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Restoring the Rule of Law through Department of Justice Reform

CLAIRE O. FINKELSTEIN | RICHARD W. PAINTER

As the nation’s principal law enforcement agency, the Department of Justice (DOJ) plays a unique role in protecting rule of law and, therefore, U.S. democracy. Despite the fact that the attorney general is appointed by the president and serves at the president’s pleasure, a recognition of the comparable independence of the DOJ from the political priorities of the rest of the executive branch has been critical for maintaining the department’s integrity and credibility over the course of its roughly 150-year history. To assure the American public that the actions of the DOJ are based on legitimate prosecutorial discretion rather than on political favoritism or electoral politics, prosecutions must be politically neutral and motivated only by the goal of evenhanded enforcement of the law, without prejudice produced by presidential political aims. The DOJ articulates its mission as to “enforce the law and defend the interests of the United States according to the law,”¹

This chapter is partially adapted from the authors’ 2020 CERL/CREW report on the Department of Justice. All material drawn from the report is properly attributed.

an aim that, when fulfilled, allows the department to serve as the guardian of the rule of law for the country as a whole. When the DOJ faithfully conforms to both law and ethics, it powerfully reinforces the foundations of democratic governance.

But the flip side is also true: the DOJ is particularly well situated to corrupt the rule of law.² When the department treats legal compliance as a creative exercise in public relations and political manipulation, it leads to the disintegration of rule of law values, not just in the DOJ but also in government as a whole. In that case, it threatens the very foundations of democratic governance. In short, any attempt to justify distortions of law by claiming the authority of law does disproportionate damage, given that such distortions strike at the very concept of legality itself.

With these principles in mind, in the summer of 2020, the authors of this chapter were reporters for a bipartisan working group hosted by the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania, in conjunction with Citizens for Responsibility and Ethics in Washington (CREW), to examine the conduct of the Department of Justice during the tenure of former Attorney General William Barr.³ The working group and consultants to the project consisted of legal and intelligence experts, including former high-ranking Justice Department officials in Republican administrations, assisted by students from CERL's 2020 summer internship program. The working group presented a number of serious concerns relating to the functioning of the DOJ in 2019–2020, which it presented in a report on October 12, 2020.⁴ The CERL/CREW report examined questions about the conduct of Attorney General Barr during the roughly twenty months of his tenure at the DOJ and found serious misconduct.⁵ A core theme that arose across the many different areas of the DOJ's functions was the extreme politicization of the department.⁶

One of the most concerning aspects of this politicization during the last administration was the DOJ's systematic use of its powers of investigation against critics of Donald Trump or individuals who had a role in initiating the FBI investigation into the Trump campaign's contact with Russia—an investigation known as Crossfire Hurricane.⁷ The politicized investigations into the origins of the Russia probe fostered an atmosphere of suspicion and intimidation relating to the FBI and the intelligence community more generally. The politicization of the department regarding the intelligence

community weakened U.S. national security by creating doubt about the motivations of intelligence investigations and federal law enforcement in general, damage that will only be repaired with great effort. In addition, the attacks on the intelligence community were amplified in Congress, where three Senate committees placed more than fifty former Obama-era officials on a subpoena list based on their role in initiating or recommending the Crossfire Hurricane probe,⁸ contributing to an atmosphere of public suspicion of intelligence operations.⁹ Such public relations campaigns across the branches of the government are dangerous to U.S. democracy and weaken the separation of powers.

After October 2020, when the CERL/CREW report was issued, matters got rapidly worse. Trump's politicization of the DOJ came to a head in the 2020 presidential campaign, when Attorney General Barr lent his pre-election support to the discredited view that mail-in voting would produce a fraudulent result, helping to pave the way for President Trump's post-election assault on the integrity of the election.¹⁰ Barr, however, was not willing to stay the course with Donald Trump's assault on the election, a matter that Trump greatly resented. On December 1, 2020, Barr gave a widely circulated interview in which he rejected Trump's claim that there had been fraud in the election.¹¹ Two weeks later, Barr resigned, but not without furnishing the public with a sycophantic resignation letter that praised Trump's presidency to the hilt.¹² Trump complained about Barr's change of heart in a rally in July 2021, saying that Barr "became a different man when the Democrats viciously stated that they wanted to impeach him." According to the *Washington Examiner*, Trump's complaint about Democrats wanting to impeach Trump referred to the CERL/CREW report, which recommended that Congress open an impeachment investigation on Barr.¹³

Barr's successor, Acting Attorney General Jeffrey A. Rosen, also came under extraordinary pressure from President Trump to declare that there was "fraud" in the November 2020 election, and Jeffrey Clark, also a political appointee in DOJ, prepared a draft letter to state legislators in Georgia declaring that there was fraud in the election, which Rosen refused to sign.¹⁴ Had DOJ issued this statement, Trump might have used it to invalidate the election, whether by declaring martial law and forcing a new election or otherwise. DOJ thus came perilously close to providing legal cover for an attempted coup.

Shortly before he would step down, Barr also revealed in a letter he sent to members of Congress that in October 2020 he had secretly sought to entrench the department's scrutiny of the origins of the Russia probe by elevating the then U.S. attorney for Connecticut, John Durham, to the post of special counsel.¹⁵ As U.S. attorney, Durham had been conducting a counter-investigation into Crossfire Hurricane and the FBI's investigation into the Trump campaign and its ties to Russia.¹⁶ Many were highly critical of this move. Former Acting Solicitor General Neal Katyal, for example, who wrote the special counsel rules as a Department of Justice staff member in 1999, characterized this appointment as violating both the special counsel rules and "fundamental democratic principles."¹⁷ He argued it was a "devious move" by Barr, "designed to entrench a politically appointed prosecutor in a new administration and make it hard for President Biden to appoint a replacement."¹⁸

Ultimately, however, Durham did not play the role in the 2020 election for which Trump had hoped. In October, Barr stated that Durham would not have a report ready prior to the election, an announcement to which Trump reacted with great anger and disappointment.¹⁹ Although the Durham investigation has now run longer than Special Counsel Mueller's investigation itself, Attorney General Merrick Garland wisely chose to allow the investigation to continue in the Biden administration, though Durham is no longer a U.S. attorney.²⁰ As of this writing, Durham has charged several individuals but still has not released his report or given a timeline for wrapping up his investigation. Whether it will be a balanced, evenhanded assessment of the origins of the Russia probe or the politicized instrument for which Trump had hoped remains to be seen, but the decision not to issue a report prior to November 3, 2020, may have avoided the worst politicization of the department by minimizing its impact on the election. It may also have helped to constrain Trump from even more egregious attempts to use the department post-election to further the attack on Biden's clear victory.

Nevertheless, disturbing revelations about Barr and the DOJ he led continue to emerge, and it remains the case that Barr allowed the department to be hijacked for partisan political purposes. In March 2021, federal judge Amy Berman Jackson wrote that Barr and the Justice Department were "disingenuous" in attempting to hold back internal DOJ documents relating to the Mueller report. She found that their claims "are so inconsistent with evidence in the record, they are not worthy of credence."²¹ Judge Jackson

was the second federal judge to make such a finding. In 2020, Judge Reggie Walton stated that Barr provided a “distorted” and “misleading” account of the Mueller report to the American people, which led the judge to question Barr’s “credibility” and, with it, the department’s representation of the report to the court.²² As we discuss below, the public also learned of secret DOJ subpoenas seeking communications records of reporters in 2017 during the Trump administration.²³ Those startling disclosures were followed by the news that in 2017 and 2018, the DOJ subpoenaed Apple for data from the accounts of Democrats on the House Intelligence Committee, their aides, and their family members, in an attempt to identify who was behind leaks of classified information early on in the Trump years.²⁴

This chapter seeks to identify some key areas where repair is badly needed following a period in which the department’s core values were severely compromised. The chapter also presents some specific measures to hasten the process of repair and put the DOJ on the path toward regaining its credibility and its trusted role as defender of the rule of law.

Politicization of the Department of Justice

Although the damage to the rule of law in the DOJ and the obstacles to repair are arguably even more formidable now than they were following President Nixon’s resignation, it is worth heeding the example of Attorney General Edward Levi, a Republican, who was appointed by President Ford in the aftermath of the Watergate scandal.²⁵ Levi’s reforms were inspired by what his then aide, now federal judge, Mark Wolf recalls as his philosophy of the executive branch “acting judicially.”²⁶ The reforms included guidelines for FBI surveillance and other activities, reinforcing the ideals of professionalism and adherence to separation of powers and the rule of law, as well as new DOJ rules and structures to assure the integrity of DOJ actions.²⁷ According to Levi, “Nothing can more weaken the quality of life or more imperil the realization of the goals we all hold dear than our failure to make clear by words and deed that our law is not an instrument of partisan purpose, and is not to be used in ways which are careless to the higher values which are within all of us.”²⁸ Levi’s words were powerful, but his reforms were vulnerable. Embodied as they were in DOJ policies and practices, these reforms could be easily changed by a subsequent attorney general.

During the Carter administration, Attorney General Griffin Bell chose to maintain the measures Levi put in place.²⁹ Bell also imposed strict limits on FBI investigations and protocols for communication between the White House and the DOJ to enhance the department's independence,³⁰ reforms that are (in updated form) still in place to this day.³¹ These protocols, for example, require White House staff to communicate with the DOJ about particular investigations and prosecutions strictly through the White House Counsel's office, rather than by contacting individual employees of the DOJ.³²

Decades earlier, Edward Levi and Griffin Bell understood that politicization on the part of government lawyers is particularly damaging.³³ A series of irresponsible and misleading memos emanated from the Office of Legal Counsel (OLC) in 2002 and 2003—memos that sought to justify the CIA-led abusive interrogation of detainees using methods amounting to torture.³⁴ Some of these memos were subsequently withdrawn,³⁵ but not before the credibility of both the CIA and the DOJ had been badly damaged.

Other examples of politicization have unfortunately damaged the department over the years and compromised its commitment to the rule of law. In 2006, for example, several U.S. attorneys were fired, at least one upon the urging of a senator.³⁶ The apparent reason for the firings was that the DOJ had refused to conduct criminal investigations having to do with alleged voter fraud.³⁷ Attorney General Alberto Gonzales in 2007 resigned after giving testimony about the U.S. attorney firings—testimony that some members of Congress found to be misleading.³⁸ Years earlier in March 1993, President Clinton fired all of the U.S. attorneys from the George H. W. Bush administration, a move that was also perceived as highly political.³⁹ In the Obama administration, results-oriented reasoning was once again on display in the DOJ in the form of a controversial memo issued by OLC on the authorization to use military force in Libya.⁴⁰ Similarly, in the domain of war powers, the 2010 Obama-era OLC memo authorizing the targeted killing in Yemen of Anwar al-Awlaki, an American citizen, has been regarded as highly problematic as well, given that Yemen is a sovereign nation with which the United States was not at war and given the memo's somewhat distorted treatment of the concept of "imminence" under International Humanitarian Law (IHL).⁴¹

These earlier instances of politicization at the DOJ under presidents of both parties, and the failure to correct these excesses, set the stage for what was to come. During the Trump administration, politicized use of the department's powers was more the norm than the exception in cases where President Trump's interests were affected. Under Barr's leadership, for example, there was a striking use of the department's prosecutorial function apparently to punish political enemies and to buy the cooperation of potential friends. There was political interference in DOJ criminal investigations and prosecutions, such as that on display in the Roger Stone and Michael Flynn cases.⁴² There was also evident vindictiveness against those who spoke out against the administration or Donald Trump, like that unleashed on the president's former lawyer, Michael Cohen, who was reimprisoned before the publication of his book about Donald Trump, following his release from prison on a medical furlough. A judge promptly and properly ordered the government to re-release him.⁴³

The public also now knows that during the Trump years, the department secretly obtained phone records of journalists, seeking to find the source of leaks to the press about the Russia investigation.⁴⁴ Except under the most extraordinary circumstances, DOJ surveillance of journalists is a violation of the First Amendment freedom of the press and should not be countenanced. In this case, President Trump's loudly proclaimed concerns about leaks in the Russia investigation were politically motivated, and there was no national security justification for targeting journalists. Trump's attacks on journalists, which began on day one of his presidency and continued throughout his time in office, were aimed at blunting criticism of his own conduct by calling any unflattering portraits he received in the media "fake news." His public attacks, as well as the DOJ's clandestine investigations of legitimate journalistic activities, were offensive and damaging to democratic values.

The department similarly targeted Democratic members of Congress as well as their aides and members of their families, including at least one minor. DOJ accomplished this by secretly obtaining the family members' phone records and other metadata by subpoena from Apple. Among those targeted in this way were members of the House Intelligence Committee that was investigating the 2016 Trump campaign's ties to Russia, including

Representative Adam Schiff (D-CA), then the committee's ranking member, and Representative Eric Swalwell (D-CA). The subpoenas also involved a gag order that made it impossible for Apple to speak out against these incursions.⁴⁵ In 2018 the DOJ also sent a subpoena to Apple to seize the phone records of former White House Counsel Don McGahn while he was still in office.⁴⁶ The foregoing privacy violations were an abuse of legitimate law enforcement investigatory powers as well as a direct affront to the separation of powers contemplated by the Constitution. Members of Congress have the constitutional right and duty to conduct oversight of executive branch functions without themselves being surveilled by that very branch. Such conduct by the nation's chief law enforcement agency is antithetical to the principles of representative democracy.

Other politicized actions in DOJ included unjustified criminal investigations,⁴⁷ allegedly politically motivated targeting of companies in antitrust enforcement,⁴⁸ using federal offices to influence elections in violation of the Hatch Act,⁴⁹ and allegedly unauthorized use of force against protestors and others exercising their First Amendment rights.⁵⁰ Many of these actions appeared to violate DOJ policy or federal law. Under Attorney General Barr, for example, the DOJ sought to justify the president's attempts to solicit the assistance of foreign countries with his bid for reelection, such as the infamous call to the president of Ukraine in 2019, for which Trump was impeached, though not removed.⁵¹ This kind of interference compromised U.S. relationships with key allies abroad and placed a personal, domestic political agenda ahead of U.S. national security.

Decades earlier, Edward Levi and Griffin Bell understood the damage that politicization on the part of government lawyers would particularly inflict on OLC in the undermining of democratic values. When the OLC uses the law as a political tool to achieve partisan aims, particularly if it distorts the law for this purpose, its conduct profoundly undermines the rule of law. This is because using the trappings and language of law to justify violating the law damages the very concept of legality itself.⁵² In particular, the willingness of OLC in the Bush years to distort the law to justify the use of torture contributed to the distrust of OLC's opinions and has conveyed the sense that OLC is primarily oriented toward providing legal cover for White House policies. Results-oriented reasoning masquerading as genuine legal advice resurfaced in Donald Trump's DOJ under the leadership of William

Barr. Barr too often seemed to regard himself as the president's personal lawyer rather than the head of a federal agency committed to enforcing the law.

Damage to the rule of law can be accomplished in an instant, but repair takes time. It will take much work and focused attention to repair the damage from the politicization of the DOJ's central functions—work that must be undertaken function by function within the DOJ. Politicization of the DOJ strikes not only at the foundations of democratic governance at home, but also damages U.S. national security interests in the domain of foreign relations. The CERL/CREW working group found that, in several different areas, “the actions of the DOJ under Mr. Barr compromised U.S. national security and increased risks to U.S. national interests relative to foreign and domestic enemies.”⁵³ OLC memos like the one defending the 2020 strike on Iranian state actor Qassim Suleimani damage the rule of law by casting doubt on fundamental principles relating domestic law to the Law of Armed Conflict (LOAC).⁵⁴ Such distortions of law impact national security for the worse. The working group found the risk to national security from the department's actions to be particularly concerning under Barr's leadership, and found that Barr was “more interested in supporting the president's reelection bid” than in protecting U.S. security priorities or upholding the law.⁵⁵ The risk he posed to national security went well beyond the politicization of OLC memos relating to the law of war, given the role Barr may have played in the aforementioned Ukraine matter. The risk of collusion between a runaway president or attorney general and a malign foreign power is significant, and in retrospect it may seem surprising that it has not occurred more frequently. Particular attention must be paid to ensure that the attorney general does not damage U.S. national security interests under pressure from a corrupt president, and to guard against the possibility of collusion between executive branch officials and foreign powers.

Restoring commitment to the rule of law will not be an easy task, particularly in light of the erosion of the norms and practices that have served as informal guardrails for U.S. democracy. In an ideal world, legal constraints provide the outlines of what democracy requires, while a shared commitment to democratic values allows citizens to trust that those outlines will be filled in with integrity. In the absence of shared values, the survival of

democracy will depend on the country's ability to replace informal norms with formal rules and laws, such as those we detail in this chapter. While it would be a mistake to think the United States can restore and secure those traditions by legislating them back into existence, the country must nevertheless attempt the task of codifying as many of the guardrails of democracy as will lend themselves to such an exercise.

New rules alone, however, cannot repair the many different forms of damage to the rule of law from acts of the past. Indeed, in many instances there were optimal rules in place, but those rules were violated with impunity. In the next section, we discuss another important aspect of restoring integrity and repairing damage to the rule of law, namely the role of accountability and the need to address legal violations, particularly those that occur within the DOJ.

Violations and Accountability in Prior Administrations

Preserving and restoring the rule of law in a democracy requires accountability for past misdeeds, particular for those of government actors. Accountability requires the country to confront and address illegal and immoral conduct on the part of various U.S. institutions that has occurred in the past.⁵⁶ Without transparency about the past and accountability of government for its actions, future administrations are likely to repeat former mistakes.

Setting the scene for the excesses of the Trump era, formal legal condemnation of senior officials in prior administrations in the United States has been rare, and most criminal activity by government officials remains unaddressed. Exceptions have included several Watergate defendants⁵⁷ (though President Nixon himself evaded accountability by receiving a pardon from President Ford), as well as several senior officials from the Reagan administration who were involved in the Iran-Contra scandal, most of whom were pardoned by President George H.W. Bush in 1992. Federal prosecutors are concerned about appearing to be political and often do not like to prosecute officials from a previous administration. With respect to allegations of international wrongdoing, the disdain of the United States for international mechanisms of accountability has undermined its ability to serve as a standard-bearer for the rule of law across the globe. For example,

the refusal of the United States to ratify the Rome Statute establishing the jurisdiction of the International Criminal Court (ICC) weakens the ability of the international community to hold senior officials, including U.S. officials, accountable for serious crimes.⁵⁸ In general, the United States has not looked favorably on attempts to hold U.S. officials accountable, even in instances of clearly illegal conduct.⁵⁹

Following this pattern, the Obama administration made the decision in 2009 not to investigate or prosecute officials from the George W. Bush administration who had been involved with the use of torture in the war on terror.⁶⁰ Upon assuming office in 2009, President Obama said that “we need to look forward as opposed to looking backwards.”⁶¹ Subsequently, detailed findings were released by the Senate Select Committee on Intelligence (SSCI) documenting a high-level, CIA-driven program to engage in the torture and mistreatment of numerous detainees captured in Iraq and Afghanistan, which also attracted the support of other sectors of government, including the DOJ.⁶² Contemporaneous with the release of the SSCI report, Attorney General Eric Holder announced that the department would not prosecute anyone following the mistaken and distorted OLC memos justifying the use of torture.⁶³ As a result, there have been no prosecutions of any of the architects or high-level participants in the Rendition, Detention, and Interrogation (RDI) program, and very few prosecutions of anyone who actually carried out the torture either. That is despite powerful evidence that the use of waterboarding and other harsh interrogation methods constituted torture, in violation of both U.S. federal law and U.S. treaty obligations under the Geneva Conventions and the UN Convention against Torture, as well as the Uniform Code of Military Justice (UCMJ).⁶⁴ Other countries have been at least superficially more willing to self-examine around this issue. The U.K., for example, authorized an investigation into crimes that were carried out by British forces in Iraq and Afghanistan,⁶⁵ but ultimately the vast majority of the charges were dropped due to lack of evidence.⁶⁶

While the SSCI report laid the greatest responsibility for the use of illegal methods of interrogation at the doorstep of the CIA, it is hard to overstate the role played by DOJ lawyers at the Office of Legal Counsel who knowingly provided the CIA and the Department of Defense (DOD) with the incorrect legal advice that so-called enhanced interrogation was legal and could be used on detainees in the war on terror.⁶⁷ Given that the Holder

Justice Department argued for immunity on the part of those who inflicted the torture because they were relying on the OLC memos,⁶⁸ one might have thought that would serve as a basis for finding those who falsely designed that justification responsible. Yet, Holder offered no explanation for why the authors of the memos were never investigated by the DOJ for their role in creating false legal advice that hundreds in the White House, the CIA, and the armed services would rely on to ensure the legality of their actions.

Moreover, the idea that those who relied on the OLC memos had a clear basis for exoneration was incorrect. The truth is considerably more complicated. The “just following the OLC memos” defense should not, in theory, be any more effective for deflecting responsibility than the “just following orders” defense was at Nuremberg.⁶⁹ No such defense can be claimed where the individual making the claim knew that the action was illegal, or where an actor knew that the proposed illegal act would be unable to meet its military or civilian objective. The rule against torture under international law is *jus cogens*, meaning that everyone is expected to know the law.⁷⁰ In the United States, public servants, including the military and members of the CIA, take an oath to defend and uphold the Constitution. That oath imposes a duty to refuse to follow a patently illegal order and to report illegality up the chain of command. Those who followed the memos could try to argue an “advice of counsel” defense, comparable to the “just following orders” defense. Yet, once again, neither defense should immunize someone who authorizes or engages in torture where the conduct in question is patently illegal and the individual knows, or has reason to know, that this is so.

Why, then, did President Obama so willingly embrace the no-accountability approach, when it flew in the face of both the Nuremberg tradition and the clear approach to illegal orders demanded by U.S. constitutional jurisprudence? There have been many rationalizations offered for the decision not to prosecute those involved in the RDI program, but they fall flat when one considers the conspiracy of silence that has surrounded even less formal means for sanctioning those who designed and implemented that program. Almost without exception, those who were most supportive of the use of torture were promoted and found further positions in government, academia, or think tanks. Jay Bybee, the former head of OLC, became a federal judge in 2003.⁷¹ John Yoo returned to legal academia as a chaired professor at the University of California at Berkeley School of Law,⁷² and his history

at OLC did not prevent the Heritage Foundation,⁷³ the National Constitution Center,⁷⁴ the American Enterprise Institute,⁷⁵ and the Federalist Society from embracing him as a fellow or for regular talks and engagements.

Gina Haspel, who served as director of the CIA under Trump, not only allegedly assisted in implementing the use of torture at a CIA so-called “black site” in Thailand during the Bush administration. As chief of staff to Jose Rodriguez, head of the CIA’s clandestine service, she also issued the order in November 2005 for the destruction of videotapes of torture sessions, some of which took place under her watch.⁷⁶ The White House counsel in 2005 had been informed of the destruction of the tapes, supposedly after the fact, and expressed grave concern, but no investigation ensued.⁷⁷ In an eight-page memo, then CIA deputy director Mike Morell exonerated Haspel for her role in destroying these tapes during the Bush administration,⁷⁸ but there appears to be no other comprehensive report on this matter.⁷⁹ For her commitment to the program and her willingness to protect other members of the CIA, Haspel was held in high regard by members of the intelligence community, support that helped her bid to secure Donald Trump’s nomination and Senate confirmation as director of the CIA.⁸⁰ Despite the controversy, Haspel was confirmed 54-45, with several key Democrats joining Republicans to support her.⁸¹

Moreover, while there have been significant investigations into the Rendition, Detention, and Investigation program, some of the resulting reports, such as U.S. Attorney John Durham’s 2012 report for DOJ on torture and the Senate Select Committee on Intelligence (SSCI) report, have not been fully declassified.⁸² Only 500 or so pages of the executive summary, out of more than 6,700 pages of the SSCI report, have been released, despite repeated requests by Senator Dianne Feinstein (D-CA), who chaired the committee, for greater public disclosure.⁸³ The failure to produce the full, unredacted text of the SSCI report stands in stark contrast with the treatment of an earlier Senate Armed Services Committee report, which was released in 2009.⁸⁴ The secrecy surrounding the CIA’s role, along with information that continues to dribble out in connection with the military commissions, means that the country cannot fully put its past use of torture to rest.⁸⁵ President Biden should declassify the remaining documents relating to the RDI program so Congress and the public can have full transparency and ensure that it never happens again. He should also put an end to the continued abuse and mis-

carriage of justice of the remaining detainees at Guantanamo Bay by closing the prison and either trying the remaining detainees in federal court or repatriating them to their home countries, as would be required for those with prisoner of war (POW) status by the Geneva Conventions.⁸⁶

Most importantly for present purposes, any reform of the DOJ will require a thorough examination of its Office of Legal Counsel, for which an investigation of the role its lawyers played in greenlighting the use of torture will be essential. While the Senate examined the role of the armed services and that of the CIA in the use of torture and did hold one hearing regarding the role of the DOJ in approving and coordinating the use of torture,⁸⁷ there is no report from either the House or the Senate Judiciary Committees on the OLC torture memos. That unwritten chapter in U.S. history continues to damage faith in the DOJ, particularly in its OLC, and creates continuing doubt about the legality and legitimacy of OLC legal advice.

From the standpoint of the rule of law, this failure of accountability is profoundly corrosive. The decision to “look forward, not back” on torture, and the legal precedent that was therefore never fully excised and rejected by the U.S. legal system, damaged the country’s ability to hold government officials to the constraints of law. It also had a damaging effect on U.S. respect for the LOAC and on the very concept of the rule of law itself.⁸⁸ As such, lack of accountability badly discredited the OLC and weakened the normative authority of its legal opinions.⁸⁹ It also created deep mistrust of the intelligence community, particularly the CIA. Damage from both sources arguably made itself felt in the Trump administration, which might have been held more in check had abuses of executive authority been reined in by the DOJ at an earlier point in time.⁹⁰

The failure to hold prior administrations accountable recurred in the transition from the Trump to the Biden administration. The Biden DOJ, for example, has thus far failed to announce any investigation into the potential crimes of Donald Trump or his administration, including in connection with the former president’s role in inciting the attack on the Capitol on January 6, 2021. However, the House of Representatives has engaged in a robust investigation of this incident, which has included issuing subpoenas to former members of President Trump’s inner circle, and the DOJ has announced that it will not honor Trump’s assertion of executive privilege to block the enforcement of such subpoenas.⁹¹

In other matters, however, Attorney General Merrick Garland has filed a flurry of motions and other papers siding with former President Trump in important cases implicating his interests. The DOJ has appealed a federal judge's order that a secret 2019 DOJ memo discussing possible indictment of President Trump be released under the Freedom of Information Act.⁹² It has also asserted executive privilege over the congressional testimony of former White House Counsel Don McGahn⁹³ in response to a House subpoena, although it ultimately settled the matter and allowed a deposition to proceed, albeit with significant constraints.⁹⁴ The Biden DOJ has also sided with Trump in urging dismissal of a suit by Black Lives Matter and other plaintiffs over the violent clearing of peaceful protestors from Lafayette Park in 2020 to facilitate a Trump campaign photo op.⁹⁵ And the department has filed briefs with the Second Circuit Court of Appeals siding with Trump in his appeal of a federal district court decision refusing to dismiss E. Jean Carroll's federal defamation suit against him.⁹⁶ The DOJ continues to take the position that Trump's statements about Carroll—who had accused Trump of a rape that took place in New York City twenty years ago—were issued in his “official” capacity. The current DOJ is maintaining that stance even though Trump called her a liar about events that had nothing to do with his presidency (and then for good measure added that Carroll was “not my type”).⁹⁷

Fortunately, DOJ did not apply this same logic to a lawsuit against a member of Congress, Representative Mo Brooks (R-AL), who was sued by Representative Eric Swalwell (D-CA) over Brooks's incendiary speech near the White House shortly before the January 6 insurrection on the Capitol. Brooks repeated unfounded allegations of election fraud and urged supporters to “start taking down names and kicking ass.” Brooks claimed that his statements were, like Trump's against Carroll, made in his official capacity and that the DOJ was obligated, under the Westfall Act, to defend him as well. The DOJ rejected this argument, determining that Brooks's statements were personal capacity “campaign activity” and declined to defend him.⁹⁸ It remains to be seen whether the DOJ would take the same stance in a civil lawsuit over the events of January 6 against former President Trump.

Which way will the DOJ ultimately go on Trump and his administration? The attorney general has the discretion to determine DOJ policy. However, the DOJ's stance in some of these cases also shows an alarming degree of

deference to presidential power, an orientation that has been fairly consistently maintained by different attorneys general for a number of years. What is particularly concerning about the deference shown to presidential power in these various contexts is that the broad scope of executive authority becomes a tool on the part of the president and other executive branch officials for avoiding accountability, and even for obstructing justice by interfering with legitimate investigations. Efforts to investigate and, ultimately, to hold executive branch officials accountable must be protected against manipulation. Even the appointment of a special counsel by the attorney general cannot adequately protect against presidential interference with attempts to establish responsibility and transparency, as shown, for instance, by the outcome of the Mueller investigation. That is particularly the case in the absence of the appointment of a special counsel to investigate the potential crimes of past administrations and the unwillingness at times on the part of the Garland DOJ to hold prior executive branch officials accountable for illegal acts of the past.

If crimes were committed by the government, even by the president himself, the architects of those crimes should be investigated and, if the evidence warrants, prosecuted. The decision whether to prosecute former government officials is a complex one, but it is best depoliticized by having the determination made by an independent counsel whose mandate allows him or her to operate substantially independently of the DOJ's current leadership. Had the Obama administration chosen to provide the American people with a full accounting of the illegalities of the previous administration, and had Obama chosen to prosecute the most significant architects of the RDI program, it would have traveled some distance toward reversing and repairing the distortion of law the administration inherited from the war on terror. Undoing legal distortions and clearly identifying and repudiating the mistakes of the past might have helped to prevent the politicization of the DOJ during the Trump administration.

Whether there is any cause and effect between the prior failures of accountability and the subsequent more wholesale dismantlement of integrity at the DOJ is a matter of speculation. But in an atmosphere in which the department has become increasingly politicized, the way was paved for further and deepening abuse of the powers of the DOJ to satisfy the political

ambitions of the current occupant of the Oval Office. Clarifying the role of the DOJ, along with enhanced transparency, accountability, and apologies for the mistakes of the past, would go some way toward reestablishing the faith once placed in the department by the American people.

Presidential Obstruction of Justice

In numerous instances, Donald Trump attempted to interfere with independent investigations of the 2016 Trump campaign, along with other potential matters of criminal interest. For example, it emerged in the course of the Mueller investigation that Trump had indeed asked White House Counsel Don McGahn to have Robert Mueller fired, and that McGahn had refused to comply.⁹⁹ Instead, Trump ultimately fired his attorney general, Jeff Sessions, and installed William Barr in his place to supervise Mueller and the rollout of the special counsel's report.

The special counsel's report describes the holes in the evidence his team gathered from witnesses who lied or withheld information, and President Trump refused to be interviewed in person by the Mueller team.¹⁰⁰ Once Mueller submitted his final report to Barr, the attorney general purported to characterize the special counsel's principal findings in a March 24, 2019, letter to the chairs and ranking members of the Senate and House Judiciary Committees.¹⁰¹ But the inaccuracy of this letter led Mueller to respond with his own letter to Barr about the "public confusion about critical aspects of the results" that the attorney general's letter had generated.¹⁰² Two federal judges have since sharply criticized Barr's "lack of candor" in his handling of the Mueller report. Judge Reggie Walton stated that Barr provided a "distorted" and "misleading" account of the report to the American people, which led the judge to question Barr's "credibility" and, with it, the department's representation of the report to the judge.¹⁰³ One year later, Judge Amy Berman Jackson echoed Judge Walton's opinion, writing that Barr and the Justice Department were "disingenuous" and that DOJ's descriptions of an OLC memorandum drafted to lend an air of legitimacy to Barr's preformed views on obstruction of justice "are so inconsistent with evidence in the record, they are not worthy of credence."¹⁰⁴

In volume II of his report, Mueller indicated he could not indict President

Trump because the DOJ has a policy against indicting a sitting president.¹⁰⁵ What transpired next—including Barr’s noted misrepresentation of the Mueller report’s findings to Congress—is a clear indication that the DOJ’s current special counsel regulations and related policies fail to protect the independence and transparency of an investigation involving the president. As we explain more fully in a forthcoming article,¹⁰⁶ the DOJ policy against indicting a sitting president is not mandated by the Constitution. That point became even more obvious when the Supreme Court ruled in *Trump v. Vance* that a sitting president is subject to criminal process, including a state grand jury subpoena.¹⁰⁷ Mueller nonetheless had no choice; his boss, Attorney General William Barr, was not going to authorize indictment of the president. After President Trump left office, however, indictment became a realistic option.¹⁰⁸ Indeed, the Mueller report contemplates just that post-presidency possibility when discussing the importance of preserving the evidence and documenting what President Trump and others did. The importance of preserving and documenting the evidence was one of the justifications in the report for the detail in volume II on obstruction of justice.

This chapter does not fully explore the merits of Mueller’s obstruction of justice case against President Trump, as this is already the subject of considerable analysis.¹⁰⁹ Much of the argument for finding Trump responsible for obstructing justice is built around specific actions he took in connection with the Russia investigation—such as firing FBI Director James Comey and attempting to fire Mueller himself—all actions intended to impede the investigation and violate the obstruction of justice statutes.¹¹⁰ As a private sector lawyer in 2018 before his second term as attorney general, William Barr had laid out a detailed argument in a letter to President Trump explaining his belief that Mueller’s “obstruction theory” was wrong and why the supposed acts of obstruction were actually within the president’s powers under Article II of the Constitution.¹¹¹ This self-serving memorandum apparently helped induce Trump to nominate Barr as attorney general. However, we believe that Mueller was right on the question of obstruction and that Barr was clearly wrong: Article II does not empower the president to obstruct justice, a point later underscored in 2020 by the Supreme Court’s clear message in *Trump v. Vance* that nothing in Article II of the Constitution exempts the president from criminal process.

A second category of rule of law violation in past administrations in-

volves conduct where the executive branch has exceeded its authority, but where the action is not necessarily criminal. Alternatively, this could be categorized as conduct that is illegal but that for various reasons has become unprosecutable, such as because the statute of limitations has run out or there is a general grant of immunity against prosecution.¹¹² True accountability would address this conduct in addition to conduct that is identifiably illegal and prosecutable. The unavailability of prosecution should not be taken to mean there are no resources to remedy the past. In such instances, the DOJ or other executive branch agencies must seek to establish accountability, coupled with transparency, along alternative lines.

The emphasis here is more on institutional accountability than on individual accountability, yet both are important. Governments can only act through individuals who serve as their agents, and thus any focus on crimes of government must also hold individuals responsible. Yet there is a great difference between accepting institutional responsibility for past failings and blaming institutional wrongdoing on individual agents, which sometimes only serves to deflect from true public accountability. The use of torture under the Bush administration, the excessive and possibly illegal use of drone strikes under the Obama administration, and the inhumane treatment of immigrants in detention facilities during the Trump administration all raised serious questions about expanding presidential war powers and executive authority more generally, as well as the ability of the other branches of the federal government to ensure that the executive branch adheres to the rule of law.¹¹³

Alternate Forms of Accountability

Criminal investigation and prosecution of current or former senior governmental leaders who violate the law is one of the most important means of establishing responsibility and repairing damage to the rule of law. Often the opposite occurs: low-level government employees who carry out the policies of their leaders are prosecuted while the architects walk free. Accountability requires particularly that we identify the crimes of senior government leaders, as it helps to establish the systematic nature of the wrongdoing and the fact that it was part of a concerted plan on the part of the state to violate the law. However, when individual prosecution of senior leaders is legally or

politically infeasible, we may still be able to hold government accountable, as well as to make significant progress toward repairing damage to the rule of law.

There are a number of ways for a government to acknowledge responsibility without conducting criminal prosecutions. For example, Japanese Americans who had been incarcerated in internment camps during World War II under a 1942 presidential executive order were partially and belatedly compensated for lost property beginning in the Truman administration, pursuant to the Japanese American Evacuation Claims Act of 1948.¹¹⁴ This statute merely compensated for seized and lost property, refusing to acknowledge that the United States government had done anything wrong, a point already made by the Supreme Court in 1944 in *Korematsu v. United States*, when it upheld the constitutionality of the executive order.¹¹⁵ A Supreme Court majority did not revisit the erroneous decision upholding the executive order until seventy-four years later, in dicta rejecting the reasoning of *Korematsu*, but in an opinion where the court nonetheless refused to strike down another executive order of dubious constitutionality, this one by President Trump banning entry to the United States of people from a group of principally Muslim countries.¹¹⁶ Hopefully in future cases, it will take less than seventy-four years to complete the process of acknowledging that the United States government was legally as well as morally wrong, a process that in this instance was only completed in 2018 when the Supreme Court may very well have blindly given its approval to yet another wrong.

Most victims of torture after 9/11 thus far have not received compensation,¹¹⁷ and some of them remain in Guantanamo indefinitely without charge or awaiting a trial that may never come. Under the UN Convention against Torture, victims of torture are entitled to “redress and . . . an enforceable right to fair and adequate compensation.”¹¹⁸ The DOJ should work accordingly with the legal advisor to the State Department to (1) determine the extent of the U.S. obligation under the circumstances of the war on terror to pay reparations and (2) make a good-faith effort to address its own liability in advance of potential litigation in international courts.¹¹⁹ This would be a particularly important move to make in light of President Biden’s decision to end the war in Afghanistan by withdrawing all U.S. troops, coupled with his insistence that American involvement in hostilities in the region has ceased.¹²⁰

Some victims of rule of law breaches by the Trump administration—including children who were illegally separated from their parents and were held in deeply inhumane conditions—also should receive compensation for their suffering. First, there is the importance of wholly or at least partially compensating the victim of illegal federal government conduct for violation of rights as one would compensate the victim of any tort, particularly an intentional tort. Of equal importance is the message to the public and to future administrations that certain actions by the federal government are illegal, and that if injury results therefrom, these actions are tortious and must be compensated. Once required to publicly acknowledge fault and to pay compensation for illegal actions, the government is less likely to perform these or similar actions again.

In addition to compensation, there is often enhanced accountability in mere transparency itself. Even many years after the injury occurred, a full and unequivocal acknowledgement of the wrongs that were inflicted can help to heal some of the wounds for the victims and also contribute to enhanced accountability on the part of government actors, even if no penalty is paid other than in the court of public opinion. Commissions established for truth and reconciliation in South Africa following apartheid, for example, were designed with precisely this function in view, though their success has been debated.¹²¹ Japan agreed to apologize as well as to pay \$8.3 million in compensation to Korean women who had been forced into sexual slavery during the Second World War,¹²² though the final resolution of the matter between the two nations has remained elusive.¹²³ And in 2013, an association of Chilean judges issued an apology for the court system's role in the human rights abuses committed during the regime of dictator Augusto Pinochet.¹²⁴

While apologies or compensation offered many years after the initial fact may seem pointless, especially if paid to a succeeding generation from that which was originally wronged, there is a forward-looking purpose to symbolic acts of this sort. Apologies or even relatively modest monetary awards serve an expressive function: they acknowledge that a wrong was committed and identify a need not to repeat the conduct again. This is important for clarifying the culpability of the government as it is for helping victims move past the injury. It constitutes a clear commitment to a different path in the future and to different values from the ones manifested in the wrongful act. That this has failed to occur in the case of the illegal meth-

ods of interrogation that occurred at Guantanamo and Abu Ghraib prisons, among other U.S.-run bases and black sites, may explain the lack of reprobation and the continued personal success of Bush administration officials who had a role in furthering the torture program.

The Advisory Function of the DOJ

Revisiting illegal conduct of previous administrations requires introspection and accountability within the DOJ itself. Much of the conduct that appeared to be contrary to law during the Trump administration occurred inside the DOJ or was approved by the department. This conduct included the DOJ's role in approving and then defending in the courts some of the executive orders and other administrative actions discussed above. DOJ lawyers, mostly political appointees of the president, and their subordinates were intimately involved in many of these activities. Among other forms of accountability, the DOJ's inspector general and Office of Professional Responsibility (OPR) should investigate this conduct and report on whether policy or legal violations occurred. Persons found to have violated the law or engaged in other serious misconduct in most instances should be barred from federal employment in the future rather than rewarded for being stalwart in defending their former colleagues in the face of political pressure to come clean.¹²⁵ Referrals should also be made to state bar disciplinary committees.

In addition to investigations of culpable individuals, the DOJ should conduct a review of legally questionable actions in previous administrations to guide the present and future administrations. A written evaluation of the legality of questionable government conduct is needed even if such conduct is not presently under consideration. If prior conduct is illegal, the DOJ should be on record indicating as much. Only in this way can the DOJ learn from the mistakes of the past and improve the legal consistency of the department over time.

Recommendations for Restoring the Rule of Law at DOJ

The CERL/CREW report, released in October 2020, included specific recommendations as to how to restore the independence of the DOJ from partisan politics and assure the department's commitment to the rule of law.¹²⁶ As coauthors of the CERL/CREW report, we incorporate those recommendations here, in some cases expanding upon the discussion in the original CERL/CREW document.

Reform efforts involving the DOJ are most likely to be implemented in one of three ways: a change in DOJ policy; an executive order (EO) by the president; or congressional action, specifically legislation. Many of the post-Watergate reforms to the DOJ were implemented by changes to DOJ policies and procedures under Attorney General Edward Levi and his successor, Griffin Bell. As noted above, such reforms are vulnerable because they can be easily reversed by subsequent attorneys general.

An EO, on the other hand, needs to be rescinded by a president, forcing future presidents to accept political accountability for the change. An EO can also give agencies outside the DOJ, such as the Office of Government Ethics (OGE) or the Office of Special Counsel (OSC), a role in monitoring and reporting to the president and to Congress about what is happening within the DOJ. From the standpoint of strengthening the ethical and legal core of the DOJ's conduct, this arrangement is preferable to one in which the attorney general has exclusive control over the department's compliance with its own rules.

Finally, the most permanent changes to DOJ policies and procedures can be accomplished by statute, which can only be reversed by an act of Congress. Because of concerns about abuse of presidential power,¹²⁷ legislative reforms are preferable whenever possible. Although ethics reform by statute can be politically fraught, this may be the right moment. The White House is currently controlled by a political party that has complained about abuses at the DOJ under the previous administration.¹²⁸ The other party, having lost the White House, may have a renewed interest in restraining the power of the executive branch, including the DOJ. However, passing legislation takes time, and therefore an executive order from the president may be the most effective means to implement these recommendations in a sufficiently timely manner until statutory reform becomes possible. Meanwhile, and de-

spite some policy differences we have with the current attorney general, we have full confidence that Merrick Garland will informally do everything in his power to reduce the overall atmosphere of politicization of the department while more lasting reforms are being established.

Recommendations for further structural changes are set out in the discussion that follows.

Strengthen the Independence of the Special Counsel

Currently, special counsels must be appointed by the attorney general or the acting attorney general, and authorization for such an appointment lies solely within the executive branch. This was not always the case, however. After Watergate, Congress passed legislation authorizing the appointment of an independent counsel, but Congress allowed the law to lapse in 1999.¹²⁹ To protect the independence of this critical role, Congress should renew the special prosecutor legislation, with particular attention to the need to ensure the independence of that office. In particular, in the absence of congressional action to establish an independent prosecutor, those investigating the president or other high-level officials will be continuously vulnerable to dismissal, which will allow the president to exercise considerable control over any investigation into her or his own potential wrongdoing or wrongdoing of persons close to the president. Independent prosecutors must be protected against arbitrary dismissal. No federal prosecutor or investigator—whether an independent counsel, an inspector general, or a U.S. attorney¹³⁰—should be fired by a superior if the motivation for the firing is to stop or obstruct an investigation of alleged criminal activity. The power to hire and fire in the federal government should not include the power to obstruct justice.

There are two main arguments against the passage of an independent counsel law: (1) that it is unconstitutional and (2) that its prior iterations led to gross prosecutorial overreach. Both fail on close examination.

First, there are those who believe that restricting the power of the president to remove an independent prosecutor would be unconstitutional. In 1988, the Supreme Court in *Morrison v. Olson*¹³¹ upheld the independent counsel statute against arguments that it unconstitutionally infringed on the power of the executive. In the face of objections that the independent counsel statute infringed on the power of the president, the Court said:

This case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office “only by the personal action of the Attorney General, and only for good cause.”¹³²

One justice, Antonin Scalia, issued a famous dissent in which he complained that the majority opinion violated the framers’ intent with regard to the separation of powers and also unduly weakened the executive branch:

This is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that “a gradual concentration of the several powers in the same department,” can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing; the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.¹³³

Scalia and other critics of that decision point to *Myers v. United States* (1926), which established the president’s right to remove members of the executive branch as a broader removal power than *Morrison* would suggest.¹³⁴ Indeed, the *Myers* case defends a theory of presidential power known as the “unitary executive theory,” which interprets the president’s power to remove executive branch officials under Article II as nearly absolute, and thus if the president wants to fire a member of the executive branch, no ordinary legislation can stop him or her. Adherents of the unitary executive theory maintain that Trump had the right to fire Robert Mueller, even if he had done so explicitly to put an end to the investigation into himself and his 2016 campaign. The same could be said under this theory of Trump’s firing of FBI Director Jim Comey, despite the fact that Trump explicitly admitted after he fired Comey that he “faced great pressure” because of the Russia inquiry.¹³⁵

We reject this expansive view of presidential removal power and do not believe that *Myers* can be understood as extending presidential removal in cases involving obstruction of justice. Indeed, *Myers* held that Congress could not restrict the president’s power to remove a postmaster, but this is

quite a far cry from removing a prosecutor in the middle of an ongoing investigation of the president or of persons close to the president. Contrary to what Scalia may have thought, *Myers* should not be read as suggesting that the president's removal power is in fact unlimited, especially when that case is read in conjunction with *Morrison*. Although *Myers* does recognize "a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone,"¹³⁶ the court in that case was addressing the narrower question of whether the fact that the Senate must approve appointments gave it the implied power of being able to exercise a veto over removals. *Myers* laid to rest the idea that the Senate might exercise such a veto, but it failed to address whether Article II constrains Congress's ability to limit the president's removal powers.

A further development in this line of cases was the court's decision in *Humphry's Executor v. United States*,¹³⁷ in which the court refined *Myers* to suggest that congressional control over executive appointments might differ depending on the agency involved. Thus the court found that *Myers* did not apply to Congress's ability to limit the president's power to remove a member of the Federal Trade Commission,¹³⁸ similar to its ruling in *Morrison*. In another case, however, the court distinguished the two cases and struck down statutory restrictions on the president's power to remove officers from the Public Company Accounting Oversight Board (PCAOB) in *Free Enterprise Fund v. PCAOB*,¹³⁹ as well as the Consumer Financial Protection Bureau (CFPB) in *Seila Law LLC v. CFPB*.¹⁴⁰ While this area of law is somewhat in flux, *Morrison* is still good law, and there is no current legal impediment to reenacting the special counsel law in some form. In particular, the existence of an independent counsel who is subject to dismissal only for cause is fully consistent with broad presidential authority under Article II,¹⁴¹ and the same might be said for an independent counsel appointed by the attorney general in the absence of special counsel legislation.

Second, bringing back the independent counsel law is controversial among some who otherwise are strong supporters of presidential accountability because of concern about an overzealous independent counsel free of supervision by the attorney general. For example, Bob Bauer and Jack Goldsmith in their 2020 book rejected the idea of bringing back an independent counsel statute and advocated that the DOJ should retain a check on the special prosecutor.¹⁴² A 1999 joint report of the American Enterprise

Institute (AEI) and the Brookings Institution also concluded that the attorney general's responsibilities for appointing a special counsel should be fully restored.¹⁴³ As the 1999 AEI-Brookings report observed:

Like many, we believe the Act's reach has been too broad and too arbitrary. Instead of promoting public confidence, the Act has failed to produce public consensus that outside counsel are being appointed when, but only when, it is in the public interest that a matter be removed from the Department of Justice's jurisdiction.¹⁴⁴

The report recommended an arrangement similar to what the United States has had for the past twenty years—namely, that the attorney general once again have the power to make decisions concerning the scope of the independent counsel's jurisdiction, the budget of the special counsel, measures to make sure that the independent counsel is both independent and conforms to Justice Department policies and procedures, and whether to remove the independent counsel for cause.

This concern about runaway independent prosecutors was fueled in particular by two lengthy investigations by special counsels: the Iran-Contra investigation by independent counsel Lawrence Walsh, and Ken Starr's investigation of President Clinton. Following these inquiries, worry about the unchecked power of independent counsel was paramount, and removing the federal judiciary from its role in appointing and supervising the independent counsel and restoring the authority of the attorney general were thought to be the route to achieving a balance between independence and accountability for independent counsels. The result, however, is that today, as in 1973, the special counsel can be dismissed by the DOJ. There is thus little protection against a recurrence of what happened to Archibald Cox on President Nixon's orders in the "Saturday Night Massacre," and indeed, President Trump very nearly did fire Robert Mueller.

In 2017, Congress considered legislation that would have protected Mueller from being fired except for good cause,¹⁴⁵ but the bill, despite being sponsored by Trump ally Senator Lindsey Graham (R-SC), never passed. During consideration of that bill, constitutional law experts like Akhil Amar, who derided *Morrison*, were called to testify about the "unconstitutionality" of Congress constraining presidential removal power and Trump's "right" to fire Mueller.¹⁴⁶ As we have explained, we strongly disagree with Amar.

Whatever the case may have been in 2017, given the abuses of the Trump DOJ since, there should be skepticism about delegating so much responsibility over the special counsel to the attorney general. By contrast, during the Trump administration, federal judges—even Trump-appointed ones—were sometimes more courageous, both in standing up to the administration and in their willingness to criticize the DOJ.¹⁴⁷ Restoring to the federal judiciary a role in supervising an independent counsel, as provided for in the Ethics in Government Act of 1978, might therefore be an attractive option. The federal judiciary would likely provide a better constraint on presidential abuse of power than the attorney general, underscoring the wisdom of the arrangement in the 1978 independent counsel statute.

Even recognizing the risks of runaway independent counsels, the importance of accountability in preserving the rule of law still speaks in favor of restoring the independent counsel law, albeit with careful reflection on checks that can be put in place for the special counsel. A compromise position, however, might be a statute that leaves DOJ special counsel regulations in place but requires the DOJ to appoint a special counsel in certain specified circumstances, such as a criminal investigation involving the president, a former president, or persons close to the president. The statute might or might not require a judicial finding of “cause” for the attorney general to remove the special counsel—the most contentious point of any independent counsel law. If removal of the special counsel by the DOJ were permitted, the statute should require the attorney general to notify Congress in writing of the reasons for removing the special counsel,¹⁴⁸ and to appear and testify before both houses of Congress to answer questions about the circumstances of the special counsel’s removal and plans for appointment of a new one.

Protect Special Counsel Investigations Through Revised Obstruction Laws

Despite the change in control of the Justice Department in January 2021, there is ample evidence that DOJ political appointees’ decisions concerning a president, including even a former president of the opposite political party, are highly deferential to the president.

In theory, there is protection beyond the mere powers of a special coun-

sel in federal law. Federal obstruction of justice law already criminalizes the removal of any prosecutor, whether by the president or anyone else, for the purpose of interfering with an ongoing investigation.¹⁴⁹ Special Counsel Robert Mueller expressed a similar view in volume II of his 2019 report.¹⁵⁰ In addition to reviving the special counsel legislation, Congress should also consider amending federal obstruction of justice law to make clear that if any prosecutor is fired for the purpose of obstructing an ongoing investigation, the firing would violate federal obstruction of justice law.¹⁵¹

It is also important to protect against efforts to obstruct investigations through the destruction of documents or through denying the special counsel's access to information needed to encourage a thorough and fully informed investigation. Following the precedent established in *United States v. Nixon*, there must be compliance with special counsel subpoenas of the executive branch, including those issued to the White House.¹⁵² If a new independent counsel law is enacted, it should include a provision for expedited judicial review of special counsel subpoenas that are challenged. Accordingly, the destruction of government documents and other records from previous administrations, or from the current administration, should not be tolerated.¹⁵³ Any destruction of government records should trigger a DOJ investigation, not just an investigation inside the agency where the destruction of the document occurred. As discussed in the preceding section, the RDI program should have been the subject of a special counsel investigation during the Obama administration, if not the Bush administration, and destruction of relevant documents would have undermined that investigation if it had occurred.¹⁵⁴ The DOJ needs to make clear that destruction of government records in any executive branch agency will be investigated as a possible criminal offense and may be prosecuted as such.

Protect Federal Prosecutors

Appointment of U.S. attorneys for fixed terms would avoid some of the problems that occur when U.S. attorneys are removed for political reasons, including reasons that may amount to obstruction of justice.¹⁵⁵ U.S. attorneys could be protected from removal by a statute that provides for fixed terms in office—for example, ten years. Initial terms could be staggered to assure that each presidential term has an equal number of vacancies to fill. Such a

statute could prevent the president from removing a U.S. attorney for anything else but cause. While such an arrangement would have required the Biden DOJ to retain some U.S. attorneys appointed by Trump, the Trump DOJ also would have been required to retain some U.S. attorneys appointed by Obama. All of these U.S. attorneys would still work under the supervision of the attorney general, but such an arrangement very likely would provide more checks and balances in the DOJ than there are today, when a president can fire and replace all of the U.S. attorneys at once. Of course, any such reform would need to account for the myriad contingencies of professional life, such as a U.S. attorney who resigns or dies. In these instances, the sitting president should be allowed to nominate a replacement for the remainder of the unfinished term.

Like the independent counsel statute, a restriction on the power of the president to remove United States attorneys would be subject to constitutional challenge on the grounds that it was inconsistent with the president's Article II powers.¹⁵⁶ While it is beyond the scope of this chapter to fully address how insulating a U.S. attorney from presidential removal can nevertheless coexist with the extensive removal powers the court has recognized in *Myers*, *CFPB*, and *PCAOB*, it is clear from cases like *Morrison* that the two are indeed reconcilable.¹⁵⁷ Indeed, in 2020 the Supreme Court held in *Trump v. Vance* that the president is subject to criminal process, including the subpoena power of a prosecutor.¹⁵⁸ Given the unique functions of prosecutors, who are responsible for enforcing existing laws—not making policies or promulgating regulations¹⁵⁹—providing job protections for U.S. attorneys is within Congress's mandate.

Other parts of the DOJ also should be insulated from partisan politics, even when the president's removal powers are recognized as fully applicable. The DOJ should accordingly enhance the role of its career attorneys in policy decisions as well as decisions in individual investigations, civil cases, and criminal prosecutions. One way to do that is to reduce the number of political appointees in the DOJ. This could be the number of presidentially appointed and Senate-confirmed (PAS) appointees or the number of middle-ranked Schedule C positions filled with political appointees chosen by the PAS appointees.¹⁶⁰ Another approach is to require the DOJ to document, in writing, material disagreements between career DOJ attorneys and political appointees unless the political appointees defer to the career attor-

neys. Such documentation should in most instances be shared with congressional oversight committees upon request. Yet another priority should be enforcing existing civil service laws that prohibit politicization of the hiring process for career civil servants, and that provide job protections to career civil servants in the DOJ and other federal agencies.¹⁶¹ Political appointees should not be allowed to intrude into the hiring, evaluation, promotion, and firing process for career civil servants. If existing statutes and regulations are not sufficient, they should be tightened by amendment. The Office of Special Counsel, which is charged with enforcing the civil service laws and the Hatch Act, should strengthen its enforcement activities and keep a close watch on the DOJ.

Finally, ethics statutes and regulations do not change from administration to administration and should not be interpreted based upon political ideology.¹⁶² Most DOJ ethics officials are career DOJ attorneys rather than political appointees and, with civil service job protections, are well suited to give ethics advice that may not be popular with senior DOJ officials.¹⁶³ Congress should require, preferably by statute, the DOJ to disclose to Congress instances in which a presidentially appointed DOJ official intentionally disregards the direct advice of DOJ ethics lawyers.¹⁶⁴

Add Legal Protections and Heighten Responsibilities for Inspectors General

Some instances of criminal conduct in the executive branch are never referred to the DOJ because the conduct is not reported and investigated in the agency where it occurred.¹⁶⁵ This is usually the job of agency inspectors general (IGs), who need independence and cooperation from other executive branch officials to do their job.¹⁶⁶ Inspectors general are part of the executive branch, but they also have a critically important independent role in investigating abuse in their agencies as part of their mission to “promote integrity, efficiency, and accountability.”¹⁶⁷ Inspectors general are frequently the bearers of bad news and negative information, as the officers tasked with verifying compliance with laws, regulations, and policies within their respective governmental agencies. It is important to protect IGs from reprisals, lest the agency and the government writ large lose the primary benefit of the IG position.

As evident during the Trump administration, inspectors general who failed to toe the party line were fired or forced to resign by the president.¹⁶⁸ In at least one case, namely, the firing of Michael Atkinson, the inspector general of the intelligence community, the dismissal took place with the endorsement of the attorney general.¹⁶⁹ For IGs to be sufficiently independent that they feel free to report wrongdoing in the agency to which they are assigned, the ability of the president to fire them must be limited, compatible with prevailing Supreme Court guidance regarding limitations on the scope of the president's removal power.

One approach is to have fixed terms for IGs as suggested above for U.S. attorneys. Appointment of inspectors general for fixed terms would avoid some of the problems that occur when IGs are removed in the middle of investigations. Inspectors general, like prosecutors, do not have a policymaking role in the executive branch, making the case for unrestrained presidential removal power under Article II of the Constitution a weak one. Although there is uncertainty about whether a statutory restriction on presidential removal power is constitutional, we believe it is essential to the independence of an inspector general.¹⁷⁰

Other than giving inspectors general fixed terms in office and making them removable only for cause, other protections should be given to IGs to enable them to do their job free of interference. Sometimes the investigative work of IGs will displease political superiors and even the president, but it is important that this work continue undisturbed. Additional regulations, and perhaps also criminal statutes, may be needed to prohibit interference with the independence of the IGs. All persons including the president should be subject to those same regulations and statutes.

Inspectors general should also report information to Congress not only at the conclusion of investigations, but also in appropriate circumstances at the outset or during an investigation, and IGs should not be removed by the president for fulfilling this duty. OLC opinions stating that IGs do not have to report certain information to Congress before the conclusion of an investigation—including the opinion OLC rendered in 2019 in connection with the Ukraine whistleblower¹⁷¹—should be rescinded. Better yet, such reports¹⁷¹ by IGs to Congress should be specifically required by an amended statute.

Finally, inside the DOJ itself, the inspector general needs the power to proceed promptly and unimpeded with investigations of alleged wrongdo-

ing. Unlike most other federal agencies, the DOJ has a separate Office of Professional Responsibility.¹⁷² Investigations should not languish under the “exclusive jurisdiction” of the DOJ’s OPR¹⁷³ before the IG begins to investigate. In addition, IG reports to Congress should not be delayed because there is also an OPR investigation. This goal would be assisted by the transfer of some responsibilities from the OPR to the DOJ IG. The Inspector General Access Act of 2019 (S. 685 / H.R. 202) provided for this needed change and had sponsors from both sides of the aisle.¹⁷⁴

Expand Recusal of Presidential Appointees

DOJ attorneys appointed by the president should recuse from participation in criminal cases and investigations in which the president has a personal interest. Generally applicable recusal rules for particular party matters in the executive branch,¹⁷⁵ if properly interpreted, would preclude political appointees from participating in some of these cases, but these rules are too subjective, and waivers are too easy to obtain. Bright-line recusal rules in the DOJ are therefore needed. A preferable approach is to embed this recusal rule in a federal statute to ensure it cannot be undone by executive order. The point is simple: in a democratic society, criminal investigation and prosecution decisions turn on the facts and an evenhanded application of the law, not on personal favoritism or politics. DOJ attorneys close to the president should not decide whether to investigate or prosecute the friends, family, or enemies of the president.

DOJ’s presidential appointees should recuse from any matter involving the president in a personal capacity, the president’s family, business entities owned by the president, and the president’s campaign. Other items on the recusal list should include matters involving close associates of the president and people appointed by the president to positions in the United States government. Presidential appointees in the DOJ probably should also recuse from matters involving members of Congress and candidates for election to Congress, as well as matters involving presidential candidates and their families. Another category meriting recusal of presidential appointees in the DOJ involves investigations and prosecutions of people whom the president has identified as requiring investigation even before they are charged with a crime.¹⁷⁶

Most of these matters can be handled by career DOJ attorneys in the main Justice Department or U.S. attorneys' offices with supervision by a senior career attorney rather than by very senior officials appointed by the president. If additional supervision of a matter is required, a senior career DOJ attorney from another part of the DOJ or a different district can assume that responsibility. For particularly complex matters, such as the 2017–2019 Russia investigation undertaken by Robert Mueller, a special counsel can be appointed.

Finally, investigations and prosecutions involving a prior president or the president's family members or appointees also should be undertaken by DOJ attorneys who are not appointees of the current president. For reasons explained above, a retrospective examination of potentially criminal conduct in previous administrations is important for preserving and restoring democratic norms. But to avoid the appearance of retaliation against a vanquished political foe by supporters of the winner, this task should not be undertaken by DOJ attorneys who are appointees of the current president.

Enhance Protections for the Intelligence Community

Many lessons regarding the intelligence community emerged from the 2016 election. Some suggest the need for greater protection for members of the intelligence community who are faithfully trying to protect U.S. national security, but others suggest a need for greater transparency on the part of intelligence agencies as well as more careful adherence to agency protocol.¹⁷⁷ Following a sustained attack on the intelligence community on the part of the Trump administration, former members of the Obama-era intelligence community were repeatedly targeted by both the president and the DOJ, with public attacks as well as counter-investigations into the origins of the Russia probe.¹⁷⁸ In particular, as discussed above, the investigation by Special Counsel John Durham held out hope for Donald Trump of exposing a conspiracy on the part of the Obama administration to bring down the Trump campaign.¹⁷⁹

The DOJ investigations occurred simultaneously with investigations by three committees in the Republican-controlled Senate, in which former members of the intelligence community or those involved in the Russia probe on the national security side were placed on a subpoena list.¹⁸⁰ Neither the

DOJ investigations nor the Senate investigations appear to have borne fruit. The highly awaited Durham probe, in particular, ended up a great disappointment to the former president when Durham told Barr, who in turn notified Trump, that Durham would not be able to issue a report prior to the election.¹⁸¹ A December 2019 report by DOJ Inspector General Michael Horowitz meanwhile found that the Russia probe was correctly predicated and duly authorized under law, meaning that the FBI had met the legal criteria for undertaking the investigation under the circumstances.¹⁸²

Nevertheless, these counter-investigations and the suspicion they raised of the FBI may have caused lasting damage to the United States intelligence community. At the same time, the Horowitz IG report identified significant difficulties within the FBI, ones that must be attended to going forward. In an earlier, August 2019 report, for example, Horowitz found that there were leaks in connection with Crossfire Hurricane and that then FBI Director James Comey was himself responsible for leaking sensitive information that he should have kept confidential.¹⁸³ Horowitz also identified difficulties of accountability within the FBI, and noted that Crossfire Hurricane was started by career officials who had not run their investigative plans all the way up the chain and, most notably, had not consulted with the DOJ as per agency guidelines.¹⁸⁴ He also discussed the low threshold for opening an investigation of a political campaign in the first place, which is necessarily politically sensitive,¹⁸⁵ as well as a lack of care and diligence in presenting information honestly to Foreign Intelligence Surveillance Act (FISA) court judges.¹⁸⁶ This latter point became apparent when Horowitz examined the highly controversial wiretap and other surveillance that was ordered on Carter Page, a member of the Trump campaign. While there were good grounds to be concerned about Page's contact with the Russians, Horowitz found FBI agents failed to reveal that Page had previously provided information to another U.S. intelligence agency and therefore the level of suspicion of his activities might have been exaggerated.¹⁸⁷ Nevertheless, Horowitz concluded that "we did not find documentary or testimonial evidence that political bias or improper motivation influenced the FBI's decision to seek FISA authority on Carter Page,"¹⁸⁸ which was at the heart of the objections to Crossfire Hurricane raised by Donald Trump and his advisors.¹⁸⁹ The report therefore suggested that the probe of Page was warranted and no laws were broken. But the report also pointed to the need for greater care in adhering

to agency protocol, as well as much greater attention to agency guidelines for ensuring the confidentiality of intelligence within the department.¹⁹⁰

Although the December 2019 Horowitz report largely vindicated the FBI and Crossfire Hurricane, some important lessons emerged from it for the department and the intelligence community. Carelessly handled DOJ investigations in the intelligence community could compromise sources and methods of obtaining intelligence, and the Horowitz report pointed to the need to handle that risk with greater care.¹⁹¹ In addition, there must be better coordination with the DOJ surrounding sensitive political probes, especially those with a significant criminal dimension. While the CERL/CREW report identified concerns with DOJ restrictions on FBI intelligence protocol,¹⁹² it is also the case that the DOJ must have an opportunity to weigh in on criminal investigations from the outset. This suggests that the DOJ should engage in better coordination with the Office of the Director of National Intelligence (ODNI), and that the ODNI inspector general's office should have enhanced opportunities to guide DOJ investigations within ODNI. The DOJ should be required to coordinate with the ODNI IG's office to make sure investigations do not compromise the quality of U.S. intelligence or unfairly intimidate intelligence employees.¹⁹³

Restrict Exercise of Prosecutorial Discretion to Domestic Considerations

With the exception of cases like those involving extradition, which necessarily involve negotiations with foreign governments, the DOJ's prosecutorial decisions should not be affected by U.S. interests relating to foreign countries. As shown by Bill Barr's overtures to a wide array of other nations in support of Trump's illegitimate attacks on the Mueller investigation, the potential for abuse is great. It can take the form of American politicians seeking to involve foreign nations in politicized DOJ activity, or of foreign governments seeking to involve the United States' criminal justice system in political disputes abroad. DOJ requests from a foreign nation for legal assistance, as well as DOJ willingness to provide legal assistance to a foreign nation, should be justified on law enforcement grounds. And given the possibility of mixed purposes in a case involving the prosecution of a foreign national, Congress should act to prohibit the exercise of federal prosecutorial

discretion with regard to domestic considerations and thus forbid trade-offs based on foreign relations. Although there are some restrictions built into the system by the Foreign Agents Registration Act (FARA), which requires individuals or organizations who engage in political activities on behalf of a foreign principal to register with the DOJ,¹⁹⁴ there are few constraints that would limit the DOJ from using its prosecutorial authority to secure the assistance or cooperation of a foreign nation.¹⁹⁵ While such decisions may on occasion occur in even a healthy democracy, the potential for abuse makes such trade-offs too risky and ultimately untenable in an agency that strives to adhere to rule of law values.

Examples of prosecutorial abuses during the tenure of Bill Barr include the aforementioned attempts by President Trump to persuade Australia, Ukraine, Italy, and the United Kingdom to assist Attorney General Barr in a counter-investigation of the origins of the Russia investigation.¹⁹⁶ Trump administration discussions with Australia¹⁹⁷ in particular may have matured into cooperation that reportedly also involved the United States in Australia's negotiation for the release of hostages in a third country, Iran.¹⁹⁸ Sometimes, foreign governments seek to influence criminal investigations inside the United States, as the Turkish government allegedly did in asking the Trump administration to scale back a criminal investigation of Halkbank, a politically influential Turkish bank, by the U.S. attorney in the Southern District of New York.¹⁹⁹

Cooperation and coordination with other nations in criminal investigations is sometimes appropriate. The United States has entered into mutual legal assistance treaties (MLATs) with other nations, and these arrangements are helpful in combatting crimes that cross international boundaries, such as narcotics trafficking, sex trafficking, money laundering, and terrorism.²⁰⁰ Prosecutors are urged to consult the DOJ's Office of International Affairs (OIA) to determine whether the United States has an MLAT with a country from which evidence or other cooperation is sought. This procedure is a shortcut for the DOJ because it is considered faster and more reliable than letters rogatory—that is, a formal request from a U.S. court addressed to a foreign court and asking for assistance in a particular matter.²⁰¹

The United States should of course abide by its treaty obligations and, when appropriate under these treaties or when letters rogatory are obtained from a court, should call upon foreign nations for reciprocal legal assistance.

Such requests should also be reviewed by career DOJ lawyers, not just political appointees, and the requests must never be politically motivated. In addition, they should fall squarely within the treaty obligations or treaty rights of the United States. Most importantly, any such agreement between U.S. law enforcement and a foreign nation should be as transparent as possible; secret deals in this domain are almost always highly suspect. Congressional oversight committees—the judiciary and intelligence committees of the House and Senate—should be informed of instances in which foreign legal assistance is requested or given, and the reasons therefor.

Enhance Privacy Protections for Journalists and Private Citizens

Finally, we return to the abuses that occurred with regard to journalists, members of Congress, and private citizens. These are difficult to correct, and there is a long and complex history regarding the reach of DOJ's investigatory powers. The surveillance of journalists and members of Congress and their families discussed above is particularly concerning, all the more so given that these investigations were judicially authorized. As a result, there is now a House review of the surveillance of lawmakers and journalists, an internal Justice Department review of the surveillance, and a review by the inspector general for the DOJ.²⁰² The critical question is what Congress will eventually do with the information it receives. Will it stand up to executive branch overreach or will it once more defer to the executive branch, even when the security and privacy of its own members are concerned?

The surveillance of journalists and members of Congress suggests the need for congressional reform of the DOJ's investigatory powers as well as constraints on the willingness of federal judges to acquiesce to executive branch demands. Surveillance that targets domestic subjects, let alone government officials, is justified under the Constitution only under the most extraordinary of circumstances, notably where the target is being directly investigated for the commission of a crime and the methods of surveillance fully satisfy the subject's Fourth Amendment rights. Federal courts should be particularly parsimonious with authorizing surveillance of journalists, as such surveillance can easily infringe upon their First Amendment rights. Surveillance and other forms of interference with a free press will over time prove particularly damaging to democratic governance.

Conclusion

The CERL/CREW working group concluded that Donald Trump's Department of Justice "compromised the interests of the United States and jeopardized our national security by failing to enforce the law evenhandedly."²⁰³ At a minimum, the department undermined public confidence by creating the perception that the law was being used as a political tool to support the reelection of the president. In some cases, the working group concluded, Attorney General Barr went so far as to violate rules of professional conduct and government ethics rules. The working group also expressed great concern about lack of congressional oversight of the DOJ and refusal of the attorney general to cooperate with Congress.²⁰⁴

Barr's leadership of the DOJ provided a test case for the ability of the department to withstand political pressure from the White House, allowing for an evaluation of whether adequate protections are in place to guard against the politicization of the department's core functions. The Trump DOJ failed that test miserably, thus exposing weaknesses in the current legal framework by which the department functions. In the case of Barr, who substantially shared the president's autocratic view of presidential power, the constraints that the DOJ observed were too often based on political consequences rather than a sense of duty or fidelity to the law.²⁰⁵ This suggests that the current guardrails that are in place to ensure that DOJ conforms to the rule of law are inadequate to protect against the destructive force of an attorney general who views his or her own extensive authority as flowing from a nearly unbounded view of presidential power.

Congress needs to be more assertive in exercising its authority under Article I to oversee the conduct of the DOJ and other executive branch agencies and departments.²⁰⁶ Although Article II puts these agencies and departments under the authority of the president, Congress sets their budget.²⁰⁷ Congress should use the power of the purse to assure greater accountability from the DOJ. This includes requiring regular testimony from the attorney general before Congress and compliance with congressional subpoenas.²⁰⁸ At a minimum, the elected representatives who decide disbursement of public funds are entitled to information on how that money is being spent by executive branch agencies, including the DOJ, and as part of the budgetary process, Congress should make sure that information is provided.

During the Trump administration, the DOJ transitioned from a department that regarded itself as bound by the rule of law to a department that treated law as a tool for achieving political ends and that treated adherence to law as optional. Using law as a weapon against political enemies poses a lasting threat, both to the integrity of the DOJ and to the United States' ability to protect democracy against erosion due to weakening moral and legal standards.²⁰⁹ The American people can no longer afford to rely on the softer constraints of conscience or political opprobrium to constrain an attorney general intent on abusing her or his authority. It is time for a second major reform effort, in the spirit of the Levi-Bell reforms, to return the Department of Justice to being a champion of the rule of law, and to restore confidence in the impartiality of its operations and comparable independence from White House political pressures.

Notes

1. "About DOJ," U.S. Department of Justice, www.justice.gov/about.
2. Jonathan Greenberg, "Twelve Signs Trump Would Try to Run a Fascist Dictatorship in a Second Term," *Washington Post*, July 10, 2020, www.washingtonpost.com/outlook/fascist-dictatorship-trump-second-term/2020/07/10/63fdd938-c166-11ea-b4f6-cb39cd894ofb_story.html.
3. The editor of this volume is the cofounder and former board chair of Citizens for Responsibility and Ethics in Washington (CREW), and one of the coauthors of this chapter also previously served on its board. Neither is currently associated with the organization.
4. CERL and CREW, *Report on the Department of Justice and the Rule of Law Under the Tenure of Attorney General William Barr*, University of Pennsylvania Center for Ethics and the Rule of Law, October 12, 2020, www.law.upenn.edu/live/files/10900-report-on-the-doj-and-the-rule-of-law.
5. *Ibid.*
6. *Ibid.*, p. 14.
7. See, e.g., George Croner, "What Durham Is Investigating and Why It Poses a Danger to U.S. Intelligence Analysis," Just Security, July 25, 2020, www.justsecurity.org/71647/what-durham-is-investigating-and-why-it-poses-a-danger-to-us-intelligence-analysis. Croner was a member of the CERL/CREW working group and also authored a substantial portion of the discussion of this same topic in the CERL/CREW report above. See note 6.
8. The relevant committees are the Senate Judiciary Committee, the Senate Homeland Security Committee, and the Senate Finance Committee. See Karoun Demirjian, "Senate Republicans Accelerate Public Scrutiny of Trump-Russia Investi-

gation as Election Looms,” *Washington Post*, September 29, 2020, www.washingtonpost.com/national-security/lindsey-graham-comey-fbi-russia/2020/09/29/oe6196a8-0276-11eb-b7ed-141dd88560ea_story.html.

9. Jordain Carney, “GOP Votes to Give Chairman Authority to Subpoena Obama Officials,” *The Hill*, June 4, 2020, <https://thehill.com/homenews/senate/501106-senate-homeland-security-panel-approves-subpoenas-of-obama-officials>; see also Tim Ryan, “Senate Targets Obama with Subpoena Vote, Putting Virus & Protests in Back Seat,” *Courthouse News Service*, June 4, 2020, www.courthousenews.com/senate-targets-obama-with-in-subpoena-vote-putting-virus-protests-in-back-seat/.

10. See, e.g., Bob Christie, “U.S. Attorney General Barr Attacks Voting by Mail While in Arizona,” *PBS News Hour*, September 10, 2020, www.pbs.org/newshour/nation/u-s-attorney-general-barr-attacks-voting-by-mail-while-in-arizona. Barr did state after the election that there was no widespread election fraud.

11. Jonathan D. Karl, “How Barr Finally Turned on Trump,” *Atlantic*, June 27, 2021, www.theatlantic.com/politics/archive/2021/06/william-barrs-trump-administration-attorney-general/619298/.

12. Norman Eisen and Donald Ayer, “William Barr’s Resignation Is One Final Parting Shot to the Rule of Law,” *Washington Post*, December 15, 2020, www.washingtonpost.com/outlook/2020/12/15/barr-resignation-rule-law/.

13. See Kaelan Deese, “Trump: Barr Was ‘Unable’ to Hold Kavanaugh Accusers and Steele Dossier Sources ‘Accountable,’” *Washington Examiner*, July 11, 2021, www.washingtonexaminer.com/news/barr-was-unable-to-hold-kavanaugh-accusers-steele-dossier-sources-accountable; Mark Hosenball, “U.S. Ethics Groups Say Barr Uses DOJ as Political Tool, Calls for His Impeachment,” *Reuters*, October 12, 2020, www.reuters.com/article/us-usa-justice-barr/u-s-ethics-groups-say-barr-uses-doj-as-political-tool-call-for-his-impeachment-idUSKBN26X2RS.

14. Josh Dawsey and Devlin Barrett, “As Trump Pushed for Probes of 2020 Election, He Called Acting AG Rosen Almost Daily,” *Washington Post*, July 28, 2021, www.washingtonpost.com/national-security/trump-rosen-election-calls/2021/07/28/43106ab6-efd6-11eb-bf80-e3877d9c5f06_story.html.

15. Charlie Savage, “Barr Makes Durham a Special Counsel in a Bid to Entrench Scrutiny of the Russia Inquiry,” *New York Times*, December 1, 2020, www.nytimes.com/2020/12/01/us/politics/john-durham-special-counsel-russia-investigation.html.

16. Michael Balsamo and Eric Tucker, “Barr Appoints Special Counsel in Russia Probe Investigation,” *AP News*, December 1, 2020, <https://apnews.com/article/election-2020-donald-trump-robert-mueller-statutes-elections-ae0275b4eb23981c1e6fb9fc49c3239>.

17. Neal Katyal, “I Wrote the Special Counsel Rules. Barr Has Abused Them,” *New York Times*, December 3, 2020, www.nytimes.com/2020/12/03/opinion/bill-barr-john-durham-prosecutor.html.

18. *Ibid.*

19. Kevin Breuninger and Dan Mangan, “Trump Fumes When Told Durham Probe

Findings Might Not Come Out Before Election Day,” CNBC, October 9, 2020, www.cnbc.com/2020/10/09/trump-fumes-when-told-durham-probe-findings-might-not-come-out-before-election-day.html.

20. Aruna Viswanatha and Sadie Gurman, “Durham Probe of What Sparked Russia Investigation Examines FBI Tipsters,” *Wall Street Journal*, August 13, 2021, www.wsj.com/articles/durham-probe-of-what-sparked-russia-investigation-examines-fbi-tipsters-11628857851.

21. *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, No. 19-1552, 2021 WL 1749763 (D.D.C. 2021).

22. *Electronic Privacy Information Center v. United States Department of Justice*, No. 19-810, at 145 (D.D.C. 2020), and *Jason Leopold and Buzzfeed, Inc., v. United States Department of Justice, et al.*, 487 F. Supp. 3d 1 (D.D.C. 2020), <https://int.nyt.com/data/documenthelper/6805-judge-walton-ruling-on-barr-cr/2df9b5c6d7deofef1e35/optimized/full.pdf#page=1>.

23. Devlin Barrett, “Trump Justice Department Secretly Obtained Post Reporters’ Phone Records,” *Washington Post*, May 8, 2021, www.washingtonpost.com/national-security/trump-justice-dept-seized-post-reporters-phone-records/2021/05/07/933cdfc6-af5b-11eb-b476-c3b287e52a01_story.html.

24. Katie Benner and others, “Hunting Leaks, Trump Officials Focused on Democrats in Congress,” *New York Times*, June 10, 2021, www.nytimes.com/2021/06/10/us/politics/justice-department-leaks-trump-administration.html.

25. Jack Fuller, ed., *Restoring Justice: The Speeches of Attorney General Edward H. Levi* (University of Chicago Press, 2013).

26. David Frank Levi and others, “Restoring Justice: The Legacy of Edward H. Levi,” American Academy of Arts and Sciences, 2014, www.amacad.org/news/restoring-justice-legacy-edward-h-levi.

27. *Ibid.*; David Leonhardt, “The Sense of Justice That We’re Losing,” *New York Times*, April 29, 2018, www.nytimes.com/2018/04/29/opinion/the-sense-of-justice-that-were-losing.html; “The Attorney General’s Guidelines,” Electronic Privacy Information Center, <https://epic.org/privacy/fbi/>.

28. Edward H. Levi, Attorney General of the United States, “Farewell Remarks before the Employees of the U.S. Department of Justice,” January 17, 1977, www.justice.gov/sites/default/files/ag/legacy/2011/08/23/01-17-1977.pdf.

29. Griffin B. Bell and Ronald J. Ostrow, *Taking Care of the Law* (Mercer University Press, 1986).

30. CERL/CREW, *Report on the Department of Justice*, p. 20.

31. “Memorandum from Donald F. McGahn II, Counsel to the President, to all White House Staff,” Politico, January 27, 2017, www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000. Restrictions on communication between DOJ and the White House have been reissued under the Biden administration. See Josh Gerstein, “Justice Department Issues Policy Limiting White House Contact,” Politico, July 21,

2021, www.politico.com/news/2021/07/21/justice-white-house-contact-biden-trump-500476.

32. Ibid.

33. CERL/CREW, *Report on the Department of Justice*.

34. See, e.g., Claire Finkelstein and Stephen N. Xenakis, “Repairing the Damage from Illegal Acts of State: The Costs of Failed Accountability for Torture,” in *Interrogation and Torture*, edited by Steven J. Barela and others (Oxford University Press, 2020), p. 49; “A Guide to the Torture Memos,” *New York Times*, <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html?> See also Richard W. Painter, *Getting the Government America Deserves: How Ethics Reform Can Make a Difference* (Oxford University Press, 2009), p. 130–32.

35. Jeffrey Rosen, “Conscience of a Conservative,” *New York Times Magazine*, September 9, 2007, www.nytimes.com/2007/09/09/magazine/09rosen.html; Ariane de Vogue, “DOJ Releases Controversial ‘Torture Memos,’” *ABC News*, April 15, 2009, <https://abcnews.go.com/Politics/LawPolitics/story?id=7343497&page=1>.

36. See Mike Gallagher, “Domenici Sought Iglesias Ouster,” *Albuquerque Journal*, April 15, 2007, www.abqjournal.com/news/special/554986nm04-15-07.htm.

37. Office of the Inspector General and Office of Personal Responsibility, U.S. Department of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (September 2008), www.justice.gov/opr/page/file/1206601/download; Dan Eggen and Amy Goldstein, “Voter-Fraud Complaints by GOP Drove Dismissals,” *Washington Post*, May 14, 2007, www.washingtonpost.com/wp-dyn/content/article/2007/05/13/AR2007051301106.html.

38. Steven Lee Myers and Philip Shenon, “Embattled Attorney General Resigns,” *New York Times*, August 27, 2007, www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html.

39. David Johnston, “Attorney General Seeks Resignations from Prosecutors,” *New York Times*, March 24, 1993, www.nytimes.com/1993/03/24/us/attorney-general-seeks-resignations-from-prosecutors.html.

40. Office of Legal Counsel, “Authority to Use Military Force in Libya,” Memorandum Opinion for the Attorney General, April 1, 2011, <https://fas.org/irp/agency/doj/olc/libya.pdf>.

41. Charlie Savage, “First Justice Department Memo on Killing Anwar Al-Awlaki,” *New York Times*, August 15, 2014, www.nytimes.com/interactive/2014/08/16/us/16firstolcawlakimemo.html. A summary of the memo was first leaked by NBC News in 2014.

42. CERL/CREW, *Report on the Department of Justice*, pp. 78–80.

43. Maggie Haberman, William K. Rashbaum, and Nicole Hong, “Michael Cohen Returned to Jail in Dispute Over Trump Book,” *New York Times*, August 13, 2020, www.nytimes.com/2020/07/09/nyregion/michael-cohen-arrested.html.

44. Charlie Savage and Katie Benner, “Trump Administration Secretly Seized

Phone Records of Times Reporters,” *New York Times*, June 3, 2021, www.nytimes.com/2021/06/02/us/trump-administration-phone-records-times-reporters.html; Adam Goldman, “Trump’s Justice Dept. Seized CNN Reporter’s Email and Phone Records,” *New York Times*, May 20, 2021, www.nytimes.com/2021/05/20/us/politics/cnn-trump-barbara-starr.html.

45. Benner and others, “Trump Officials Focused on Democrats in Congress.”

46. Ryan Lucas, “DOJ Subpoenaed Apple for Data on Trump White House Lawyer,” NPR, June 13, 2021, www.npr.org/2021/06/13/1006082436/doj-subpoenaed-apple-for-data-on-trump-white-house-lawyer.

47. CERL/CREW, *Report on the Department of Justice*, pp. 128–130.

48. *Ibid.*, 138–146.

49. *Ibid.*, 146–147.

50. *Ibid.*, 95–100.

51. “Full Document: Trump’s Call with the Ukrainian President,” *New York Times*, October 30, 2019, www.nytimes.com/interactive/2019/09/25/us/politics/trump-ukraine-transcript.html.

52. Finkelstein and Xenakis, “Repairing the Damage,” p. 49.

53. CERL/CREW, *Report on the Department of Justice*, p. 8.

54. Office of Legal Counsel, “January 2020 Airstrike in Iraq against Qassem Soleimani,” Memorandum for John A. Eisenberg, Legal Advisor to the National Security Council, March 10, 2020, <https://s3.documentcloud.org/documents/21012045/redacted-olc-memo-justification-of-soleimani-strike.pdf>.

55. *Ibid.*, pp. 8–9.

56. See Claire Finkelstein, “Vindicating the Rule of Law: Prosecuting Free Riders on Human Rights,” in *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration*, edited by Austin Sarat and Nasser Hussein (New York University Press, 2010).

57. Lesley Oelsner, “Mitchell, Haldeman, Ehrlichman Are Sentenced to 2½ to 8 Years, Mardian to 10 Months to 3 Years,” *New York Times*, February 22, 1975, www.nytimes.com/1975/02/22/archives/mitchell-haldeman-ehrllichman-are-sentenced-to-2-to-8-years-mardian.html.

58. President Clinton signed the Rome treaty, but the agreement was never sent to the Senate for ratification. The Bush administration later withdrew support for the ICC, in effect nullifying President Clinton’s signature to the treaty. Curtis A. Bradley, “U.S. Announces Intent Not to Ratify International Criminal Court Treaty,” *American Society of International Law* 7, no. 7 (May 11, 2002), www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty.

59. Maggie Jo Buchanan, Tom Jawetz, and Stephanie Wylie, “Promoting Accountability: State and Federal Officials Shouldn’t Be Above the Law,” Center for American Progress, December 17, 2020, www.americanprogress.org/issues/courts/reports/2020/12/17/493748/promoting-accountability-state-federal-officials-shouldnt-law/.

60. For an argument in favor of prosecution, see Claire Finkelstein and Michael

Lewis, “Should Bush Administration Lawyers be Prosecuted for Authorizing Torture?” *University of Pennsylvania Law Review* (PENumbra) 158 (2010), p. 195.

61. David Johnston and Charlie Savage, “Obama Reluctant to Look into Bush Programs,” *New York Times*, January 11, 2009, www.nytimes.com/2009/01/12/us/politics/12inquire.html.

62. The SSCI report was completed in 2012, yet it took two years for just the 500-plus page executive summary to be released in redacted form. Despite persistent requests by the chair of the report committee, Sen. Dianne Feinstein, the full report, totaling thousands of pages, has yet to be released. See Staff of S. Select Comm. on Intelligence, 113th Cong., *Study of the Central Intelligence Agency’s Detention and Interrogation Program* (2014), www.congress.gov/congressional-report/113th-congress/senate-report/288/1.

63. Glenn Greenwald, “Obama’s Justice Department Grants Final Immunity to Bush’s CIA Torturers,” *Guardian*, August 31, 2012, www.theguardian.com/commentsfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer.

64. See Staff of S. Select Comm. on Intelligence, 113th Cong., *Study of the Central Intelligence Agency’s Detention and Interrogation Program* (2014), www.congress.gov/congressional-report/113th-congress/senate-report/288/1; Pub. L. No. 108-375, § 1091, 118 Stat. 2068 (2004); “No More Excuses: A Roadmap to Justice for CIA Torture,” Human Rights Watch, December 1, 2015, www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture.

65. Jonathan Owen, “British Soldiers ‘Face Prosecution’ over 55 Iraq War Deaths,” *Independent*, January 8, 2016, www.independent.co.uk/news/uk/home-news/british-soldiers-face-prosecution-over-55-iraq-war-deaths-a6803211.html; Owen Bowcott, “UK Military Investigating Hundreds of Alleged Abuses in Afghanistan,” *Guardian*, September 22, 2016, www.theguardian.com/uk-news/2016/sep/22/uk-military-investigating-hundreds-of-alleged-abuses-in-afghanistan.

66. Mark Duell and Martin Robinson, “UK Soldiers Hit by War Crimes Claims Unlikely to Face Criminal Trials,” *Daily Mail*, June 2, 2020, www.dailymail.co.uk/news/article-8379245/UK-soldiers-hit-war-crimes-claims-unlikely-face-criminal-trials.html; Luke Andrews, “No more British troops will be prosecuted over Afghanistan war crimes,” *Daily Mail*, June 21, 2020, www.dailymail.co.uk/news/article-8444251/No-British-troops-prosecuted-alleged-war-crimes-Afghanistan.html.

67. Finkelstein, “Vindicating the Rule of Law.”

68. Greenwald, “Bush’s CIA Torturers.”

69. “Nuremburg Trials,” United States Holocaust Museum, last edited January 5, 2018, <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-trials>.

70. *Report of the International Law Commission*, UN General Assembly Official Records, 74th Sess., Supp. No. 10. U.N. Doc. A/74/10 (2019).

71. “Bybee, Jay S.,” Federal Judicial Center, www.fjc.gov/history/judges/bybee-jay-s.

72. See “John Yoo,” Faculty Profiles, Berkeley Law, www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/.

73. See “Virtual Event: Is the President Trumping Constitutional Norms?” Heritage Foundation, August 3, 2020, www.heritage.org/the-constitution/event/virtual-event-the-president-trumping-constitutional-norms.

74. See Jeffrey Rosen, Kimberly Wehle, and John Yoo, “The Executive and the Rule of Law,” *We the People*, podcast produced by the National Constitution Center, February 27, 2020, <https://constitutioncenter.org/interactive-constitution/podcast/the-executive-and-the-rule-of-law>.

75. “Visiting Scholar Profile for John Yoo,” American Enterprise Institute, www.aei.org/profile/john-yoo/.

76. Glenn Kessler, “CIA Director Nominee Haspel and the Destruction of Interrogation Tapes: Contradictions and Questions,” *Washington Post*, May 11, 2018, www.washingtonpost.com/news/fact-checker/wp/2018/05/11/cia-director-nominee-haspel-and-destruction-of-interrogation-tapes-contradictions-and-questions/. See also Claire Finkelstein and Steve Xenakis, “Lawyers Told Gina Haspel Torture Was Legal. But It Never Was,” *New York Times*, May 9, 2018, www.nytimes.com/2018/05/09/opinion/gina-haspel-cia-torture.html.

77. See memorandum from Michael J. Morell, Deputy Director, Central Intelligence Agency, to the Director of the Central Intelligence Agency re: “Disciplinary Review Related to Destruction of Interrogation Tapes,” republished in Mathew Kahn, “CIA Releases Memo on Haspel Involvement in Destruction of Tapes,” *Lawfare*, April 20, 2018, www.lawfareblog.com/cia-releases-declassified-memo-haspel-involvement-destruction-tapes.

78. *Ibid.*

79. The issue might have been discussed by John Durham in his report on torture, but that report is still classified as of this writing.

80. Finkelstein and Xenakis, “Lawyers Told Gina Haspel Torture Was Legal.”

81. Associated Press, “Gina Haspel Confirmed as CIA Director after Key Democrats Vote in Favor,” *Guardian*, May 17, 2018, www.theguardian.com/us-news/2018/may/17/gina-haspel-cia-director-senate-vote.

82. Laura Pitter, “Delusion of Justice on CIA Torture,” *The Hill*, December 14, 2015, thehill.com/blogs/congress-blog/262947-delusion-of-justice-on-cia-torture.

83. President Obama made the decision before the end of his term not to make the report public, but he did preserve it by including it in his presidential records. Josh Gerstein, “Obama Won’t Declassify Senate ‘Torture Report’ Now, But Will Preserve It,” *Politico*, December 12, 2016, www.politico.com/blogs/under-the-radar/2016/12/barack-obama-torture-report-declassify-preserve-232519.

84. Staff of S. Comm. on Armed Services, 110th Cong. Rep., *Inquiry into the Treatment of Detainees in U.S. Custody* (2008), <https://media.npr.org/documents/2009/apr/senatereport.pdf>.

85. Sheri Fink, James Risen, and Charlie Savage, “C.I.A. Torture Detailed in Newly Disclosed Documents,” *New York Times*, January 19, 2017, www.nytimes.com/2017/01/19/us/politics/cia-torture.html.

86. See Geneva Conventions Relative to the Treatment of Prisoners of War art. 118-119, Aug. 12, 1949, 5 U.S.T. 3316, 75 U.N.T.S. 135.

87. There was a hearing in 2009. See *What Went Wrong: Hearing on Torture and the Office of Legal Counsel in the Bush Administration Before the S. Subcomm. on Administrative Oversight and the Courts of the S. Comm. of the Judiciary*, 111th Cong. (2009), https://fas.org/irp/congress/2009_hr/wrong.html.

88. See “Shortchanging Justice Carries High Price,” Human Rights Watch, July 7, 2009, www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace.

89. See Shalev Rolsman, “The Real Decline of OLC,” Just Security, October 8, 2019, www.justsecurity.org/66495/the-real-decline-of-olc/. “After all, the more OLC unfailingly says ‘Yes’ to proposed executive action, the more the White House Counsel will be tempted to ask its view. Increased involvement might thus sometimes (but not always) be the result of reliably saying ‘Yes’—conduct that is likely to decrease OLC’s legitimacy.”

90. *Ibid.* “In recent months, OLC has been on the frontlines defending some of the Trump Administration’s most politically fraught policies. It approved President Trump’s proclamation reallocating funds to pay for his long sought-after border wall. It was the legal face of the Secretary of Treasury’s refusal to turn over President Trump’s personal tax returns to Congress. It has provided the legal justification for some of the Trump White House’s most extreme claims relating to executive privilege. And, most recently, it provided the public legal justification for the Trump Administration’s initial refusal to turn over the Ukraine whistleblower complaint to Congress.” See also Chris Smith, “‘There Has Never Been Accountability’: Ali Soufan on How the 9/11 Disinformation Campaign Paved the Way for Political Armageddon,” *Vanity Fair*, September 8, 2020, www.vanityfair.com/news/2020/09/how-the-911-disinformation-campaign-paved-the-way-for-political-armageddon.

91. Nicholas Wu, Kyle Cheney, Betsy Woodruff Swan, and Meridith McGraw, “Biden White House Waives Executive Privilege for Initial Set of Trump-Era Documents Sought by Jan. 6 Panel,” *Politico*, October 8, 2021, www.politico.com/news/2021/10/08/bannon-jan-6-subpoena-515681.

92. See *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civ. No. 19-1522 (D.D.C. 2020), www.citizensforethics.org/wp-content/uploads/2021/05/show_public_doc.pdf; Claire O. Finkelstein and Richard W. Painter, “Biden Is Defending Trump’s Sweeping View of Executive Power,” *Washington Post*, May 29, 2021 (criticizing the DOJ’s decision to appeal this order), www.washingtonpost.com/politics/2021/06/03/daily-202-biden-is-guarding-some-trumps-big-secrets/.

93. See Claire O. Finkelstein and Richard W. Painter, “Why Is Merrick Garland’s DOJ Covering for Trump?” *Slate*, June 3, 2021 (criticizing DOJ’s continued assertion of executive privilege over Don McGahn’s Congressional testimony), <https://slate.com/news-and-politics/2021/06/don-mcghahn-testimony-trump-doj-interference.html>.

94. See *U.S. House Judiciary Comm. v. McGahn*, 968 F.3d 755 (D.C. Cir., 2020). The D.C. Circuit upheld the enforceability of the House subpoena and explicitly left open the question of whether portions of McGahn’s potential testimony would be privileged.

95. *Black Lives Matter D.C., et al. v. Joseph R. Biden, Jr., President of the United States of America, et al.* (D.D.C., No. 20-1469, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.218706/gov.uscourts.dcd.218706.158.o.pdf>. See also Celine Castronuovo, “DOJ Asks Judge to Dismiss Cases Against Trump, Barr for Lafayette Square Clearing,” *The Hill*, May 29, 2021, <https://thehill.com/regulation/court-battles/556077-doj-asks-judge-to-dismiss-cases-against-trump-barr-for-lafayette>.

96. See Reply Brief of Appellant United States of America, filed June 7, 2021, in *Carroll v. Trump*, No. 20-3977 and 20-3978 (2nd Cir., 2021), <http://cdn.cnn.com/cnn/2021/images/06/07/jean.carroll.pdf>.

97. *Ibid.*

98. Joe Walsh, “DOJ Says It Won’t Defend Mo Brooks in Jan. 6 Lawsuit from Eric Swalwell,” *Forbes*, July 27, 2021, www.forbes.com/sites/joewalsh/2021/07/27/doj-says-it-wont-defend-mo-brooks-in-jan-6-lawsuit-from-eric-swalwell/?sh=425837a62b3a; Paul Figley, “Expert Backgrounder: The Westfall Act and Representative Brooks’s Speech,” Just Security, July 23, 2021, www.justsecurity.org/77561/expert-backgrounder-the-westfall-act-and-representative-brooks-speech/. Other encouraging signs of DOJ’s attention to accountability include the investigation of and raid on Trump’s former lawyer Rudy Giuliani, the prosecution of Trump friend and inaugural committee chair Tom Barrack, the decision to allow Trump administration officials to testify before Congress regarding the January 6 insurrection and Trump’s conduct leading up to it, and of course the prosecution of over 600 of the insurrectionists as of this writing; see also Norman Eisen and Donald Ayer, “Merrick Garland Is Doing More to Hold Trump Accountable than It Appears,” *Washington Post*, July 28, 2021, www.washingtonpost.com/outlook/2021/07/28/garland-brooks-jan-6-immunity/.

99. See Robert S. Mueller III, U.S. Department of Justice, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, vol II, at p. 211, March 2019, www.justice.gov/storage/report_volume2.pdf.

100. *Ibid.*

101. “Letter from William P. Barr, Attorney General, U.S. Department of Justice, to Sen. Lindsey Graham, Sen. Dianne Feinstein, Sen. Jerrold Nadler, and Sen. Doug Collins,” March 24, 2019, <https://assets.documentcloud.org/documents/5779688/AG-March-24-2019-Letter-to-House-and-Senate.pdf>.

102. “Letter from Robert S. Mueller III, Special Counsel, to William P. Barr, U.S. Attorney General,” March 27, 2019, <https://assets.documentcloud.org/documents/5984410/Mueller-letter-to-Barr.pdf>.

103. *EPIC*, No. 19-810, at 145, and *Leopold*, at 487 F. Supp. 3d 1.

104. *Citizens for Responsibility and Ethics in Washington*, No. 19-1552.

105. Robert S. Mueller III, U.S. Department of Justice, *Report on the Investigation*

into *Russian Interference in the 2016 Presidential Election*, vol. II, p. 1 (March 2019), www.justice.gov/storage/report_volume2.pdf.

106. Claire O. Finkelstein and Richard W. Painter, “Presidential Accountability and the Rule of Law: Can the President Claim Immunity If He Shoots Someone on Fifth Avenue?” *University of Pennsylvania Journal of Constitutional Law* 24, no. 1 (2021), <https://ssrn.com/abstract=3879702>.

107. *Trump v. Vance*, 591 U.S. __ (2020).

108. “Recognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President’s term is over or he is otherwise removed from office by resignation or impeachment.” *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 255 (2000), www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-vo24-p0222_o.pdf.

109. Barry H. Berke, Noah Bookbinder, and Norman Eisen, “Presidential Obstruction of Justice: The Case of Donald J. Trump,” Brookings Institution, August 22, 2018, www.brookings.edu/research/presidential-obstruction-of-justice-the-case-of-donald-j-trump-2nd-edition/; Quinta Jurecic, “Obstruction of Justice in the Mueller Report: A Heat Map,” *Lawfare*, April 21, 2019, www.lawfareblog.com/obstruction-justice-mueller-report-heat-map.

110. 18 U.S.C. § 1512(c)(2). See Robert S. Mueller III, “Executive Summary to Volume II,” pp. 3–7 (2019), www.snopes.com/uploads/2019/05/Mueller-Summary-Volume-II.pdf.

111. Mikhaila Fogel and Benjamin Wittes, “Bill Barr’s Very Strange Memo on Obstruction of Justice,” *Lawfare*, December 20, 2018, www.lawfareblog.com/bill-barrs-very-strange-memo-obstruction-justice.

112. See Shalev Roisman, “The Real Decline of OLC,” Just Security, October 8, 2019, www.justsecurity.org/66495/the-real-decline-of-olc, discussing OLC’s involvement with Trump reallocating funds to pay for a border wall, the Treasury secretary’s refusal to turn over President Trump’s personal tax returns to Congress, expansive claims by the White House to executive privilege, and the refusal to turn over the Ukraine whistleblower complaint to Congress.

113. Louis Charbonneau, “U.S. Drone Strikes Violate Pakistan’s Sovereignty: U.N.,” Reuters, March 15, 2013, www.reuters.com/article/us-un-drones/u-s-drone-strikes-violate-pakistans-sovereignty-u-n-idUSBRE92EoY320130315; ACLU, Human Rights Watch, National Immigrant Justice Center, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, April 2020, www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf.

114. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942), www.archives.gov/historical-docs/todays-doc/?dod-date=219; Japanese-American Evacuation Claims Act of 1948, Pub. L. No. 80–886, 62 Stat. 1231.

115. *Korematsu v. United States*, 323 U.S. 214 (1944). A formal apology for the internment and partial reparations for interned Japanese Americans did not begin until President Reagan signed the Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 904.

116. Chief Justice Roberts wrote, “The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’” *Trump v. Hawaii*, 585 U.S. ___ (2018) (Jackson, J., dissenting) (quoting *Korematsu*, 323 U.S. at 248). The majority opinion in *Hawaii* nonetheless refused to enter an injunction against Presidential Proclamation No. 9645, 82 Fed. Reg. 45, 161 (Sept. 24, 2017) which had banned entry immigration from seven predominantly Muslim countries.

117. See Dorothy Samuels, “At Last, Some Justice for Torture Victims,” Brennan Center for Justice, October 2, 2017, www.brennancenter.org/our-work/analysis-opinion/last-some-justice-torture-victims.

118. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14 (Dec. 10, 1984), 1465 U.N.T.S. 113.

119. See Fionnuala Ní Aoláin, “What Is the Remedy for American Torture?” Just Security, November 25, 2014, www.justsecurity.org/17720/remedy-american-torture/. “A starting point to addressing why the United States has an obligation of reparations is to recall why remedies exist for human rights violations under international treaty law. Reparations exist because they provide a concrete means to show a desire for non-repetition, to give redress to persons who have been harmed and to individually confirm meaningful condemnation in the aftermath of grievous harm to a human being.”

120. Terri Moon Cronk, “Biden Announces Full U.S. Troop Withdrawal from Afghanistan by Sept. 11,” U.S. Department of Defense News, April 14, 2021, www.defense.gov/Explore/News/Article/Article/2573268/biden-announces-full-us-troop-withdrawal-from-afghanistan-by-sept-11/; Ellen Knickmeyer, “Biden Ending US Support for Saudi-Led Offensive in Yemen,” AP News, February 4, 2021, <https://apnews.com/article/biden-end-support-saudi-offensive-yemen-b68f58493dbfc530b9cfd80a13098f>.

121. Truth and Reconciliation Commission, www.justice.gov.za/trc/index.html.

122. Choe Sang-Hun, “Japan and South Korea Settle Dispute Over Wartime ‘Comfort Women,’” *New York Times*, December 28, 2015, www.nytimes.com/2015/12/29/world/asia/comfort-women-south-korea-japan.html.

123. Motoko Rich, “Japan Balks at Call for New Apology to South Korea Over ‘Comfort Women,’” *New York Times*, January 12, 2018, www.nytimes.com/2018/01/12/world/asia/japan-south-korea-comfort-women.html. A Korean judge has also entered an order that Japan pay reparations to the victims. See Choe Sang-Hun, “South Korean Court Orders Japan to Pay Reparations for Wartime Sexual Slavery,” *New York Times*, January 7, 2021, www.nytimes.com/2021/01/07/world/asia/south-korea-comfort-women-japan.html.

124. Alexander Besant, “Chile Judges Apologize for Role in Pinochet Regime Abuses,” *The World*, PRI, September 5, 2013, www.pri.org/stories/2013-09-05/chile-judges-apologize-role-pinochet-regime-abuses.

125. This was surely the case with Gina Haspel, who allegedly destroyed videotapes of torture sessions, in violation of federal law, to protect the CIA. While the de-

struction of evidence was an issue at her confirmation hearing, she was likely so strongly supported by the intelligence circles in which she was influential because she was understood to be a “team player.” See Finkelstein and Xenakis, “Lawyers Told Gina Haspel Torture Was Legal”; Nicholas Fandos, “Senate Confirms Gina Haspel to Lead C.I.A. Despite Torture Concerns,” *New York Times*, May 17, 2018, www.nytimes.com/2018/05/17/us/politics/haspel-confirmed.html?searchResultPosition=17.

126. CERL/CREW, *Report on the Department of Justice*, pp. 175–79.

127. In the past fifty years, two presidents have been impeached by the House (one of them impeached twice) and one president has resigned under threat of impeachment. Tara Law, “What to Know about the U.S. Presidents Who’ve Been Impeached,” *Time*, January 13, 2021, <https://time.com/5552679/impeached-presidents>.

128. H. Comm. on Oversight and Reform, “House Democrats Introduce Landmark Reforms Package, the Protecting Our Democracy Act,” press release, September 23, 2020, <https://oversight.house.gov/news/press-releases/house-democrats-introduce-landmark-reforms-package-the-protecting-our-democracy>.

129. Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824. Title VI amended Title 28 of the United States Code to provide for the independent counsel. Title VI expired in June 1999.

130. See, e.g., Claire O. Finkelstein and Richard W. Painter, “The ‘Friday Night Massacre’ Spells the Downfall of William Barr,” *Newsweek*, June 23, 2020, www.newsweek.com/friday-night-massacre-spells-downfall-william-barr-opinion-1512935, discussing the sudden firing of Geoffrey Berman, the U.S. Attorney for the Southern District of New York, in the middle of several investigations that were politically and personally sensitive to President Trump.

131. *Morrison v. Olson*, 487 U.S. 654 (1988).

132. *Ibid.*, at 686.

133. *Ibid.*, at 699, citing Federalist No. 51, p. 321 (J. Madison).

134. *Myers v. United States*, 272 U.S. 52 (1926).

135. Linda Qiu, “Did Trump Fire Comey Over the Russia Inquiry or Not?” *New York Times*, May 31, 2018, www.nytimes.com/2018/05/31/us/politics/fact-check-trump-fire-comey-russia.html.

136. *Myers*, 272 U.S., at 117.

137. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

138. *Ibid.*, at 626–628.

139. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

140. *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ____ (2020).

141. This view runs into some difficulty because of a recent case, *Seila Law v. CFPB*, which held that the Constitution does not permit Congress to create nonremovable positions in other areas of the executive branch, as that would infringe on the president’s Article II powers and violate the necessary separation between Congress and the executive branch. We believe *Seila Law* is distinguishable, however. The policy-

making role of the CFPB director is very different from the narrow, case-specific focus of the investigatory and prosecutorial functions of an independent counsel.

142. Bob Bauer and Jack Goldsmith, *After Trump: Reconstructing the Presidency*, (Lawfare Institute 2020), proposing changes to internal DOJ regulations but not statutory controls on prosecutorial functions similar to the 1978 independent counsel statute. For a critique of Bauer and Goldsmith's approach, see William G. Howell and Terry M. Moe, "Reforming the Presidency: How Far is Far Enough," *Judicature* 104, no. 3 (Fall/Winter 2020–2021), <https://judicature.duke.edu/articles/reforming-the-presidency-how-far-is-far-enough/>. Bauer and Goldsmith "see serious downsides to having executive officials and agencies that are securely insulated from presidential control—worrying that they will go rogue (as, for example, many think independent counsel Kenneth Starr did)—and they put great stock in the political accountability allegedly gained when presidents and their appointees have almost total control over the executive branch, its officials, and its operations."

143. "Project on the Independent Counsel Statute, Report and Recommendations," American Enterprise Institute and Brookings Institution, May 1999, www.brookings.edu/wp-content/uploads/2016/06/icreport.pdf.

144. *Ibid.*, p. 10.

145. See S. 1735 (Graham-Booker) and S. 1741 (Tillis-Coons) on providing job protections for the special counsel. See also "Booker, Graham, Coons, Tillis Introduce Merged Legislation, The Special Counsel Independence and Integrity Act," press release from the office of Sen. Cory Booker, April 11, 2018, www.booker.senate.gov/news/press/booker-graham-coons-tillis-introduce-merged-legislation-the-special-counsel-independence-and-integrity-act.

146. See testimony of Akhil Reed Amar before the United States Senate Committee on the Judiciary, September 26, 2017, www.judiciary.senate.gov/imo/media/doc/09-26-17%20Amar%20Testimony.pdf, stating, among other things, that a proposed bill protecting Mueller from being fired by Trump would be unconstitutional and that *Morrison v. Olson* had been wrongly decided.

147. See *EPIC*, No. 19-810; and *Leopold*, 19-957, Memorandum and Opinion, at 19. "The inconsistencies between Attorney General Barr's statements, made at a time when the public did not have access to the redacted version of the Mueller Report to assess the veracity of his statements, and portions of the redacted version of the Mueller Report that conflict with those statements cause the Court to seriously question whether Attorney General Barr made a calculated attempt to influence public discourse about the Mueller Report in favor of President Trump despite certain findings in the redacted version of the Mueller Report to the contrary."

148. The AEI-Brookings report (above) at p. 18, also recommended that the attorney general be required to report to Congress to explain removal of a special counsel.

149. See, e.g., Claire Finkelstein and Richard Painter, "Bloomberg Insights, Trump's Unitary Executive Theory Meets Cyrus Vance on Fifth Avenue," Bloomberg,

July 17, 2020, <https://news.bloomberglaw.com/us-law-week/insight-trumps-unitary-executive-theory-meets-cyrus-vance-on-fifth-avenue>.

150. Mueller, 2016 *Presidential Election*, vol. II, p. 169.

151. This is the topic discussed in volume II of the Mueller report and a topic that we also address in a separate law review article. Even if the firing of a prosecutor is within the purported powers of the president under Article II of the Constitution or the powers delegated by the president to another officer of the executive branch, that power cannot lawfully be used to obstruct justice in an ongoing investigation.

152. Todd Garvey, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, Congressional Research Service, R45653 (2019), <https://crsreports.congress.gov/product/pdf/R/R45653>.

153. See Kessler, “CIA Destruction of Interrogation Tapes.”

154. Criminal statutes implicated by destruction of government records include 18 USC § 641 (public money, property, or records), 18 USC § 1361 (government property or contracts), 18 USC § 2071 (concealment, removal, or mutilation generally), 18 USC § 793 (gathering, transmitting, or losing defense information), and 18 USC § 1512 (tampering with a witness, a victim, or an informant). See Richard W. Painter, “Destroying Federal Documents During a Presidential Transition Is a Federal Crime,” Just Security, November 5, 2020, www.justsecurity.org/73265/destroying-federal-documents-during-a-presidential-transition-is-a-federal-crime/.

155. See “Fired U.S. Attorneys: A Who’s Who,” NPR, April 15, 2007, www.npr.org/templates/story/story.php?storyId=7777925; Tierney Sneed and Manu Raju, “Former U.S. Attorney Tells Investigators He Quit Because He Heard Trump Was Considering Firing Him,” CNN, August 11, 2021, www.cnn.com/2021/08/11/politics/pak-trump-georgia-election-testimony/index.html.

156. Saikrishna Prakash, “Removal and Tenure in Office,” *Virginia Law Review* 92, no. 8 (2006), pp. 1779–1852, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=889378. See also discussion of the Supreme Court’s holding in *Myers* and *CFPB* above.

157. See Pratin Vallabhaneni, “U.S. Supreme Court Rules CFPB’s Leadership Structure is Unconstitutional But Leaves CFPB Intact,” White & Case, July 8, 2020, www.whitecase.com/publications/alert/us-supreme-court-rules-cfpbs-leadership-structure-unconstitutional-leaves-cfpb.

158. *Vance*, 591 U.S. ____.

159. See “9-27.000—Principles of Federal Prosecution,” U.S. Department of Justice, www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.

160. See H. Comm. on Oversight and Reform, 116th Cong., *Policy and Supporting Positions* (2020), www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf; “3-4.000—Personnel Management,” U.S. Department of Justice, www.justice.gov/jm/jm-3-4000-personnel-management.

161. See Troy Cribb, “Politicizing the Civil Service: How a New Executive Order Destabilizes the U.S. Government,” Just Security, November 2, 2020, www.justsecurity.org

.org/73213/politicizing-the-civil-service-how-a-new-executive-order-destabilizes-the-u-s-government/.

162. Presidents Obama, Trump, and Biden issued executive orders imposing additional ethics restrictions on presidential appointees in their administrations, but these restrictions are in addition to, and do not preempt, the federal statutes and Office of Government Ethics regulations that govern executive branch ethics from administration to administration.

163. H. Comm. on Oversight and Reform, 116th Cong., *Policy and Supporting Positions* (2020), www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf. Among the Trump executive orders that need to be rescinded by President Biden is one diminishing civil service job protections for career federal employees. See Cribb, “Politicizing the Civil Service.”

164. Title VI, Section 603 of PODA remains unchanged in the version introduced in the 117th Congress. Title VI would mandate that the attorney general keep a log of specified communications between the White House and the DOJ. The communications would include correspondence relating to any investigation or litigation underway by the Department of Justice in any civil or criminal matter. The statute would require the attorney general to furnish the communications log to the DOJ inspector general every six months. The IG would be mandated by the statute to review the log and share with Congress any communications reflecting improper political interference or other inappropriate conduct. See H.R. 5314, 117th Congress (2021–2022), Title VI, § 603, www.congress.gov/bill/117th-congress/house-bill/5314.

165. A discussion about insulating inspectors general from political retribution is also included in chapter 2, this volume.

166. Robert Longley, “About the U.S. Inspectors General: The U.S. Government’s Built-In Watchdogs,” ThoughtCo., December 5, 2020, www.thoughtco.com/about-the-office-of-inspector-general-3322191#:~:text=A%20U.S.%20ofederal%20inspector%20general,government%20procedures%20occurring%20within%20the.

167. “About the Office,” Office of the Inspector General, U.S. Department of Justice, <https://oig.justice.gov/about>.

168. Melissa Quinn, “The Internal Watchdogs Trump Has Fired or Replaced,” CBS News, May 19, 2020, www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list.

169. Charlie Savage, “Endorsing Trump’s Firing of Inspector General, Barr Paints Distorted Picture,” *New York Times*, April 10, 2020, www.nytimes.com/2020/04/10/us/politics/barr-inspector-general-firing.html.

170. “About the Office,” Office of the Inspector General.

171. “Urgent Concern” *Determination by the Inspector General of the Intelligence Community*, 43 Op. O.L.C. ___ (2019), www.justice.gov/olc/opinion/file/1205711/download.

172. “Office of Professional Responsibility,” U.S. Department of Justice, www.justice.gov/opr.

173. See “Jurisdiction and Relationship to the Office of Inspector General,” Office

of Professional Responsibility, U.S. Department of Justice, June 5, 2019, www.justice.gov/opr/jurisdiction-and-relationship-office-inspector-general, stating that the OPR has exclusive jurisdiction over investigations of allegations of impropriety against DOJ attorneys relating to exercise of their power to investigate, litigate, and provide legal advice, and that the DOJ inspector general should refer such investigations to OPR.

174. Inspector General Access Act of 2019, S. 685, 116th Cong. § 2.

175. 5 C.F.R. § 2635.502 (2020). This Office of Government Ethics rule is known as the “impartiality regulation,” but outside of very specific situations, mostly involving former employers or family members of government officials, the rule depends upon subjective assessment by government officials of their own bias. The rule also requires similarly subjective determinations by their superiors, themselves also political appointees, who may grant “authorizations”—i.e. waivers.

176. This recommendation is also made in H.R. 1 and S. 1, which would amend the U.S. Code to require any presidential appointee to recuse himself or herself from any matter in which the president has a personal interest. Sen. Joe Manchin has indicated support for this recommendation from the bill as well.

177. See Carrie Cordero, “Intelligence Transparency and Foreign Threats to Elections: Responsibilities, Risks, and Recommendations,” Center for a New American Security, July 23, 2020, www.cnas.org/publications/reports/intelligence-transparency-and-foreign-threats-to-elections.

178. CERL/CREW, *Report on the Department of Justice*, pp. 37–45.

179. *Ibid.*, pp. 14, 37. See also Jen Kirby, “‘Obamagate’: Trump’s Latest Conspiracy Theory, Explained,” Vox, May 15, 2020, www.vox.com/2020/5/15/21257299/obamagate-trump-flynn-unmasking-conspiracy.

180. Jeremy Herb, “GOP-Led Senate Panel Authorizes Subpoenas of Top Obama Officials,” CNN, June 11, 2020, www.cnn.com/2020/06/11/politics/subpoenas-obama-officials-lindsey-graham/index.html.

181. Murray Waas, “How Trump and Barr’s October Surprise Went Bust,” *New York Magazine*, November 2, 2020, <https://nymag.com/intelligencer/2020/11/durham-investigation-how-trumps-october-surprise-went-bust.html>.

182. Office of the Inspector General, U.S. Department of Justice, *Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation* (2019), p. iv, www.justice.gov/storage/120919-examination.pdf.

183. Office of the Inspector General, U.S. Department of Justice, *Report of Investigation of Former Federal Bureau of Investigation Director James Comey’s Disclosure* (2019), <https://oig.justice.gov/reports/2019/01902.pdf>. See also Bauer and Goldsmith, *After Trump*, p. 210.

184. Bauer and Goldsmith, *After Trump*, p. 209; U.S. Department of Justice, *Review of Four FISA Applications*, pp. 410–11.

185. U.S. Department of Justice, *Review of Four FISA Applications*, p. iii.

186. *Ibid.*, p. v.

187. *Ibid.*, pp. viii–ix.

188. *Ibid.*, p. vi.

189. “Trump says he is the victim of a politicized F.B.I. He says senior agents tried to rig the election by declining to prosecute Mrs. Clinton, then drummed up the Russia investigation to undermine his presidency. He has declared that a deeply rooted cabal—including his own appointees—is working against him.” Matt Apuzzo, Adam Goldman, and Nicholas Fandos, “Code Name Crossfire Hurricane: The Secret Origins of the Trump Investigation,” *New York Times*, May 16, 2018, www.nytimes.com/2018/05/16/us/politics/crossfire-hurricane-trump-russia-fbi-mueller-investigation.html.

190. U.S. Department of Justice, *Review of Four FISA Applications*, p. xix.

191. *Ibid.*, pp. 410–14.

192. CERL/CREW, *Report on the Department of Justice*, pp. 57–58.

193. H.R. 1 and S. 1 also propose mechanisms to increase coordination between DOJ and ODNI, specifically requiring that the DNI and heads of offices of the federal government, including the AG, submit a joint report on foreign threats no later than 180 days before the date of the next federal election. Further, the bills require the president, DNI, AG, and other agency heads to issue a national strategy to protect the country’s democratic institutions from threats. Finally, they establish a unit in the DOJ dedicated to FARA investigations, recommending that the AG consult with the DNI in investigations relating to foreign threats. The requirement of a joint report on foreign threats and the establishment of a unit within the DOJ dedicated to enforcing FARA is no longer found in the 117th Congress’s version of the Freedom to Vote Act (2021–2022). S. 2747 does keep the proposed amendments to the FEC requiring disclosure of “reportable foreign contact,” establishing a foreign contact reporting compliance system, and establishing criminal penalties for violation. See S. 2747, 117th Congress (2021–2022), 1st Sess., Division B, Title III, Subtitle I, §§ 3802–3806, www.congress.gov/bill/117th-congress/senate-bill/2747/text.

194. 22 U.S.C. § 611 et seq., discussed in detail in chapter 4 of this volume.

195. See 22 U.S.C. §§ 612–613.

196. Zachary B. Wolf and Sean O’Key, “The Trump-Ukraine Impeachment Inquiry Report, Annotated,” CNN, December 3, 2019, www.cnn.com/interactive/2019/12/politics/trump-ukraine-impeachment-inquiry-report-annotated/; Andy Sullivan, “Barr Gives Top Priority to Investigating the Investigators of Russian Meddling,” Reuters, October 1, 2019, www.reuters.com/article/us-usa-trump-whistleblower-barr-explaine/explainer-barr-gives-top-priority-to-investigating-the-investigators-of-russian-meddling-idUSKBN1WG4QZ.

197. See Mark Mazzetti and Katie Benner, “Trump Pressed Australian Leader to Help Barr Investigate Mueller Inquiry’s Origins,” *New York Times*, September 30, 2019, www.nytimes.com/2019/09/30/us/politics/trump-australia-barr-mueller.html.

198. Quoting Claire Finkelstein: “This story suggests that the president is continuing to use the authority of his office to pressure foreign leaders into assisting him

in covering up Russia's assistance with his 2016 victory. This is the same conduct for which Trump was impeached, and the reporting suggests that he is undeterred." See Erin Banco, "Barr Pressed Australia for Help on Mueller Review as DOJ Worked to Free its Hostages," *Daily Beast*, June 16, 2020, www.thedailybeast.com/bill-barr-pressed-australia-for-help-on-mueller-review-as-doj-worked-to-free-its-hostages.

199. Eric Lipton and Benjamin Weiser, "Turkish Bank Case Shows Erdogan's Influence with Trump," *New York Times*, October 29, 2020, www.nytimes.com/2020/10/29/us/politics/trump-erdogan-halkbank.html.

200. See Bureau of International Narcotics and Law Enforcement Affairs, U.S. Department of State, *International Narcotics Control Strategy Report: Money Laundering* (March 2020), www.state.gov/wp-content/uploads/2020/03/Tab-2-INCSR-Vol-2-508.pdf.

201. "Criminal Resource Manual," U.S. Department of Justice, January 22, 2020, www.justice.gov/archives/jm/criminal-resource-manual-276-treaty-requests.

202. Benjamin Swasey, "A House Panel Will Investigate Trump DOJ Surveillance of Lawmakers and Journalists," NPR, June 14, 2021, www.npr.org/2021/06/14/1006417513/a-house-panel-will-investigate-trump-era-surveillance-by-the-department-of-justice; Matt Zapotosky, Felicia Sonmez, and Karoun Demirjian, "Justice Dept. Watchdog to Probe Trump-Era Leak Investigations, Including Secret Subpoenas for Data from Congress, Journalists," *Washington Post*, June 11, 2021, www.washingtonpost.com/powerpost/trump-justice-department-democrats-congress/2021/06/11/7c2b1aa8-cace-11eb-a11b-6c6191ccd599_story.html.

203. CERL/CREW, *Report on the Department of Justice*, p. 168.

204. *Ibid.*, pp. 168–69.

205. *Ibid.*

206. See Christopher M. Davis, Todd Garvey, and Ben Wilhelm, Cong. Rsch. Serv., RL30240, *Congressional Oversight Manual* (2020), <https://fas.org/sgp/crs/misc/RL30240.pdf>.

207. U.S. Const. art. II; "Budget of the U.S. Government," USA.gov, October 26, 2021, www.usa.gov/budget#:~:text=Each%20year%2C%20Congress%20works%20on,includes%20a%20detailed%20spending%20plan.

208. "FY 2021 Congressional Budget Submission," U.S. Department of Justice, www.justice.gov/doj/fy-2021-congressional-budget-submission.

209. CERL/CREW, *Report on the Department of Justice*, p. 8.