special Counsel's report as I can consistent with applicable law, regulations, and Departmental policies.

Based on my discussions with the Special Counsel and my initial review, it is apparent that the report contains material that is or could be subject to Federal Rule of Criminal Procedure 6(e), which imposes restrictions on the use and disclosure of information relating to "matter[s] occurring before [a] grand jury." Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e) generally limits disclosure of certain grand jury information in a criminal investigation and prosecution. Id.

Disclosure of 6(e) material beyond the strict limits set forth in the rule is a crime in certain circumstances. See, e.g., 18 U.S.C.

401 (3). This restriction protects the integrity of grand jury proceedings and ensures that the unique and invaluable investigative powers of a grand jury are used strictly for their intended criminal justice function.

Given these restrictions, the schedule for processing the report depends in part on how quickly the Department can identify the 6(e) material that by law cannot be made public. I have requested the assistance of the Special Counsel in identifying all 6(e) information contained in the report as quickly as possible. Separately, I also must identify any information that could impact other ongoing matters, including those that the Special Counsel has referred to other offices. As soon as that process is complete, I will be in a position to move forward expeditiously in determining what can be released in light of applicable law, regulations, and Departmental policies.

As I observed in my initial notification, the Special Counsel regulations provide that "the Attorney General may determine that public release of' notifications to your respective Committees "would be in the public interest." 28 C.F.R. 600.9(c). I have so determined, and I will disclose this letter to the public after delivering it to you.

Sincerely,

William P. Barr

Attorney General

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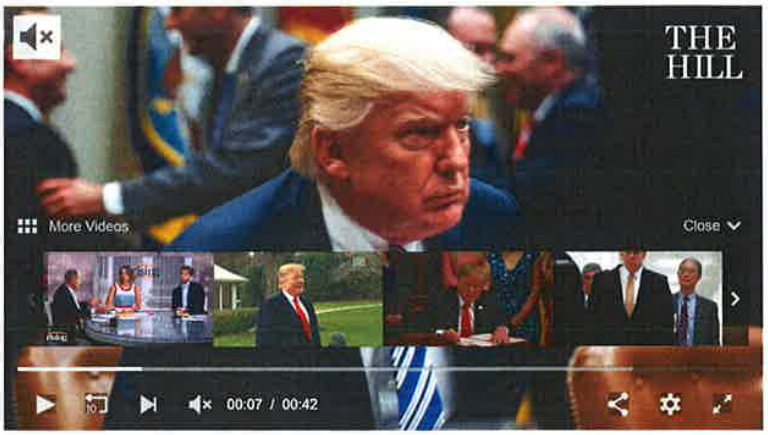

President Trump's legal team is zeroing-in on the relationship between former FBI directors Robert Mueller and James Comey to argue that their long professional partnership represents a conflict of interest that compromises Mueller's integrity as special counsel.

The effort to make the case about a conflict of interest around Mueller's investigative body comes amid reports that Mueller is looking into whether Trump is guilty of obstruction of justice for allegedly asking Comey to drop an investigation into former national security adviser Michael Flynn. Trump later fired Comey.

The president tweeted Friday that he is under investigation for firing Comey — proceedings Trump ripped as a "witch hunt."

Those making the case that Mueller is compromised because of his relationship with Comey point to a Justice Department statute that says recusal is necessary when there is the "appearance" of a "personal" conflict of interest.

"Mueller is compromised by the close professional — and I would sure think personal — relationship with Comey," said Bill Otis, the former special counsel for President George H.W. Bush. "That is an encompassing standard...that should be interpreted broadly so that the public will have maximum confidence in the outcome of the special counsel's work, however it winds up."

That is not the view of many others in the legal community, who are irate that some would seek to cast doubt on the veracity of Mueller's special counsel by alleging that he is incapable of conducting a fair investigation.

Mueller, a decorated Marine Corps veteran, has a sterling reputation as an independent investigator.

"Mueller is absolutely not compromised by his professional relationship with Comey," said Richard Painter, the White House ethics lawyer for President George W. Bush. "This is just an effort to undermine the credibility of the special counsel."

Spokespeople for Trump's legal team and Mueller's special counsel declined to comment.

These heavy questions and many more hung over Washington on Friday as Mueller built the special counsel's staff by hiring a dozen top-level prosecutors.

Mueller's hires have experience in complicated investigations, including Watergate, Enron and Mafia prosecutions. That's raised speculation that the special counsel investigation might extend to Trump's business empire, which the president has tried to shield from public scrutiny.

"The biggest risks in these kinds of cases are the collateral offenses," said Jonathan Turley, a legal professor at George Washington University.

Vice President Pence has obtained legal counsel, as has Trump's personal attorney Michael Cohen. Members of Trump's transition team are being told to preserve materials that might be relevant to the special counsel's investigation.

"If I worked at the White House right now I'd quit," said Painter. "There's no way I'd stick around and wait for someone to throw me under the bus."

The administration's allies are pushing back back furiously on the special counsel investigation, pointing to donations some prosecutors made to Democratic candidates. Trump's backers are also fuming over the latest round of anonymous leaks, which they say are designed to keep a shadow of suspicion over the White House.

Deputy attorney general Rod Rosenstein took the unusual step Thursday of releasing a statement warning that reports citing anonymous officials are not to be trusted, suggesting that the leaks revealing the obstruction investigation into Trump did not come from the Justice Department or the special counsel.

Still, speculation is growing that Trump is laying the groundwork to have Mueller removed as special counsel, an action that Trump's allies warn would backfire and potentially lead to impeachment.

"It would be a mistake to fire Mueller at this point," said Bill Barr, a former attorney general in the George H.W. Bush administration.

The fate of Rosenstein is also the subject of intense speculation. There are questions about whether the deputy attorney general, who wrote the memo the administration initially used to justify firing Comey, will have to recuse himself from the investigation if he becomes a witness in the obstruction case.

"The safest thing is probably for him to recuse himself," said John Wood, a former U.S. attorney.

Again, the legal community is split here.

"Rosenstein needs to stay on to protect the integrity of the investigation," said Robert Ray, the former independent counsel for the Whitewater case. "If Rod thinks he needs to recuse, I'm sure he will, but for the life of me I don't see a basis for it."

But the allegations that Mueller is too close to Comey have moved to the forefront of the debate around the special counsel and go to the heart of

whether the special counsel can conduct an impartial investigation around Trump and his associates.

Mueller was the director of the FBI in 2003, when Comey was deputy attorney general under John Ashcroft.

Their professional relationship was cemented in 2004, when Mueller backed Comey in a dramatic standoff against George W. Bush when the president sought to reauthorize a controversial surveillance program they believed to be illegal.

Comey famously rushed to the bedside of a hospitalized Ashcroft to talk him out of reauthorizing the program. Mueller assisted, ordering Ashcroft's FBI detail to give Comey access and to not allow White House officials to be alone with the sick attorney general.

Both threatened to resign the next day. Bush backed off, ultimately asking the Justice Department to find firmer legal footing for the surveillance program.

That dramatic story takes on new meaning in 2017 with Comey and Mueller back in the thick of things.

Comey has given his detractors some additional political ammunition, testifying before the Senate Intelligence Committee that he leaked details of his private meetings with Trump in order to spur the Justice Department to appoint a special counsel.

It worked. Rosenstein appointed Mueller.

"Their historical stand together during the Bush administration has made them part of the legacy and lore of the Justice Department," Turley said. "Mueller would be a tremendous choice for a special counsel. I would not have recommended him for this one."

Now, legal experts are debating the veracity of two bombshell reports in the Washington Post. One story said Trump is the target of an obstruction investigation. A second said that the financial transactions of Trump's son-in-law, Jared Kushner, had attracted the scrutiny of the special counsel.

Kushner's spokesman said that it is "standard practice" for the special counsel to request records associated with the investigation.

Barr, the former attorney general, said the media stories were overblown. Most of what is going on now is early, normal course investigative work that says nothing about the special counsel's ultimate findings, Barr said.

"I suspect the Washington Post story exaggerates the maturity of the investigation," he told The Hill. "I don't think it has crystallized to that point."

Barr also called the obstruction investigation "asinine" and warned that the special counsel risks "taking on the look of an entirely political operation to overthrow the president."

But Ray, the Whitewater lawyer, said the White House is not doing itself any favors by attacking Mueller.

"I'm sure the White House feels threatened and under siege, but it's unfortunate that they're trying to undermine the duly appointed special counsel," he said. "I've lived through this before. It does nothing but prolong the investigation. That's not in anyone's interests and will only undermine public confidence."

- This post was updated at 11:21 a.m.

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MEMORANDUM 8 June 2018

To: Deputy Attorney General Rod Rosenstein
Assistant Attorney General Steve Engel

From: Bill Barr

Re: Mueller's "Obstruction" Theory

I am writing as a former official deeply concerned with the institutions of the Presidency and the Department of Justice. I realize that I am in the dark about many facts, but I hope my views may be useful.

It appears Mueller's team is investigating a possible case of "obstruction" by the President predicated substantially on his expression of hope that the Comey could eventually "let...go" of its investigation of Flynn and his action in firing Comey. In pursuit of this obstruction theory, it appears that Mueller's team is demanding that the President submit to interrogation about these incidents, using the threat of subpoenas to coerce his submission.

Mueller should not be permitted to demand that the President submit to interrogation about alleged obstruction. Apart from whether Mueller a strong enough factual basis for doing so, Mueller's obstruction theory is fatally misconceived. As I understand it, his theory is premised on a novel and legally insupportable reading of the law. Moreover, in my view, if credited by the Department, it would have grave consequences far beyond the immediate confines of this case and would do lasting damage to the Presidency and to the administration of law within the Executive branch.

As things stand, obstruction laws do not criminalize just any act that can influence a "proceeding." Rather they are concerned with acts intended to have a *particular kind* of impact. A "proceeding" is a formalized process for finding the truth. In general, obstruction laws are meant to protect proceedings from actions designed subvert the integrity of their truth-finding function through compromising the honesty of decision-makers (*e.g.*, judge, jury) or impairing the integrity or availability of evidence – testimonial, documentary, or physical. Thus, obstruction laws prohibit a range of "bad acts" – such as tampering with a witness or juror; or destroying, altering, or falsifying evidence – all of which are inherently wrongful because, by their very nature, they are directed at depriving the proceeding of honest decision-makers or access to full and accurate evidence. In general, then, the *actus reus* of an obstruction offense is the inherently subversive "bad act" of impairing the integrity of a decision-maker or evidence. The requisite *mens rea* is simply intending the wrongful impairment that inexorably flows from the act.

Obviously, the President and any other official can commit obstruction in this classic sense of sabotaging a proceeding's truth-finding function. Thus, for example, if a President knowingly destroys or alters evidence, suborns perjury, or induces a witness to change testimony, or commits

any act deliberately impairing the integrity or availability of evidence, then he, like anyone else, commits the crime of obstruction. Indeed, the acts of obstruction alleged against Presidents Nixon and Clinton in their respective impeachments were all such "bad acts" involving the impairment of evidence. Enforcing these laws against the President in no way infringes on the President's plenary power over law enforcement because exercising this discretion – such as his complete authority to start or stop a law enforcement proceeding -- does not involve commission of any of these inherently wrongful, subversive acts.

The President, as far as I know, is not being accused of engaging in any wrongful act of evidence impairment. Instead, Mueller is proposing an unprecedented expansion of obstruction laws so as to reach facially-lawful actions taken by the President in exercising the discretion vested in him by the Constitution. It appears Mueller is relying on 18 U.S.C. §1512, which generally prohibits acts undermining the integrity of evidence or preventing its production. Section 1512 is relevant here because, unlike other obstruction statutes, it does not require that a proceeding be actually "pending" at the time of an obstruction, but only that a defendant have in mind an anticipated proceeding. Because there were seemingly no relevant proceedings pending when the President allegedly engaged in the alleged obstruction, I believe that Mueller's team is considering the "residual clause" in Section 1512 – subsection (c)(2) – as the potential basis for an obstruction case. Subsection (c) reads:

> (c) Whoever corruptly-- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) *otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so [is guilty of the crime of obstruction]. [emphasis added].

As I understand the theory, Mueller proposes to give clause (c)(2), which previously has been *exclusively* confined to acts of evidence impairment, a new unbounded interpretation. First, by reading clause (c)(2) in isolation, and glossing over key terms, he construes the clause as a free-standing, all-encompassing provision prohibiting *any act* influencing a proceeding if done with an improper motive. Second, in a further unprecedented step, Mueller would apply this sweeping prohibition to facially-lawful acts taken by public officials exercising of their discretionary powers if those acts influence a proceeding. Thus, under this theory, simply by exercising his Constitutional discretion in a facially-lawful way – for example, by removing or appointing an official; using his prosecutorial discretion to give direction on a case; or using his pardoning power – a President can be accused of committing a crime based solely on his subjective state of mind. As a result, any discretionary act by a President that influences a proceeding can become the subject of a criminal grand jury investigation, probing whether the President acted with an improper motive.

If embraced by the Department, this theory would have potentially disastrous implications, not just for the Presidency, but for the Executive branch as a whole and for the Department in particular. While Mueller's focus is the President's discretionary actions, his theory would apply to *all exercises of prosecutorial discretion* by the President's subordinates, from the Attorney General down to the most junior line prosecutor. Simply by giving direction on a case, or class of

cases, an official opens himself to the charge that he has acted with an "improper" motive and thus becomes subject to a criminal investigation. Moreover, the challenge to Comey's removal shows that not just prosecutorial decisions are at issue. Any personnel or management decisions taken by an official charged with supervising and conducting litigation and enforcement matters in the Executive branch can become grist for the criminal mill based solely on the official's subjective state of mind. All that is needed is a claim that a supervisor is acting with an improper purpose and any act arguably constraining a case – such as removing a U.S. Attorney -- could be cast as a crime of obstruction.

It is inconceivable to me that the Department could accept Mueller's interpretation of §1512(c)(2). It is untenable as a matter of law and cannot provide a legitimate basis for interrogating the President. I know you will agree that, if a DOJ investigation is going to take down a democratically-elected President, it is imperative to the health of our system and to our national cohesion that any claim of wrongdoing is solidly based on evidence of a *real* crime – not a debatable one. It is time to travel well-worn paths; not to veer into novel, unsettled or contested areas of the law; and not to indulge the fancies by overly-zealous prosecutors.

As elaborated on below, Mueller's theory should be rejected for the following reasons:

First, the sweeping interpretation being proposed for § 1512's residual clause is contrary to the statute's plain meaning and would directly contravene the Department's longstanding and consistent position that generally-worded statutes like § 1512 cannot be applied to the President's exercise of his constitutional powers in the absence of a "clear statement" in the statute that such an application was intended.

Second, Mueller's premise that, whenever an investigation touches on the President's own conduct, it is inherently "corrupt" under § 1512 for the President to influence that matter is insupportable. In granting plenary law enforcement powers to the President, the Constitution places no such limit on the President's supervisory authority. Moreover, such a limitation cannot be reconciled with the Department's longstanding position that the "conflict of interest" laws do not, and cannot, apply to the President, since to apply them would impermissibly "disempower" the President from supervising a class of cases that the Constitution grants him the authority to supervise.

Third, defining facially-lawful exercises of Executive discretion as potential crimes, based solely on subjective motive, would violate Article II of the Constitution by impermissibly burdening the exercise of core discretionary powers within the Executive branch.

Fourth, even if one were to indulge Mueller's obstruction theory, in the particular circumstances here, the President's motive in removing Comey and commenting on Flynn could not have been "corrupt" unless the President and his campaign were actually guilty of illegal collusion. Because the obstruction claim is entirely dependent on first finding collusion, Mueller should not be permitted to interrogate the President about obstruction until has enough evidence to establish collusion.

I. The Statute's Plain Meaning, and "the Clear Statement" Rule Long Adhered To By the Department, Preclude Its Application to Facially-Lawful Exercises of the President's Constitutional Discretion.

The unbounded construction Mueller would give §1512's residual clause is contrary to the provision's text, structure, and legislative history. By its terms, §1512 focuses exclusively on actions that subvert the truth-finding function of a proceeding by impairing the availability or integrity of evidence – testimonial, documentary, or physical. Thus, §1512 proscribes a litany of specifically-defined acts of obstruction, including killing a witness, threatening a witness to prevent or alter testimony, destroying or altering documentary or physical evidence, and harassing a witness to hinder testimony. All of these enumerated acts are "obstructive" in precisely the same way – they interfere with a proceeding's ability to gather complete and reliable evidence.

The question here is whether the phrase – "or corruptly otherwise obstructs" – in clause (c)(2) is divorced from the litany of the specific prohibitions in § 1512, and is thus a free-standing, all-encompassing prohibition reaching *any* act that influences a proceeding, or whether the clause's prohibition against "otherwise" obstructing is somehow tied to, and limited by, the character of all the other forms of obstruction listed in the statute. I think it is clear that use of the word "otherwise" in the residual clause expressly links the clause to the forms of obstruction specifically defined elsewhere in the provision. Unless it serves that purpose, the word "otherwise" does no work at all and is mere surplusage. Mueller's interpretation of the residual clause as covering *any and all acts* that influence a proceeding reads the word "otherwise" out of the statute altogether. But any proper interpretation of the clause must give effect to the word "otherwise;" it must do some work.

As the Supreme Court has suggested, *Begay v. United States,* 553 U.S. 137, 142-143 (2008), when Congress enumerates various specific acts constituting a crime and then follows that enumeration with a residual clause, introduced with the words "or otherwise," then the more general action referred to immediately after the word "otherwise" is most naturally understood to cover acts that cause a *similar kind* of result as the preceding listed examples, but cause those results in a *different manner*. In other words, the specific examples enumerated prior to the residual clause are typically read as refining or limiting in some way the broader catch-all term used in the residual clause. *See also Yates v. United States*, 135 S.Ct. 1074, 1085-87 (2015). As the *Begay* Court observed, if Congress meant the residual clause to be so all-encompassing that it subsumes all the preceding enumerated examples, "it is hard to see why it would have needed to include the examples at all." 553 U.S. at 142; *see McDonnell v. United States*, 136 S.Ct. 2355, 2369 (2016). An example suffices to make the point: If a statute prohibits "slapping, punching, kicking, biting, gouging eyes, or otherwise hurting" another person, the word "hurting" in the residual clause would naturally be understood as referring to the same *kind* of physical injury inflicted by the enumerated acts, but inflicted in a different way – *i.e.,* pulling hair. It normally would not be understood as referring to any kind of "hurting," such as hurting another's feelings, or hurting another's economic interests.

Consequently, under the statute's plain language and structure, the most natural and plausible reading of 1512(c)(2) is that it covers acts that have the *same kind of obstructive impact* as the listed forms of obstruction – *i.e.,* impairing the availability or integrity of evidence – but cause this impairment in a different way than the enumerated actions do. Under this construction,

then, the "catch all" language in clause (c)(2) encompasses any conduct, even if not specifically described in 1512, that is directed at undermining a proceeding's truth-finding function through actions impairing the integrity and availability of evidence. Indeed, this is how the residual clause has been applied. From a quick review of the cases, it appears all the cases have involved attempts to interfere with, or render false, the evidence that would become available to a proceeding. Even the more esoteric applications of clause (c)(2) have been directed against attempts to prevent the flow of evidence to a proceeding. *E.g., United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014)(soliciting tips from corrupt cops to evade surveillance); *United States v. Phillips*, 583 F.3d 1261 (10th Cir. 2009)(disclosing identity of undercover agent to subject of grand jury drug investigation). As far as I can tell, no case has ever treated as an "obstruction" an official's exercise of prosecutorial discretion or an official's management or personnel actions collaterally affecting a proceeding.

Further, reading the residual clause as an all-encompassing proscription cannot be reconciled either with the other subsections of § 1512, or with the other obstruction provisions in Title 18 that must be read *in pari passu* with those in § 1512. Given Mueller's sweeping interpretation, clause (c)(2) would render all the specific terms in clause (c)(1) surplusage; moreover, it would swallow up all the specific prohibitions in the remainder of § 1512 -- subsections (a), (b), and (d). More than that, it would subsume virtually all other obstruction provisions in Title 18. For example, it would supervene the omnibus clause in § 1503, applicable to pending judicial proceedings, as well as the omnibus clause in § 1505, applicable to pending proceedings before agencies and Congress. Construing the residual clause in § 1512(c)(2) as supplanting these provisions would eliminate the restrictions Congress built into those provisions -- *i.e.*, the requirement that a proceeding be "pending" -- and would supplant the lower penalties in those provisions with the substantially higher penalties in § 1512(c). It is not too much of an exaggeration to say that, if § 1512(c)(2) can be read as broadly as being proposed, then virtually all Federal obstruction law could be reduced to this single clause.

Needless to say, it is highly implausible that such a revolution in obstruction law was intended, or would have gone uncommented upon, when (c)(2) was enacted. On the contrary, the legislative history makes plain that Congress had a more focused purpose when it enacted (c)(2). That subsection was enacted in 2002 as part of the Sarbanes-Oxley Act. That statute was prompted by Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen, had systematically destroyed potentially incriminating documents. Subsection (c) was added to Section 1512 explicitly as a "loophole" closer meant to address the fact that the existing section 1512(b) covers document destruction only where a defendant has induced another person to do it and does not address document destruction carried out by a defendant directly.

As reported to the Senate, the Corporate Fraud Accountability Act was expressly designed to "clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. No. 107-146, at 14-15. Section 1512(c) did not exist as part of the original proposal. See S. 2010, 107th Cong. (2002). Instead, it was later introduced as an amendment by Senator Trent Lott in July 2002. 148 Cong. Rec. S6542 (daily ed. July 10, 2002). Senator Lott explained that, by adding new § 1512(c), his proposed amendment:

> would enact stronger laws against *document shredding*. Current law prohibits obstruction of justice by a defendant acting alone, but only if a proceeding is pending and a subpoena has been issued for the evidence that has been destroyed or altered .... [T]his section would allow the Government to charge obstruction against individuals who acted alone, even if the tampering took place prior to the issuance of a grand jury subpoena. I think this is something we need to make clear so we do not have a repeat of what we saw with the Enron matter earlier this year.

Id. at S6545 (statement of Sen. Lott) (emphasis supplied). Senator Orrin Hatch, in support of Senator Lott's amendment, explained that it would "close [] [the] loophole" created by the available obstruction statutes and hold criminally liable a person who, acting alone, destroys documents. Id. at S6550 (statement of Sen. Hatch). The legislative history thus confirms that § 1512(c) was not intended as a sweeping provision supplanting wide swathes of obstruction law, but rather as a targeted gap-filler designed to strengthen prohibitions on the impairment of evidence.

Not only is an all-encompassing reading of § 1512(c)(2) contrary to the language and manifest purpose of the statute, but it is precluded by a fundamental canon of statutory construction applicable to statutes of this sort. Statutes must be construed with reference to the constitutional framework within which they operate. *E.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Reading § 1512(c)(2) broadly to criminalize the President's facially-lawful exercises of his removal authority and his prosecutorial discretion, based on probing his subjective state of mind for evidence of an "improper" motive, would obviously intrude deeply into core areas of the President's constitutional powers. It is well-settled that statutes that do not *expressly* apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). OLC has long rigorously enforced this "clear statement" rule to limit the reach of broadly worded statutes so as to prevent undue intrusion into the President's exercise of his Constitutional discretion.

As OLC has explained, the "clear statement" rule has two sources. First, it arises from the long-recognized "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions. Second, the rule exists to protect the "usual constitutional balance" between the branches contemplated by the Framers by "requir[ing] an express statement by Congress before assuming it intended" to impinge upon Presidential authority. *Franklin*, 505 U.S. at 801; *see, e.g., Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995).

This clear statement rule has been applied frequently by the Supreme Court as well as the Executive branch with respect to statutes that might otherwise, if one were to ignore the constitutional context, be susceptible of an application that would affect the President's constitutional prerogatives. For instance, in *Franklin* the Court was called upon to determine whether the Administrative Procedure Act ("APA"), 5 U.S.C §§ 701-706, authorized "abuse of discretion" review of final actions by the President. Even though the statute defined reviewable action in a way that facially could include the President, and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court:

> [t]he President is not [expressly] excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800-01. To amplify, she continued, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." *Id.* at 801.

Similarly, in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), the Court held that the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 2, does not apply to the judicial recommendation panels of the American Bar Association because interpreting the statute as applying to them would raise serious constitutional questions relating to the President's constitutional appointment power. By its terms, FACA applied to any advisory committee used by an agency "in the interest of obtaining advice or recommendations for the President." 5 U.S.C. app. § 3(2(c). While acknowledging that a "straightforward reading" of the statute's language would seem to require its application to the ABA committee, *Public Citizen*, 491 U.S. at 453, the Court held that such a reading was precluded by the "cardinal principle" that a statute be interpreted to avoid serious constitutional question." *Id.* at 465-67. Notably, the majority stated, "[o]ur reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government," and "[t]hat construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable." *Id.* at 466.

> The Office of Legal Counsel has consistently "adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President would pose a significant question regarding the President's constitutional prerogatives." *E.g, The Constitutional Separation of Powers Between the President and Congress*, __ Op. O.L.C. 124, 178 (1996); *Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges,* 19 Op. O.L.C. 350 (1995).

The Department has applied this principle to broadly-worded criminal statutes, like the one at issue here. Thus, in a closely analogous context, the Department has long held that the conflict-of-interest statute, 18 U.S.C § 208, does not apply to the President. That statute prohibits any "officer or employee of the executive branch" from "participat[ing] personally and substantially" in any particular matter in which he or she has a personal financial interest. *Id.* In the leading opinion on the matter, then-Deputy Attorney General Laurence Silberman determined that the legislative history disclosed no intention to cover the President and doing so would raise "serious questions as to the constitutionality" of the statute, because the effect of applying the statute to the President would "disempower" the President from performing his constitutionally-prescribed functions as to certain matters . See *Memorandum for Richard T. Burress, Office of the President,*

from Laurence H. Silberman, Deputy Attorney General, Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution at 2, 5 (Aug. 28, 1974).

Similarly, OLC opined that the Anti-Lobbying Act, 18 U.S.C. § 1913, does not apply fully against the President. *See Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 304-06 (1989). The Anti-Lobbying Act prohibits any appropriated funds from being "used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress." 18 U.S.C. § 1913. The statute provided an exception for communications by executive branch officers and employees if the communication was made pursuant to a request by a member of Congress or was a request to Congress for legislation or appropriations. OLC concluded that applying the Act as broadly as its terms would otherwise allow would raise serious constitutional questions as an infringement of the President's Recommendations Clause power.

In addition to the "clear statement" rule, other canons of statutory construction preclude giving the residual clause in §1512(c)(2) the unbounded scope proposed by Mueller's obstruction theory. As elaborated on in the ensuing section, to read the residual clause as extending beyond evidence impairment, and to apply it to any that "corruptly" affects a proceeding, would raise serious Due Process issues. Once divorced from the concrete standard of evidence impairment, the residual clause defines neither the crime's *actus reus* (what conduct amounts to obstruction) nor its *mens rea* (what state of mind is "corrupt") "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." *See e.g. McDonnell v. United States*, 136 S.Ct. at 2373. This vagueness defect becomes even more pronounced when the statute is applied to a wide range of public officials whose normal duties involve the exercise of prosecutorial discretion and the conduct and management of official proceedings. The "cardinal rule" that a statute be interpreted to avoid serious constitutional questions mandates rejection of the sweeping interpretation of the residual clause proposed by Mueller.

Even if the statute's plain meaning, fortified by the "clear statement" rule, were not dispositive, the fact that § 1512 is a criminal statute dictates a narrower reading than Mueller's all-encompassing interpretation. Even if the scope of § 1512(c)(2) were ambiguous, under the "rule of lenity," that ambiguity must be resolved against the Government's broader reading. *See, e.g., United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances -- where text, structure, and history fail to establish that the Government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.")

In sum, the sweeping construction of § 1512(c)'s residual clause posited by Mueller's obstruction theory is novel and extravagant. It is contrary to the statute's plain language, structure, and legislative history. Such a broad reading would contravene the "clear statement" rule of statutory construction, which the Department has rigorously adhered to in interpreting statutes, like this one, that would otherwise intrude on Executive authority. By it terms, § 1512 is intended to protect the truth-finding function of a proceeding by prohibiting acts that would impair the availability or integrity of evidence. The cases applying the "residual clause" have fallen within this scope. The clause has never before been applied to facially-lawful discretionary acts of

Executive branch official. Mueller's overly-aggressive use of the obstruction laws should not be embraced by the Department and cannot support interrogation of the President to evaluate his subjective state of mind.

II. Applying §1512(c)(2) to Review Facially-Lawful Exercises of the President's Removal Authority and Prosecutorial Discretion Would Impermissibly Infringe on the President's Constitutional Authority and the Functioning of the Executive Branch.

This case implicates at least two broad discretionary powers vested by the Constitution exclusively in the President. First, in removing Comey as director of the FBI there is no question that the President was exercising one of his core authorities under the Constitution. Because the President has Constitutional responsibility for seeing that the laws are faithfully executed, it is settled that he has "illimitable" discretion to remove principal officers carrying out his Executive functions. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138, 3152 (2010); *Myers v. United States*, 272 U.S. 52 (1926). Similarly, in commenting to Comey about Flynn's situation – to the extent it is taken as the President having placed his thumb on the scale in favor of lenity – the President was plainly within his plenary discretion over the prosecution function. The Constitution vests *all Federal law enforcement power*, and hence prosecutorial discretion, in the President. The President's discretion in these areas has long been considered "absolute," and his decisions exercising this discretion are presumed to be regular and are generally deemed non-reviewable. *See, e.g., United States v. Armstrong,* 517 U.S. 456, 464 (1996); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see generally* S. Prakash, The Chief Prosecutor, 73 Geo. Wash. L. Rev. 521 (2005)

The central problem with Mueller's interpretation of §1512(c)(2) is that, instead of applying the statute to inherently wrongful acts of evidence impairment, he would now define the *actus reus* of obstruction as *any act,* including facially lawful acts, that influence a proceeding. However, the Constitution vests plenary authority over law enforcement proceedings in the President, and therefore one of the President's core constitutional authorities is precisely to make decisions "influencing" proceedings. In addition, the Constitution vests other discretionary powers in the President that can have a collateral influence on proceedings – including the power of appointment, removal, and pardon. The crux of Mueller's position is that, whenever the President exercises any of these discretionary powers and thereby "influences" a proceeding, he has completed the *actus reus* of the crime of obstruction. To establish guilt, all that remains is evaluation of the President's state of mind to divine whether he acted with a "corrupt" motive.

Construed in this manner, §1512(c)(2) would violate Article II of the Constitution in at least two respects:

First, Mueller's premise appears to be that, when a proceeding is looking into the President's own conduct, it would be "corrupt" within the meaning of §1512(c)(2) for the President to attempt to influence that proceeding. In other words, Mueller seems to be claiming that the obstruction statute effectively walls off the President from exercising Constitutional powers over cases in which his own conduct is being scrutinized. This premise is clearly wrong constitutionally. Nor can it be

reconciled with the Department's longstanding position that the "conflict of interest" laws do not, and cannot, apply to the President, since to apply them would impermissibly "disempower" the President from supervising a class of cases that the Constitution grants him the authority to supervise. Under the Constitution, the President's authority over law enforcement matters is necessarily all-encompassing, and Congress may not exscind certain matters from the scope of his responsibilities. The Framers' plan contemplates that the President's law enforcement powers extend to all matters, including those in which he had a personal stake, and that the proper mechanism for policing the President's faithful exercise of that discretion is the political process – that is, the People, acting either directly, or through their elected representatives in Congress.

Second, quite apart from this misbegotten effort to "disempower" the President from acting on matters in which he has an interest, defining facially-lawful exercises of Executive discretion as potential crimes, based solely on the President's subjective motive, would violate Article II of the Constitution by impermissibly burdening the exercise of core discretionary powers within the Executive branch. The prospect of criminal liability based solely on the official's state of mind, coupled with the indefinite standards of "improper motive" and "obstruction," would cast a pall over a wide range of Executive decision-making, chill the exercise of discretion, and expose to intrusive and free-ranging examination of the President's (and his subordinate's) subjective state of mind in exercising that discretion.

A. Section 1512(c)(2) May Not "Disempower" the President from Exercising His Law Enforcement Authority Over a Particular Class of Matters.

As discussed further below, a fatal flaw in Mueller's interpretation of §1512(c)(2) is that, while defining obstruction solely as acting "corruptly," Mueller offers no definition of what "corruptly" means. It appears, however, that Mueller has in mind particular circumstances that he feels may give rise to possible "corruptness" in the current matter. His tacit premise appears to be that, when an investigation is looking into the President's own conduct, it would be "corrupt" for the President to attempt to influence that investigation.

On a superficial level, this outlook is unsurprising: at first blush it accords with the old Roman maxim that a man should not be the judge in his own case and, because "conflict-of-interest" laws apply to all the President's subordinates, DOJ prosecutors are steeped in the notion that it is illegal for an official to touch a case in which he has a personal stake. But constitutionally, as applied to the President, this mindset is entirely misconceived: there is no *legal* prohibition – as opposed a political constraint -- against the President's acting on a matter in which he has a personal stake.

The Constitution itself places no limit on the President's authority to act on matters which concern him or his own conduct. On the contrary, the Constitution's grant of law enforcement power to the President is plenary. Constitutionally, it is wrong to conceive of the President as simply the highest officer within the Executive branch hierarchy. He alone *is* the Executive branch. As such, he is the sole repository of *all Executive powers* conferred by the Constitution. Thus, the full measure of law enforcement authority is placed in the President's hands, and no limit is placed on the kinds of cases subject to his control and supervision. While the President has subordinates --the Attorney General and DOJ lawyers -- who exercise prosecutorial discretion on

his behalf, they are merely "his hand," *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) – the discretion they exercise is the President's discretion, and their decisions are legitimate precisely because they remain under his supervision, and he is still responsible and politically accountable for them.

Nor does any statute purport to restrict the President's authority over matters in which he has an interest. On the contrary, in 1974, the Department concluded that the conflict-of interest-laws cannot be construed as applying to the President, expressing "serious doubt as to the constitutionality" of a statute that sought "to disempower" the President from acting over particular matters. *Letter to Honorable Howard W. Cannon from Acting Attorney General Laurence H. Silberman*, dated September 20, 1974; and *Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution* at 2, 5 (Aug. 28, 1974). As far as I am aware, this is the only instance in which it has previously been suggested that a statute places a class of law enforcement cases "off limits" to the President's supervision based on his personal interest in the matters. The Department rejected that suggestion on the ground that Congress could not "disempower" the President from exercising his supervisory authority over such matters. For all the same reasons, Congress could not make it a crime for the President to exercise supervisory authority over cases in which his own conduct might be at issue.

The illimitable nature of the President's law enforcement discretion stems not just from the Constitution's plenary grant of those powers to the President, but also from the "unitary" character of the Executive branch itself. Because the President alone constitutes the Executive branch, the President cannot "recuse" himself. Just as Congress could not *en masse* recuse itself, leaving no source of the Legislative power, the President cannot take a holiday from his responsibilities. It is in the very nature of discretionary power that ultimate authority for making the choice must be vested in some final decision-maker. At the end of the day, there truly must be a desk at which "the buck stops." In the Executive, final responsibility must rest with the President. Thus, the President, "though able to delegate duties to others, cannot delegate ultimate responsibility or *the active obligation to supervise that goes with it.*" *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 130 S. Ct. 3138, 3154 (2010) (*quoting Clinton v. Jones*, 520 U.S. 681, 712-713 (1997) (Breyer, J., concurring in judgment)) (emphasis added).

In framing a Constitution that entrusts broad discretion to the President, the Framers chose the means they thought best to police the exercise of that discretion. The Framers' idea was that, by placing all discretionary law enforcement authority in the hands of a single "Chief Magistrate" elected by all the People, and by making him politically accountable for all exercises of that discretion by himself or his agents, they were providing the best way of ensuring the "faithful exercise" of these powers. Every four years the people as a whole make a solemn national decision as to the person whom they trust to make these prudential judgments. In the interim, the people's representatives stand watch and have the tools to oversee, discipline, and, if they deem appropriate, remove the President from office. Thus, under the Framers' plan, the determination whether the President is making decisions based on "improper" motives or whether he is "faithfully" discharging his responsibilities is left to the People, through the election process, and the Congress, through the Impeachment process.

The Framers' idea of political accountability has proven remarkably successful, far more so than the disastrous experimentation with an "independent" counsel statute, which both parties agreed to purge from our system. By and large, fear of political retribution has ensured that, when confronted with serious allegations of misconduct within an Administration, Presidents have felt it necessary to take practical steps to assure the people that matters will be pursued with integrity. But the measures that Presidents have adopted are voluntary, dictated by political prudence, and adapted to the situation; they are not legally compelled. Moreover, Congress has usually been quick to respond to allegations of wrongdoing in the Executive and has shown itself more than willing to conduct investigations into such allegations. The fact that President is answerable for any abuses of discretion and is ultimately subject to the judgment of Congress through the impeachment process means that the President is *not* the judge in his own cause. *See Nixon v. Harlow*, 457 U.S. 731, 757-58 n.41 (1982)(" The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office.")

Mueller's core premise -- that the President acts "corruptly" if he attempts to influence a proceeding in which his own conduct is being scrutinized – is untenable. Because the Constitution, and the Department's own rulings, envision that the President may exercise his supervisory authority over cases dealing with his own interests, the President transgresses no legal limitation when he does so. For that reason, the President's exercise of supervisory authority over such a case does not amount to "corruption." It may be in some cases politically unwise; but it is not a crime. Moreover, it cannot be presumed that any decision the President reaches in a case in which he is interested is "improperly" affected by that personal interest. Implicit in the Constitution's grant of authority over such cases, and in the Department's position that the President cannot be "disempowered" from acting in such cases, is the recognition that Presidents have the capacity to decide such matters based on the public's long-term interest.

In today's world, Presidents are frequently accused of wrongdoing. Let us say that an outgoing administration – say, an incumbent U.S. Attorney -- launches a "investigation" of an incoming President. The new President knows it is bogus, is being conducted by political opponents, and is damaging his ability to establish his new Administration and to address urgent matters on behalf of the Nation. It would neither be "corrupt" nor a crime for the new President to terminate the matter and leave any further investigation to Congress. There is no legal principle that would insulate the matter from the President's supervisory authority and mandate that he passively submit while a bogus investigation runs its course.

At the end of the day, I believe Mueller's team would have to concede that a President does not act "corruptly" simply by acting on – even terminating – a matter that relates to his own conduct. But I suspect they would take the only logical fallback position from that – namely, that it would be "corrupt" if the President had actually engaged in unlawful conduct and then blocked an investigation to "cover up" the wrongdoing. In other words, the notion would be that, if an investigation was bogus, the President ultimately had legitimate grounds for exercising his supervisory powers to stop the matter. Conversely, if the President had really engaged in wrongdoing, a decision to stop the case would have been a corrupt cover up. But, in the latter case, the predicate for finding any corruption would be first finding that the President had engaged in the wrongdoing he was allegedly trying to cover up. Under the particular circumstances here, the

issue of obstruction only becomes ripe after the alleged collusion by the President or his campaign is established first. While the distinct crime of obstruction can frequently be committed even if the underlying crime under investigation is never established, that is true only where the obstruction is an act that is wrongful in itself -- such as threatening a witness, or destroying evidence. But here, the only basis for ascribing "wrongfulness" (*i.e.*, an improper motive) to the President's actions is the claim that he was attempting to block the uncovering of wrongdoing by himself or his campaign. Until Mueller can show that there was unlawful collusion, he cannot show that the President had an improper "cover up" motive.

For reasons discussed below, I do not subscribe to this notion. But here it is largely an academic question. Either the President and his campaign engaged in illegal collusion or they did not. If they did, then the issue of "obstruction" is a sideshow. However, if they did not, then the cover up theory is untenable. And, at a practical level, in the absence of some wrongful act of evidence destruction, the Department would have no business pursuing the President where it cannot show any collusion. Mueller should get on with the task at hand and reach a conclusion on collusion. In the meantime, pursuing a novel obstruction theory against the President is not only premature but – because it forces resolution of numerous constitutional issues – grossly irresponsible.

B. Using Obstruction Laws to Review the President's Motives for Making Facially-Lawful Discretionary Decisions Impermissibly Infringes on the President's Constitutional Powers.

The crux of Mueller's claim here is that, when the President performs a facially-lawful discretionary action that influences a proceeding, he may be criminally investigated to determine whether he acted with an improper motive. It is hard to imagine a more invasive encroachment on Executive authority.

1. The Constitution Vests Discretion in the President To Decide Whether To Prosecute Cases or To Remove Principal Executive Officers, and Those Decisions are Not Reviewable.

The authority to decide whether or not to bring prosecutions, as well as the authority to appoint and remove principal Executive officers, and to grant pardons, are quintessentially Executive in character and among the discretionary powers vested exclusively in the President by the Constitution. When the President exercises these discretionary powers, it is presumed he does so lawfully, and his decisions are generally non-reviewable.

The principle of non-reviewability inheres in the very reason for vesting these powers in the President in the first place. In governing any society certain choices must be made that cannot be determined by tidy legal standards but require prudential judgment. The imperative is that there must be some ultimate decision-maker who has the final, authoritative say -- at whose desk the "buck" truly does stop. Any system whereby other officials, not empowered to make the decision themselves, are permitted to review the "final" decision for "improper motives" is antithetical both to the exercise of discretion and its finality. And, even if review can censor a particular choice, it leaves unaddressed the fact that a choice still remains to be made, and the reviewers have no power to make it. The prospect of review itself undermines discretion. *Wayte v. United States,* 470 U. S.

598, 607-608 (1985); *cf. Franklin v. Massachusetts*, 505 U.S. at 801. But any regime that proposes to review and *punish* decision-makers for "improper motives" ends up doing more harm than good by chilling the exercise of discretion, "dampen[ing] the ardor of all but the most resolute ...in the unflinching discharge of their duties." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2d Cir. 1949)(Learned Hand). In the end, the prospect of punishment chills the exercise of discretion over a far broader range of decisions than the supposedly improper decision being remedied. *McDonnell,* 136 S.Ct. at 2373.

For these reasons, the law has erected an array of protections designed to prevent, or strictly limit, review of the exercise of the Executive discretionary powers. *See, e.g., Nixon v. Fitzgerald*, 457 US 731,749 (1982) (the President's unique discretionary powers require that he have absolute immunity from civil suit for his official acts). An especially strong set of rules has been put in place to insulate those who exercise prosecutorial discretion from second-guessing and the possibility of punishment. *See. e.g., Imbler v. Pachtman*, 424 U. S. 409 (1976); *Yaselli v. Goff*, 275 U. S. 503 (1927), *aff'g* 12 F. 2d 396 (2d Cir. 1926). Thus, "it is entirely clear that the refusal to prosecute cannot be the subject of judicial review." *See, e.g., ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987); *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir. 1965) (The U.S. Attorney's decision not to prosecute even where there is probable cause is "a matter of executive discretion which cannot be coerced or reviewed by the courts."); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Even when there is a prosecutorial decision to proceed with a case, the law generally precludes review or, in the narrow circumstances where review is permitted, limits the extent to which the decision-makers' subjective motivations may be examined. Thus, a prosecutor's decision to bring a case is generally protected from civil liability by absolute immunity, even if the prosecutor had a malicious motive. *Yaselli v. Goff*, 275 U. S. 503 (1927), *aff'g* 12 F. 2d 396 (2d Cir. 1926). Even where some review is permitted, absent a claim of selective prosecution based on an impermissible classification, a court ordinarily will not look into the prosecutor's real motivations for bringing the case as long as probable cause existed to support prosecution. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Further, even when there is a claim of selective prosecution based on an impermissible classification, courts do not permit the probing of the prosecutor's subjective state of mind until the plaintiff has first produced objective evidence that the policy under which he has been prosecuted had a discriminatory effect. *United States v. Armstrong*, 517 U.S. 456 (1996). The same considerations undergird the Department's current position in *Hawaii v. Trump*, where the Solicitor General is arguing that, in reviewing the President's travel ban, a court may not look into the President's subjective motivations when the government has stated a facially legitimate basis for the decision. (*SG's Merits Brief* at 61).

In short, the President's exercise of its Constitutional discretion is not subject to review for "improper motivations" by lesser officials or by the courts. The judiciary has no authority "to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made" in the courts. *Marbury v. Madison, 1 Cranch (5 U.S.) 137, 170 (1803).*

2. Threatening criminal liability for facially-lawful exercises of discretion, based solely on the subjective motive, would impermissibly burden the exercise of core Constitutional powers within the Executive branch..

Mueller is effectively proposing to use the criminal obstruction law as a means of reviewing discretionary acts taken by the President when those acts influence a proceeding. Mueller gets to this point in three steps. First, instead of confining §1512(c)(2) to inherently wrongful acts of evidence impairment, he would now define the *actus reus* of obstruction as *any act* that influences a proceeding. Second, he would include within that category the official discretionary actions taken by the President or other public officials carrying out their Constitutional duties, including their authority to control all law enforcement matters. The net effect of this is that, once the President or any subordinate takes any action that influences a proceeding, he has completed the *actus reus* of the crime of obstruction. To establish guilt, all that remains is evaluation of the President's or official's subjective state of mind to divine whether he acted with an improper motive.

Wielding §1512(c)(2) in this way preempts the Framers' plan of political accountability and violate Article II of the Constitution by impermissibly burdening the exercise of the core discretionary powers within the Executive branch. The prospect of criminal prosecution based solely on the President's state of mind, coupled with the indefinite standards of "improper motive" and "obstruction," would cast a pall over a wide range of Executive decision-making, chill the exercise of discretion, and expose to intrusive and free-ranging examination the President's (or his subordinate's) subjective state of mind in exercising that discretion

Any system that threatens to punish discretionary actions based on subjective motivation naturally has a substantial chilling effect on the exercise of discretion. But Mueller's proposed regime would mount an especially onerous and unprecedented intrusion on Executive authority. The sanction that is being threatened for improperly-motivated actions is the most severe possible – personal criminal liability. Inevitably, the prospect of being accused of criminal conduct, and possibly being investigated for such, would cause officials "to shrink" from making potentially controversial decisions and sap the vigor with which they perform their duties. *McDonnell v. United States*, 136 S.Ct. at 2372-73.

Further, the chilling effect is especially powerful where, as here, liability turns solely on the official's subjective state of mind. Because charges of official misconduct based on improper motive are "easy to allege and hard to disprove," *Hartman v. Moore*, 547 U.S. 250, 257-58 (2006), Mueller's regime substantially increases the likelihood of meritless claims, accompanied by the all the risks of defending against them. Moreover, the review contemplated here would be far more intrusive since it does not turn on an objective standard – such as the presence in the record of a reasonable basis for the decision – but rather requires probing to determine the President's actual subjective state of mind in reaching a decision. As the Supreme Court has observed, *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982), even when faced only with civil liability, such an inquiry is especially disruptive:

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of

> subjecting officials to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. ...[T]he judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables ...frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery .... Inquiries of this kind can be peculiarly disruptive of effective government.

Moreover, the encroachment on the Executive function is especially broad due to the wide range of actors and actions potentially covered. Because Mueller defines the *actus reus* of obstruction as any act that influences a proceeding, he is including not just exercises of prosecutorial discretion directly deciding whether a case will proceed or not, but also exercises of any other Presidential power that might collaterally affect a proceeding, such as a removal, appointment, or grant of pardon. And, while Mueller's immediate target is the President's exercise of his discretionary powers, his obstruction theory reaches all exercises of prosecutorial discretion by the President's subordinates, from the Attorney General, down the most junior line prosecutor. It also necessarily applies to all personnel, management, and operational decision by those who are responsible for supervising and conducting litigation and enforcement matters -- civil, criminal or administrative -- on the President's behalf.

A fatal flaw with Mueller's regime – and one that greatly exacerbates its chilling effect -- is that, while Mueller would criminalize any act "corruptly" influencing a proceeding, Mueller can offer no definition of "corruptly." What is the circumstance that would make an attempt by the President to influence a proceeding "corrupt?" Mueller would construe "corruptly" as referring to one's purpose in seeking to influence a proceeding. But Mueller provides no standard for determining what motives are legal and what motives are illegal. Is an attempt to influence a proceeding based on political motivations "corrupt?" Is an attempt based on self-interest? Based on personal career considerations? Based on partisan considerations? On friendship or personal affinity? Due process requires that the elements of a crime be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." *See McDonnell*, 136 S.Ct. at 2373. This, Mueller's construction of §1512(c)(2) utterly fails to do.

It is worth pausing on the word "corruptly," because courts have evinced a lot of confusion over it. It is an adverb, modifying the verbs "influence," "impede," etc. But few courts have deigned to analyze its precise adverbial mission. Does it refer to "how" the influence is accomplished – *i.e.,* the means used to influence? Or does it refer to the ultimate purpose behind the attempt to influence? As an original matter, I think it was clearly used to described the means used to influence. As the D.C. Circuit persuasively suggested, the word was likely used in its 19th century transitive sense, connoting the turning (or corrupting) of something from good and fit for its purpose into something bad and unfit for its purpose – hence, "corrupting" a magistrate; or "corrupting" evidence. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir.1991). Understood this way, the ideas behind the obstruction laws come more clearly into focus. The thing that is

corrupt is the means being used to influence the proceeding. They are inherently wrong because they involve the corruption of decision-makers or evidence. The culpable intent does not relate to the actor's ultimate motive for using the corrupt means. The culpable state of mind is merely the intent that the corrupt means bring about their immediate purpose, which is to sabotage the proceeding's truth-finding function. The actor's ultimate purpose is irrelevant because the means, and their immediate purpose, are dishonest and malign. Further, if the actor uses lawful means of influencing a proceeding – such as asserting an evidentiary privilege, or bringing public opinion pressure to bear on the prosecutors – then his ultimate motives are likewise irrelevant. *See Arthur Anderson*, 544 U.S. at 703-707. Even if the actor is guilty of a crime and his only reason for acting is to escape justice, his use of lawful means to impede or influence a proceeding are perfectly legitimate.

Courts have gotten themselves into a box whenever they have suggested that "corruptly" is not confined to the use of wrongful means, but can also refer to someone's ultimate motive for using lawful means to influence a proceeding. The problem, however, is that, as the courts have consistently recognized, there is nothing inherently wrong with attempting to influence or impede a proceeding. Both the guilty and innocent have the right to use lawful means to do that. What is the motive that would make the use of lawful means to influence a proceeding "corrupt?" Courts have been thrown back on listing "synonyms" like "depraved, wicked, or bad." But that begs the question. What is depraved – the means or the motive? If the latter, what makes the motive depraved if the means are within one's legal rights? Fortunately for the courts, the cases invariably involve evidence impairment, and so, after stumbling around, they get to a workable conclusion. Congress has also taken this route. *Poindexter* struck down the omnibus clause of §1505 on the grounds that, as the sole definition of obstruction, the word "corruptly" was unconstitutionally vague. 951 F.2d at 377-86. Tellingly, when Congress sought to "clarify" the meaning of "corruptly" in the wake of *Poindexter*, it settled on even more vague language – "acting with an improper motive" – and then proceeded to qualify this definition further by adding, "including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. §1515(b). The fact that Congress could not define "corruptly" except through a laundry list of acts of evidence impairment strongly confirms that, in the obstruction context, the word has no intrinsic meaning apart from its transitive sense of compromising the honesty of a decision-maker or impairing evidence.

At the end of the day then, as long as §1512 is read as it was intended to be read – *i.e.*, as prohibiting actions designed to sabotage a proceeding's access to complete and accurate evidence -- the term "corruptly" derives meaning from that context. But once the word "corruptly" is deracinated from that context, it becomes essentially meaningless as a standard. While Mueller's failure to define "corruptly" would be a Due Process violation in itself, his application of that "shapeless" prohibition on public officials engaged in the discharge of their duties impermissibly encroach on the Executive function by "cast[ing] the pall of potential prosecution" over a broad range of lawful exercises of Executive discretion. *McDonnell*, 136 S.Ct. at 2373-74.

The chilling effect is magnified still further because Mueller's approach fails to define the kind of impact an action must have to be considered an "obstruction." As long as the concept of obstruction is tied to evidence impairment, the nature of the actions being prohibited is discernable. But once taken out of this context, how does one differentiate between an unobjectionable

"influence" and an illegal "obstruction?" The actions being alleged as obstructions in this case illustrate the point. Assuming arguendo that the President had motives such that, under Mueller's theory, any direct order by him to terminate the investigation would be considered an obstruction, what action short of that would be impermissible? The removal of Comey is presumably being investigated as "obstructive" due to some *collateral* impact it could have on a proceeding. But removing an agency head does not have the natural and foreseeable consequence of obstructing any proceeding being handled by that agency. How does one gauge whether the collateral effects of one's actions could impermissibly affect a proceeding?

The same problem exists regarding the President's comments about Flynn. Even if the President's motives were such that, under Mueller's theory, he could not have ordered termination of an investigation, to what extent do comments short of that constitute obstruction? On their face, the President's comments to Comey about Flynn seem unobjectionable. He made the accurate observation that Flynn's call with the Russian Ambassador was perfectly proper and made the point that Flynn, who had now suffered public humiliation from losing his job, was a good man. Based on this, he expressed the "hope" that Comey could "see his way clear" to let the matter go. The formulation that Comey "see his way clear," explicitly leaves the decision with Comey. Most normal subordinates would not have found these comments obstructive. Would a superior's questioning the legal merit of a case be obstructive? Would pointing out some consequences of the subordinate's position be obstructive? Is something really an "obstruction" if it merely is pressure acting upon a prosecutor's psyche? Is the obstructiveness of pressure gauged objectively or by how a subordinate subjectively apprehends it?

The practical implications of Mueller's approach, especially in light of its "shapeless" concept of obstruction, are astounding. DOJ lawyers are always making decisions that invite the allegation that they are improperly concluding or constraining an investigation. And these allegations are frequently accompanied by a claim that the official is acting based on some nefarious motive. Under the theory now being advanced, any claim that an exercise of prosecutorial discretion was improperly motived could legitimately be presented as a potential criminal obstruction. The claim would be made that, unless the subjective motivations of the decision maker are thoroughly explored through a grand jury investigation, the putative "improper motive" could not be ruled out.

In an increasingly partisan environment, these concerns are by no means trivial. For decades, the Department has been routinely attacked both for its failure to pursue certain matters and for its decisions to move forward on others. Especially when a house of Congress is held by an opposing party, the Department is almost constantly being accused of deliberately scuttling enforcement in a particular class of cases, usually involving the environmental laws. There are claims that cases are not being brought, or are being brought, to appease an Administration's political constituency, or that the Department is failing to investigate a matter in order to cover up its own wrongdoing, or to protect the Administration. Department is bombarded with requests to name a special counsel to pursue this or that matter, and it is frequently claimed that his reluctance to do so is based on an improper motive. When a supervisor intervenes in a case, directing a course of action different from the one preferred by the subordinate, not infrequently there is a tendency for the subordinate to ascribe some nefarious motive. And when personnel changes are made – as

for example, removing a U.S. Attorney – there are sometimes claims that the move was intended to truncate some investigation.

While these controversies have heretofore been waged largely on the field of political combat, Mueller's sweeping obstruction theory would now open the way for the "criminalization" of these disputes. Predictably, challenges to the Department's decisions will be accompanied by claims that the Attorney General, or other supervisory officials, are "obstructing" justice because their directions are improperly motivated. Whenever the slightest colorable claim of a possible "improper motive" is advanced, there will be calls for a criminal investigation into possible "obstruction." The prospect of being accused of criminal conduct, and possibly being investigated for such, would inevitably cause officials "to shrink" from making potentially controversial decisions.

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505
Telephone: (505) 983-9834
Fax: (505) 983-9836

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813
Telephone: (808) 531-9722
Fax: (808) 486-2833

March 7, 2019

VIA FEDERAL EXPRESS

Office of Disciplinary Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street NW, Building A, Suite 117
Washington, DC 2001

Hamilton P. Fox, III, Disciplinary Counsel
Jennifer P. Lyman, Senior Assistant
Joseph N. Bowman, Assistant Counsel
Dolores Dorsainvil, Assistant Counsel
Ebtehaj Kalantar, Assistant Counsel
Sean P. O'Brien, Assistant Counsel
William R. Ross, Assistant Counsel
H. Clay Smith, III, Assistant Counsel
Traci M. Tait, Assistant Counsel
Sheryl C. Cline, Case Management
Angela Walker, Case Manager
Christina M. Spears, Office Manager
Julia L. Porter, Deputy Disciplinary Counsel
Becky A. Neal, Senior Assistant
Hendrik R. DeBoer, Assistant Counsel
Jerri U. Dunston, Assistant Counsel
Jelani C. Lowery, Assistant Counsel
Joseph C. Perry, Assistant Counsel
Clinton R. Shaw, Jr., Assistant Counsel
Caroll Donayre Somoza, Assistant Counsel
Lawrence K. Bloom, Senior Staff Attorney
Carol Threlkeld, Case Manager
Helen I. Severson, Executive Assistant

Re: NATIONAL EMERGENCY - <u>SUPPLEMENTAL ARGUMENT NO. 2</u>
State Bar Ethics Complaints Filed to Force Recusal of U.S. Attorney William Pelham Barr From Mueller Investigation Decision-Making

Sirs/Madams:

Since the filing of my request for the recusal of Mr. Barr from any involvement with the Mueller Investigation, there has been an escalation of animus by President Trump and his complicit party loyalists toward the Investigation, and Mr. Barr's corresponding silence and failure to express any support for the legitimacy of the Investigation and the ultimate disclosure of it's evidence to the American public cause me even more concern that Mr. Barr will either prematurely terminate the Investigation or will otherwise interfere with the effect of its outcome, to include hiding its evidence and refusing to recommend or take action against the President for his patent criminal activity. Because his publicly-expressed views concerning the invalidity of the Mueller Investigation reflects a per se conflict of interest, Attorney General Barr therefore must not be permitted to interact with said Investigation either directly or indirectly. *See* previously submitted request for recusal and related correspondence attached.

I am 71 years old and have been engaged in the practice of law for over 43 years, and my education, training and military and other life experience all cause me to continue to entreat you to consider my urgent concern that irreparable damage to our democracy will result if Mr. Barr's recusal from the Mueller Investigation is not immediately directed by his Bar Association, which is perhaps the last authoritative guardrail that may be able to avert this impending disaster. *See*

http://thebennettlawgroup.com/attorneys/merit-bennett/;
http://thebennettlawgroup.com/major-cases/honolulu-police-department-race-and-gender-discrimination-lawsuit/;
http://thebennettlawgroup.com/major-cases/wal-mart-sex-discrimination-nationwide-class-action-lawsuit/;
http://thebennettlawgroup.com/major-cases/wal-mart-sex-harassment-verdict/;
http://thebennettlawgroup.com/major-cases/clergy-sex-abuse/;
http://thebennettlawgroup.com/attorneys/merit-bennett/more-about-merit/

Sincerely,

Merit Bennett

Enclosure

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505
Telephone: (505) 983-9834
Fax: (505) 983-9836

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813
Telephone: (808) 531-9722
Fax: (808) 486-2833

February 22, 2019

VIA FEDERAL EXPRESS

Office of Disciplinary Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street NW, Building A, Suite 117
Washington, DC 2001

Hamilton P. Fox, III, Disciplinary Counsel
Jennifer P. Lyman, Senior Assistant
Joseph N. Bowman, Assistant Counsel
Dolores Dorsainvil, Assistant Counsel
Ebtehaj Kalantar, Assistant Counsel
Sean P. O'Brien, Assistant Counsel
William R. Ross, Assistant Counsel
H. Clay Smith, III, Assistant Counsel
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Lawrence K. Bloom, Senior Staff Attorney
Carol Threlkeld, Case Manager
Helen I. Severson, Executive Assistant

Re: NATIONAL EMERGENCY - SUPPLEMENTAL ARGUMENT
Ethics Complaint Previously Lodged Against William Pelham Barr

Sirs/Madams:

Upon further consideration, and in supplement of the referenced Bar Complaint previously lodged by the undersigned, an additional basis for the relief requested may be required, and, if so, such is therefore submitted below.

The District of Columbia Bar may have adopted the rule that an "appearance of impropriety" is insufficient to disqualify an attorney from representation of a client and that "an actual conflict of interest" must be established to mandate recusal.

If the District of Columbia Bar has indeed adopted this rule, I would ask the Disciplinary Committee to consider the following:

1. Mr. Barr has expressed an "actual conflict of interest" with Special Counsel Robert Mueller and the Special Counsel Investigation which automatically mandates Mr.

Barr's recusal from any involvement, connection with or decision-making regarding the Special Counsel's Investigation, to include, but not limited to, any limitation on the disclosure to the public or to Congress of the evidence gleaned from said investigation:

> Mr. Barr has been publicly critical of the Mueller Investigation, saying that it was not balanced. In June of 2018, Mr. Barr sent an unsolicited 20-page memo to Deputy Attorney General Rod Rosenstein, arguing that the Special Counsel's approach to potential obstruction of justice by Trump was 'fatally misconceived' and that, based on Barr's knowledge, Trump's actions, which were under investigation by Special Counsel Mueller, were within presidential authority.
>
> *https://www.wsj.com/public/resources/documents/BarrMueller.pdf?mod=article_inline*

2. Even if the Committee somehow determines that Mr. Barr's pre-disposition to fail to give appropriate credence to the findings of the Special Counsel Investigation is not an "actual conflict of interest" requiring his recusal, the prior rule of disqualification for an "appearance of impropriety" should still apply to the particular circumstances of this matter, simply because Mr. Barr is not acting as an attorney in a private capacity. He is instead acting in a public capacity as an attorney representing the people of the United States in a matter with national security implications, which therefore requires him to be held to the higher standard of recusal "appearance of impropriety."

Accordingly, please consider this to be a supplement to the second request to immediately take appropriate action upon the previously-filed Bar Complaint.

Sincerely,

Merit Bennett

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505
Telephone: (505) 983-9834
Fax: (505) 983-9836

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813
Telephone: (808) 531-9722
Fax: (808) 486-2833

February 21, 2019

VIA FEDERAL EXPRESS

Office of Disciplinary Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street NW Building A, Suite 117
Washington, DC 20001

Re: NATIONAL EMERGENCY
Ethics Complaint Previously Lodged Against William Pelham Barr

Sirs/Madams:

As you may know, the undersigned recently filed a Bar "Complaint" against Mr. William Pelham Barr, Esq., requesting the District of Columbia Bar to direct Mr. Barr's immediate recusal from any involvement with or influence upon the Robert Mueller Special Counsel Investigation or upon the publication of its findings, conclusions or report(s). *See* Bar Complaint attached.

Recent news reports forewarning of the imminent closing of the Special Counsel Investigation at the direction of Mr. Barr requires your immediate consideration of the undersigned's previously-filed recusal request in order to avert irrevocable harm to our fundamental institutions, including to our Constitution, our national security, the rule of law and the public and historical reputation of our legal profession and its inherent duty to protect our citizens against ethical, political and illegal misconduct.

Accordingly, please consider this to be a respectful second request to immediately consider and take appropriate action upon the previously filed (and again attached) Bar Complaint.

Thank you again for your attention to this urgent matter.

Sincerely,

Merit Bennett

Enclosures

THE BENNETT LAW GROUP LLC
Attorneys at Law

Merit Bennett
New Mexico – Hawai'i – Colorado
mb@thebennettlawgroup.com

Talia Kosh
New Mexico – Maryland
tk@thebennettlawgroup.com

New Mexico Office:
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505
Telephone: (505) 983-9834
Fax: (505) 983-9836

Hawai'i Office:
1050 Bishop Street, #302
Honolulu, Hawai'i 96813
Telephone: (808) 531-9722
Fax: (808) 486-2833

February 14, 2019

VIA FEDERAL EXPRESS

Office of Disciplinary Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street, N.W.
Building A, Room 117
Washington, D.C. 20001

Re: Request for the Bar's Direction to Attorney General William Pelham Barr to Recuse Himself from the United States Justice Department's Special Counsel Investigation

Sir/Madam:

According to the intent and guidance of the New Mexico, Colorado and Hawai'i Codes of Professional Responsibility, the undersigned, being licensed to practice law in those states, feels ethically and morally obligated to report actual and/or potential conflicts of interest of another lawyer to that lawyer's Bar Association, especially when vital societal interests are at stake.

Notwithstanding that obligation, the undersigned is also making this Request as a citizen of the United States and a civilian member of the American public, all of whom are represented by the United States Department of Justice and the Office of the United States Attorney General, the office to which Mr. William Pelham Barr has been appointed and confirmed.

As the Bar is likely aware, Mr. Barr has been nominated by President Donald J. Trump to serve as the United States government's Attorney General, to head the Department of Justice ("DOJ") following President Trump's firing of former Attorney General Jeff Sessions.

As the Bar also may know, Mr. Barr has expressed opinions which should disqualify him from any personal involvement in certain investigations which are now being conducted and/or which may be conducted by the DOJ in the future, including especially with regard to any association he may have or any influence he may or could exert in connection with the investigation currently being undertaken by Special Counsel Robert Mueller ("Special Counsel Investigation").

For the purpose of this Request, it should be assumed that Mr. Barr is unaware of his potential conflict of interest and that he bears no mal-intent contrary to the interests of the United States or of its citizenry.

After viewing the United States Senate hearing on the confirmation of Mr. Barr's appointment by President Donald J. Trump to serve as the United States Attorney General, the undersigned felt professionally and personally obligated to lodge this "Request for the Bar's Direction to Mr. Barr" to immediately recuse himself from the Special Counsel Investigation currently being conducted by Special Counsel Robert Mueller.

This Request is also made in good faith in order to assist and protect Mr. Barr and his alleged excellent professional standing to insure that he does not act upon the likely mistaken legal views he expressed at the Senate confirmation hearing, because, if he did so, he may unnecessarily suffer professional disrepute and unwittingly jeopardize our country's national security.

Therefore, please consider this letter to be (1) a report of the actual and/or potential conflict(s) of interest D.C. Bar member William Pelham Barr, who has been nominated by President Donald Trump and confirmed by the United States Senate to serve as the United States Attorney General for the United States of America in Washington, D.C., and (2) a request that the Bar, among other appropriate remedial action, direct Mr. Barr to recuse himself from the pending Department of Justice ("Special Counsel") investigation referred to below. ***See also*** **the completed Complaint Form enclosed.**

See attached to this letter the detailed summary in *Wikipedia* of Mr. Barr's openly-expressed views which should disqualify him from having any connection with any DOJ investigations (including their funding, processing, conclusions or public disclosure) involving legal or investigatory issues concerning: (1) abortion and a woman's right to choose; (2) the separation of church and state; and, most importantly, **(3) the investigation(s) of Russian interference with the 2016 U.S. election and/or any conspiracy/collusion/complicity/cooperation between Donald Trump and the Russian Government or any of its agents, which investigation(s) is/are currently being conducted by Robert Mueller and other law enforcement officials (Special Counsel Investigation).** *See* highlighted text on pages 7, 8 and 9 of the attached *Wikipedia* summary.

(Issues nos. 1 and 2 are included here only to put into ideological context Mr. Barr's apparent conflict of interest should he have any involvement with or attempt to exercise any influence over the Mueller Investigation.)

Perhaps most disqualifying, last June Mr. Barr wrote a 19-page memorandum describing the Special Counsel Investigation as "fatally misconceived" and based "on a novel and insupportable reading of the law."

During his Senate confirmation hearing, he assured senators of his independence and said he would not be bullied by anyone into doing something he believes is wrong if he takes the helm of the Justice Department. Barr, however, did suggest he may not release Mueller's final report to the public because of an agency guideline.

It is my understanding that a lawyer cannot ethically be permitted to publicly express his or her personal negative political judgment concerning the propriety or permissible authority of a national security investigation and then later actually oversee, influence or be allowed to limit that investigation, as any such oversight, influence or limitation would implicitly reflect an

impermissible conflict of interest which would therefore constitute an unprofessional and unethical "appearance of impropriety" on full display to the American public, thereby weakening the public's confidence in our country's institutions as the guardians of our constitution and its protected freedoms.

Therefore, and notwithstanding his representations of "neutrality" at his Senate confirmation hearing, in order to avoid the obvious appearance of impropriety implicated by his Senate testimony and his previous publicly-expressed "legal opinions," it is requested that **Mr. Barr be separately required by his licensing bar associations (because he has testified to the Senate Judiciary Committee that he is not obligated to follow the advice of DOJ's ethics counsel) to recuse himself from any involvement with or influence upon any aspect of the Special Counsel Investigation.**

This recusal should be required in order to maintain public confidence in our legal profession which has a special duty to insure that our lawyers provide conflict-free representation to the public without any appearance of impropriety whatsoever, especially when the lawyer whose recusal is required is obligated to protect the vital security interests of the American public.

Finally, at the Senate hearing, Mr. Barr self-proclaimed the reservation of his right to override or ignore any recusal opinion issued by DOJ ethics counsel, which testimony may even constitute the appearance of an ethical compromise *per se*, therefore requiring Mr. Bar's recusal from taking, initiating or encouraging any action (however slight) or participating in, initiating or encouraging any failure to act (however benign) in furtherance of or to adequately fund, in connection with the Special Counsel Investigation, either directly or indirectly.

Given his prior public statements disparaging the Special Counsel Investigation, **this testimony, by itself, automatically mandates Mr. Barr's recusal**, as any exercise by him of such alleged authority would again portray to the public an impermissible appearance of impropriety and could certainly compromise the reputation and good standing of the legal profession in our society.

Accordingly, it is vital that the Bar direct Mr. Barr to immediately and permanently recuse himself from any involvement or decision-making whatsoever regarding the conduct or reporting of the Special Counsel Investigation, including its funding, processing, conclusions, report redactions or private or public disclosure.

Because our country's national security and the fundamental integrity of our nation's legal profession are urgently in jeopardy, please render your opinion as soon as possible and please immediately make it available to both houses of Congress and the American public.

Please advise if you have any questions or require any further information or citation.

Thank you for your urgent consideration of this request.

Sincerely,

Merit Bennett

Enclosures

OFFICE OF DISCIPLINARY COUNSEL
THE BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

515 Fifth Street, N.W.
Building A, Room 117
Washington, D.C. 20001
(202) 638-1501 Fax (202) 638-0862
www.dcattorneydiscipline.org

(*Please print or type*)

Date: January 14, 2019

A. Your Name: (Dr.) (Mr.) (Ms.) (Mrs.) Mr. Merit Bennett
(First) (Initial) (Last)

Address: 460 St. Michael's Drive, Ste. 703
(Street) (Apt. #)

Santa Fe, New Mexico 87505
(City) (State) (Zip)

Business Phone: 505-983-9834 Home Phone: _____ Cell Phone: 505-577-8037

Email Address: mb@thebennettlawgroup.com

(NOTE: It is very important that we have your telephone number(s) and that you inform our office if you have a change of address.)

B. Attorney Complained Of:

Name: William Pelham Barr
(First) (Initial) (Last)

Address: Kirkland & Ellis LLP, 655 Fifteenth Street, N.W.
(Street) (Apt. #)

Washington, D.C. 20005-5793
(City) (State) (Zip)

Telephone No.: 202-879-5080 Attorney's Bar No., if known: _____

C. Have you filed a complaint about this matter anywhere else? ■ Yes ☐ No // If yes, please give details.
Virginia State Bar

D. Do you have a written retainer agreement with the attorney? ☐ Yes ■ No // If yes, please attach a copy.

E. Where applicable, state the name of the court where the underlying case was filed, and the case name and number.
William P. Barr's Confirmation by the United States Senate to be United States Attorney General

F. Do you have other documents that are relevant? ■ Yes ☐ No // If yes, please give details and provide copies.
https://en.m.wikipedia.org/wiki/William_Barr - a copy is attached hereto - see highlighted material which establishes that Mr. Barr has a conflict of interest barring him from involvement with the Mueller investigation.

SEE REVERSE SIDE FOR REQUIRED DETAILS & SIGNATURE

G. DETAILS OF COMPLAINT:

Mr. Barr has expressed personal and professional views, as are highlighted in the material cited in the attached Wikipedia summary, which are contrary to the principles of and dangerous to the operation of our American democracy and in violation of the rule of law and legal precedent, to include, but not limited to, his views contrary to the democratic principles of separation of church and state, of a woman's right to choose whether to have an abortion, and, most importantly, of not allowing our current president, Donald Trump, to exercise unprecedented executive power which places Trump above the law and is intended to insulate him from the law's normal consequences for his unpresidential, immoral, illegal and/or criminal misconduct. See attached citations to this misconduct.

Accordingly, because of one or more of the foregoing, and troubling, views held and openly expressed by Mr. Barr, he should not be permitted to exercise any control or influence over any matters engaged in by the U.S. Department of Justice with respect to any issues or decisions involving or concerning any any matter regarding: (1) the principle of a woman's right to choose; (2) the principle of the necessity for the separation of church and state; and (3) the investigation(s) of Russian interference with the U.S. election process and/or any conspiracy/collusion/complicity/cooperation between Donald Trump and the Russian Government or any of its agents, which investigation(s) is/are currently being conducted by Robert Mueller and other law enforcement officials.

With respect to issue no. 3, Mr. Barr should also be instructed to not interfere with the Mueller investigation in any way, to include with its scope, subpoena power, evidence, outcome, prosecutions and/or public disclosure.

The Undersigned hereby certifies to the Office of Disciplinary Counsel that the statements in the foregoing Complaint are true and correct to the best of my knowledge.

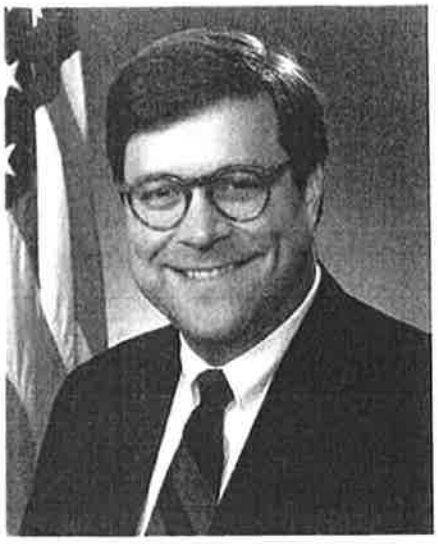
SIGNATURE

For other people named William Barr, see William Barr (disambiguation).

William Pelham Barr (born May 23, 1950) is an American attorney who served as the 77th United States Attorney General from 1991 to 1993 during the first Bush administration.[1] He is a member of the Republican Party.

SEE HIGHLIGHTS ON PAGES 7, 8 AND 9.

William Barr



United States Attorney General

Nominee

Assuming office
TBD*

President	Donald Trump
Deputy	Rod Rosenstein
Succeeding	Matthew Whitaker (acting)

77th United States Attorney General

In office
November 26, 1991 – January 20, 1993

President	George H. W. Bush
Deputy	George J. Terwilliger III
Preceded by	Dick Thornburgh
Succeeded by	Janet Reno

25th United States Deputy Attorney General

In office
May 1990 – November 26, 1991

President	George H. W. Bush
Preceded by	Donald B. Ayer

Succeeded by	George J. Terwilliger III

United States Assistant Attorney General for the Office of Legal Counsel

In office
April 1989 – May 1990

President	George H. W. Bush
Preceded by	Douglas Kmiec
Succeeded by	J. Michael Luttig

Personal details

Born	William Pelham Barr May 23, 1950 New York City, New York, U.S.
Political party	Republican
Education	Columbia University (BA, MA) George Washington University (JD)

*Pending Senate confirmation

On December 7, 2018, President Donald Trump announced that he would nominate Barr to again serve as Attorney General of the United States.[2]

Early life and education

Barr was born in New York City, the son of Columbia University faculty members Mary Margaret (Ahern) and Donald Barr.[3] His father was born Jewish, and had converted to Catholicism. Barr was raised Catholic.[4] He grew up on the Upper West Side, and attended the Corpus Christi School and Horace Mann School. He received his B.A. degree in government in 1971 and his M.A. degree in government and Chinese studies in 1973, both from Columbia University. He received his J.D. degree with highest honors in 1977 from the George Washington University Law School.[5]

Career

Barr greeting President Ronald Reagan in 1983

Early career

From 1973 to 1977, Barr was employed by the Central Intelligence Agency. Barr was a law clerk to Judge Malcolm Wilkey of the U.S. Court of Appeals for the District of Columbia Circuit from 1977 through 1978. He served on the domestic policy staff at the Reagan White House from May 3, 1982 to September 5, 1983, with his official title being Deputy Assistant Director for Legal Policy.[6] He was also in private practice for nine years with the Washington law firm of Shaw, Pittman, Potts & Trowbridge.[7]

Department of Justice

Barr and Dan Quayle watch as President George H. W. Bush signs the Civil Rights Commission Reauthorization Act in the Rose Garden of the White House in 1991

In 1989, at the beginning of his administration, President George H. W. Bush appointed Barr to the U.S. Department of Justice as Assistant Attorney General for the Office of Legal Counsel, an office which functions as the legal advisor for the President and executive agencies.

Barr was known as a strong defender of Presidential power and wrote advisory opinions justifying the U.S. invasion of Panama and arrest of Manuel Noriega, and a controversial opinion that the F.B.I. could enter onto foreign soil without the consent of the host government to apprehend fugitives wanted by the United States government for terrorism or drug-trafficking.[8]

Deputy Attorney General

In May 1990, Barr was appointed Deputy Attorney General, the official responsible for day-to-day management of the Department. According to media reports, Barr was generally praised for his professional management of the Department.[9]

During August 1991, when then-Attorney General Richard Thornburgh resigned to campaign for the Senate, Barr was named Acting Attorney General.[10] Three days after Barr accepted that position, 121 Cuban inmates, awaiting deportation to Cuba, seized 9 hostages at the Talladega federal prison. He directed the FBI's Hostage Rescue Team to assault the prison, which resulted in rescuing all hostages without loss of life.[11][12]

United States Attorney General (1991–1993)

Nomination and confirmation

It was reported that President Bush was impressed with Barr's management of the hostage crisis; weeks later, President Bush nominated him as Attorney General.[13]

Barr's two-day confirmation hearing was "unusually placid", and he received a good reception from both Republicans and Democrats on the Senate Judiciary Committee.[14] Asked whether he thought a constitutional right to privacy included the right to an abortion, Barr responded that he believed the constitution was not originally intended to create a right to abortion; that *Roe v. Wade* was thus wrongly decided; and that abortion should be a "legitimate issue for state legislators".[14] "Barr also said at the hearings that Roe v. Wade was 'the law of the land' and claimed he did not have 'fixed or settled views' on abortion."[15] Senate Judiciary Committee Chair Joe Biden, though disagreeing with Barr, responded that it was the "first candid answer" he had heard from a nominee on a question that witnesses would normally evade; Biden hailed Barr as "a throwback to the days when we actually had attorneys general that would talk to you."[16] Barr was approved unanimously by the Senate Judiciary Committee, was confirmed by voice vote by the full Senate,[17] and was sworn in as Attorney General on November 26, 1991.[1]

Tenure

According to *The New York Times*, Barr's tenure started with anti-crime measures. In an effort to prioritize violent crime Barr reassigned three hundred F.B.I. agents from counterintelligence work to investigations of gang violence, which the *Times* called, "the largest single manpower shift in the bureau's history."[18]

In October 1991, Barr appointed then retired Democratic Chicago judge Nicholas Bua as special counsel in the Inslaw scandal. Bua's 1993 report found the Department of no wrong doing in the matter.[19]

In October 1992, Barr appointed then retired New Jersey federal judge Frederick B. Lacey, to investigate the Department of Justice and the Central Intelligence Agency handling of the Banca Nazionale del Lavoro (BNL) Iraqgate scandal.[20] The appointment came after Democrats called for a special prosecutor during the scandal fearing a "cover-up" by the administration. House Banking Committee Chairman Henry B. González called for Barr's resignation, citing "repeated, clear failures and obstruction" by the Department of Justice.[21][22]

On December 24, 1992, nearing the end of his term in office after being defeated by Bill Clinton the previous month, George H. W. Bush pardoned[23] six administration officials, five who had been found guilty on charges relating to the Iran–Contra affair. Barr was consulted extensively regarding the pardons,[24] and especially advocated for the pardon of former Secretary of Defense, Caspar Weinberger, who had not yet come to trial.[25][26]

The media described Barr as staunchly conservative.[18] *The New York Times* described the "central theme" of his tenure to be: "his contention that violent crime can be reduced only by expanding Federal and state prisons to jail habitual violent offenders."[18] At the same time, reporters consistently described Barr as affable with a dry, self-deprecating wit.[27]

Post-DOJ career

After his tenure at the Department of Justice, Barr spent more than 14 years as a senior corporate executive. At the end of 2008 he retired from Verizon Communications, having served as Executive Vice President and General Counsel of GTE Corporation from 1994 until that company merged with Bell Atlantic to become Verizon. During his corporate tenure, Barr directed a successful litigation campaign by the local telephone industry to achieve deregulation by scuttling a series of FCC rules, personally arguing several cases in the federal courts of appeals and the Supreme Court.[28]

Barr's Memorandum to DOJ in opposition to Mueller

In Virginia, Barr was appointed during 1994 by then-Governor George Allen, the last Republican to be elected as Governor of the demographically changing state, to co-chair a commission to reform the criminal justice system and abolish parole in the state.[29] He served on the Board of Visitors of the College of William & Mary in Williamsburg from 1997 to 2005.[30] He became an independent director of Time Warner (now WarnerMedia) in July 2009.

In 2009, Barr was of counsel to Kirkland & Ellis. He rejoined the firm in 2017.[31]

2018 United States Attorney General nomination

On December 7, 2018, President Donald Trump announced his nomination of Barr for Attorney General to succeed Jeff Sessions.[32] Michael Isikoff and Daniel Klaidman reported that Trump had sought Barr as chief defense lawyer for Trump regarding the Mueller investigation in 2017 after Barr supported Trump's firing of Comey (May 9, 2017) and questioned some of Mueller's prosecutors due to political donations they had made to the Clinton campaign, and also due to purported conflicts of interest (Jennie Rhee, Bruce Ohr).[33][34][35]

On January 2, 2019, Sen. Chuck Grassley and Sen. Lindsey Graham announced that on January 15 and 16 the Senate Judiciary Committee will hold hearings to approve Barr as attorney general.[36]

Policy positions

Immigration

As Deputy Attorney General, Barr – together with others at the Department of Justice – successfully pushed for the withdrawal of a proposed Department of Health and Human Services rule that would have allowed people with HIV/AIDS into the United States.[37] He also advocated the use of Guantanamo Bay to prevent Haitian refugees and HIV infected individuals from claiming asylum in the United States.[26] According to *Vox* in December 2018, Barr took hardline positions on immigration as Attorney General in the Bush Administration.[38]

Social issues

In 1991, Barr stated that he believed the framers of the Constitution did not originally intend to create a right to abortion; that *Roe v. Wade* was thus wrongly decided; and that abortion should be a "legitimate issue for state legislators."[14] "Barr also said at the hearings that Roe v. Wade was 'the law of the land' and claimed he did not have 'fixed or settled views' on abortion."[15]

In a 1995 scholarly article for *The Catholic Lawyer*, Barr states that American government is "predicated precisely" on the Judeo-Christian system.[39][39]:3 Barr grapples with the challenge of representing Catholicism "in an increasingly militant, secular age."[39]:1 Barr asserts that there are three ways secularists use "law as a legal weapon."[39]:8 The first method is through elimination of traditional moral norms through legislation and litigation; Barr cites the elimination of the barriers to divorce and the Supreme Court's decision in *Roe v. Wade* as examples of this method.[39]:8 The second is the promotion of moral relativism through the passage of laws that dissolve moral consensus and enforce neutrality.[39]:8 Barr draws attention to a 1987 case, *Gay Rights Coalition v. Georgetown University*, which "compel[s] Georgetown University to treat homosexual activist groups like any other student group."[39]:9 The third method is the use of law directly against religion; as an example of this method, Barr cites efforts to use the Establishment Clause to exclude religiously motivated citizens from the public square.[39]:9 Concluding, Barr states the need to "restructure education and take advantage of existing tax deductions for charitable institutions to promote Catholic education."[39]:12

2016 election and Trump administration

Barr donated $55,000 to Jeb Bush during the 2016 United States presidential election.[40]

Barr believed that then-Republican candidate Donald J. Trump's calls for investigating Hillary Clinton, the Democratic candidate for President, were appropriate. He told *The New York Times* that "there is nothing inherently wrong about a president calling for an investigation. Although an investigation shouldn't be launched just because a president wants it, the ultimate question is whether the matter warrants investigation." In the same *Times* piece, Barr added that an

investigation into the Uranium One controversy was more warranted than looking into whether Trump conspired with Russia: "To the extent it is not pursuing these matters, the department is abdicating its responsibility."[41] Elsewhere, Barr has commented that "I don't think all this stuff about throwing [Hillary Clinton] in jail or jumping to the conclusion that she should be prosecuted is appropriate. But I do think that there are things that should be investigated that haven't been investigated."[42]

In February 2017, Barr argued Trump was justified in firing Acting Attorney General Sally Yates over her refusal to defend Executive Order 13769.[43]

Barr has been critical of the Mueller investigation saying that it was not balanced, "In my view, prosecutors who make political contributions are identifying fairly strongly with a political party, I would have liked to see him have more balance on this group."[44] In June 2018 he sent an unsolicited 20-page memo to deputy attorney general Rod Rosenstein arguing that the Special Counsel's approach to potential obstruction of justice by Trump was "fatally misconceived" and that, based on his knowledge, Trump's actions were within his presidential authority.[45] The day after the existence of the memo became known, Rosenstein stated, "our decisions are informed by our knowledge of the actual facts of the case, which Mr. Barr didn't have."[46]

Personal life

Barr has been married to his wife, Christine, since 1973. As of 2018, the Barrs' daughter, Mary Daly, works at the U.S. Department of Justice; she serves as the Trump Administration's point person on the opioid crisis.[47] Barr is an avid bagpiper; he began playing the bagpipes at age 8, and has played competitively in Scotland with a major American pipe band. At one time, Barr was a member of the City of Washington Pipe Band.[48]

Barr is a Roman Catholic.[49]

See also

- Timeline of Russian interference in the 2016 United States elections

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External links

- Media related to William Pelham Barr at Wikimedia Commons
- Works written by or about William P. Barr at Wikisource
- Appearances on C-SPAN

Legal offices		
Preceded by **Donald B. Ayer**	**United States Deputy Attorney General** 1990–1991	Succeeded by **George J. Terwilliger III**
Preceded by **Dick Thornburgh**	**United States Attorney General** 1991–1993	Succeeded by **Janet Reno**
Preceded by **Matthew Whitaker** **Acting**	**United States Attorney General** Taking office 2019	**Nominee**

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