



June 12, 2017

The Honorable Michael E. Horowitz
Inspector General
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W
Suite 4706
Washington, DC 20530

BY FAX: (202) 616-9881

RE: Avoiding Interference in Investigations at the Department of Justice

Dear Inspector General Horowitz:

We are concerned that the Department of Justice (DOJ) is failing to adhere to its decades-old policy protecting its independence from the White House. In recent months, the White House and President Trump have engaged in improper communications with the Department on specific ongoing law enforcement matters on several occasions. According to recent reports, DOJ leadership has failed to respond appropriately to these situations. DOJ must abruptly cease its tacit endorsement of the White House's communications with Department staff about ongoing investigations. Your office should conduct an immediate investigation to understand why DOJ leadership has failed to observe and enforce this critical policy protecting the even-handed and faithful application of the rule of law.

Since the beginning of the year, DOJ staff reportedly have been party to multiple instances, of increasing seriousness, involving communications with the White House about ongoing investigations. Former FBI Director James Comey testified about President Trump's repeated initiation of communication with him, coupled with empty responses from DOJ leadership to take action to stop such communications. Much of this seems to have been prompted by the actions of President Trump, who appears to neither understand nor accept the importance of maintaining the independence of DOJ and federal law enforcement. As the Department's Inspector General, your mission is to "detect and deter waste, fraud, abuse and misconduct in DOJ's programs and personnel" Because DOJ leadership has been unable, or unwilling, to resist the President's inappropriate contacts with Department officials, we urge you to act with all necessary speed to make recommendations on how DOJ must comply with its contacts policy. We also urge you to investigate violations of the policy before such circumstances impinge DOJ's independence in carrying out its functions.

Longstanding Policies Protect DOJ Independence from the White House

Since Watergate, both Republican and Democratic administrations have put in place written policies, called “contacts policies,” to ensure that the DOJ impartially exercises its law enforcement powers by restricting the Department’s contacts with the White House.¹ These contacts policies have channeled communications between the White House and DOJ about any ongoing case, investigation, or adjudicative matter to a small number of pre-designated high-level officials. Moreover, the contacts policy establish that those communications should take place only when necessary for the discharge of the President’s constitutional duties and must be appropriate from a law enforcement perspective. The longstanding policies restricting contacts between the White House and DOJ are most important in the context of enforcement and litigation actions involving specific parties.²

Under this Administration, both the White House and DOJ have contacts policies that strictly limit communications between them on investigations and enforcement matters, as has historically been the case. The White House has adopted a contacts policy that sets forth: “DOJ currently advises the White House about contemplated or pending investigations or enforcement actions under specific guidelines issued by the Attorney General. As a general matter, only the President, Vice President, Counsel to the President, and designees of the Counsel to the President may be involved in such communications.”³ The Justice Department guidelines are the ongoing 2009 guidance entitled, “Communications with the White House and Congress.”⁴ DOJ’s policy applies to all of its components, including the FBI, to prevent political interference, or even the appearance of political interference, that arises when the White House communicates about specific matters with DOJ officials.

¹ See, e.g. Eric Holder, *Communications with the White House and Congress*, Memorandum for Heads of Department Components and All U.S. Attorneys, May 11, 2009, <https://lawfare.s3-us-west-2.amazonaws.com/staging/2017/2009%20Eric%20Holder%20memo.pdf> (“Holder Memo”); Michael B. Mukasey, *Communications with the White House*, Memorandum for Heads of Department Components and U.S. Attorneys, Dec. 19, 2007, <https://assets.documentcloud.org/documents/3371650/Mukasey-12-19-07.pdf>.

² Memo from United to Protect Democracy to Interested Parties, *White House Communications with the DOJ and FBI*, Mar. 8, 2017, at <https://unitedtoprotectdemocracy.org/agencycontacts/> (“UPD Contacts Memo”).

³ Memorandum from Don McGahn, Counsel to the President, to all White House Staff, *Communications Restrictions with Personnel at the Department of Justice*, Jan. 27, 2017, <http://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>

⁴ See Freedom of Information Act Request from Protect Democracy to the U.S. Department of Justice Office of Information Policy, Apr. 18, 2017, and response, Letter from U.S. Department of Justice Office of Information Policy to Protect Democracy, May 15, 2017 (on behalf of the Offices of the Attorney General and Deputy Attorney General) attaching DOJ’s current policy, *Communications with the White House and Congress*, Memorandum for Heads of Department Components and All U.S. Attorneys, May 11, 2009, <https://unitedtoprotectdemocracy.org/wp-content/uploads/2017/05/DOJContactsFOIA.pdf>; see also Senate Judiciary Committee Questions for the Record at pp. 9, 12-15 (May 2017) (referencing the Attorney General Holder memo dated May 11, 2009 as one of the “safeguards in place”), <https://www.judiciary.senate.gov/imo/media/doc/Delrahim%20Responses%20to%20QFRs.pdf>.

Potential Contacts Policy Violations Politicize DOJ

Earlier this year, some of us raised red flags about the White House's repeated communications to DOJ, which have cast doubt on DOJ's compliance with the contacts policy,⁵ and wrote to you about a potential violation involving an ongoing antitrust matter.⁶ In addition, new reports have pointed out that White House Chief of Staff Reince Priebus may have violated these policies by requesting the FBI refute news reports of communications between Russian intelligence and Trump campaign advisors.⁷

The White House's escalating communications to the Department about the Russia investigation raise the specter of might over right – those communications suggest that the White House is seeking to use its leverage to influence an investigation that may have direct consequences for those in the White House. Just with respect to one Department official, former FBI Director Comey, President Trump reportedly had nine conversations with him in under five months.⁸ President Trump has acknowledged making multiple demands to Comey to know if he was under investigation,⁹ pushed Comey to publicize to that he was not under investigation,¹⁰ and sought his “loyalty.”¹¹ Reportedly, he also asked Comey to end the Flynn investigation.¹²

⁵ See UPD Contacts Memo at 3. First, news reports indicated that White House Counsel Donald McGahn attempted to access a surveillance order on Mr. Trump and others issued by the Foreign Intelligence Surveillance Court, though a White House official later attempted to recharacterize that effort. Michael D. Shear and Michael S. Schmidt, *Trump, Offering No Evidence, Says Obama Tapped His Phones*, N.Y. Times, Mar. 4, 2017, https://www.nytimes.com/2017/03/04/us/politics/trump-obama-tap-phones.html?_r=0. Secondly, White House Senior Policy Adviser Stephen Miller, who is not part of the Counsel's office, reportedly called the U.S. Attorney for the Eastern District of New York at his home to direct the argument for defending the travel ban. Harry Siegel, *Stephen Miller Called Brooklyn U.S. Attorney At Home and Told Him How To Defend Travel Ban in Court*, N.Y. Daily News (Feb. 18, 2017), <http://www.nydailynews.com/opinion/stephen-miller-called-u-s-attorney-travel-ban-defense-article-1.2975873>. Third, White House Chief of Staff Reince Priebus reportedly requested FBI Deputy Director Andrew McCabe to refute news articles about communications between Russia and Trump campaign advisors during the presidential campaign. Brian Naylor, *White House Asked FBI To Publicly Refute Reports Trump Associates Had Russia Contacts*, NPR, Feb. 24, 2017, <http://www.npr.org/2017/02/24/517011779/white-house-asked-fbi-to-publicly-refute-reports-trump-associates-had-russia-con>

⁶ Letter from Ian Bassin, Executive Director of Protect Democracy, to DOJ Inspector General, *Avoiding Interference in Pending Antitrust Litigation*, Mar. 23, 2017, <http://unitedtoprotectdemocracy.org/wp-content/uploads/2017/03/20170323AntitrustDivisionLettertoDOJOIG.pdf>.

⁷ Isaac Arnsdorf, *Priebus Talk with FBI Appears to Break White House Rules*, Politico, Mar. 17, 2017, <http://www.politico.com/story/2017/03/reince-priebus-fbi-discussion-white-house-rules-236192>

⁸ *Open Hearing Before the S. Select Comm. for Intelligence.*, 115th Cong. (2017) (statement of James B. Comey) <https://www.intelligence.senate.gov/sites/default/files/documents/os-jcomey-060817.pdf> (“Comey Prepared Testimony”).

⁹ Ali Vitali and Corky Siemaszko, *Trump Interview with Lester Holt: President Asked Comey If He Was Under Investigation*, NBC News, May 11, 2017, <http://www.nbcnews.com/news/us-news/trump-reveals-he-asked-comey-whether-he-was-under-investigation-n757821>

¹⁰ *Comey Prepared Testimony at 6-7.*

¹¹ See *id.* at 3-4; see also Pierre Thomas et al., *Trump Asked ex-FBI Director James Comey for Loyalty At a Recent Dinner*, ABC News, May 12, 2017, <http://abcnews.go.com/Politics/trump-asked-fbi-director-james-comey-loyalty-recent/story?id=47374262>

¹² See *Comey Prepared Testimony at 5*; see also Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. Times, May 16, 2017, <https://www.nytimes.com/2017/05/16/us/politics/james-comey->

Finally, after Comey rebuffed President Trump's repeated request to "'get out' that he [was] not personally under investigation" by telling the President to speak with the Acting Deputy Attorney General,¹³ an allowable communications path under the contacts policy, the President ultimately fired him.

Even prior to Comey's Senate testimony, there has been extensive public concern over the potential for politicizing DOJ, and Members of Congress have raised concerns about the Department's compliance with the contacts policy. Senate Judiciary Committee members pressed the importance of the contacts policy and sought to learn about its enforcement during the nomination hearings of DOJ leadership, including of AG Jeff Sessions¹⁴ and Makan Delrahim, nominee to be Assistant Attorney General of the Antitrust Division.¹⁵ Several Senators from the Judiciary Committee have also written to White House Counsel Don McGahn and AG Sessions about the contacts policy and possible violations of it.¹⁶ Additionally, scholars¹⁷ and former DOJ officials have weighed in with concern over DOJ's adherence to the

trump-flynn-russia-investigation.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region®ion=top-news&WT.nav=top-news&_r=1

¹³ See *Comey Prepared Testimony at 7*.

¹⁴ *Confirmation Hearing for Attorney General Nominee Jeff Sessions: Hearing Before the S. Judiciary Comm.*, 115th Cong (2017) (at 2:33 mark, Sessions responding to a question from Sen. Whitehouse to "maintain those rules" in referring to the Justice Department contacts policy under the Bush Administration, authored by AG Mukasey, which predated the 2009 Holder memo) <https://www.c-span.org/video/?420932-1/attorney-general-nominee-jeff-sessions-testifies-confirmation-hearing>.

¹⁵ See, e.g., Questions for the Record, Senate Judiciary Committee (May 2017)

<https://www.judiciary.senate.gov/imo/media/doc/Delrahim%20Responses%20to%20QFRs.pdf> (Ranking Member Feinstein question 14, Sen. Leahy question 5, 7; Sen. Whitehouse questions 1-5, Sen. Coons question 3).

¹⁶ *Justice Department Nominations: Hearing Before the S. Judiciary Comm.*, 115th Cong. (2017) (Question from Antitrust Subcomm. Ranking Member Klobuchar to Assistant Attorney General for Antitrust Nominee Makan Delrahim, at minute 45) ("Maintaining the integrity of the antitrust division is critical. What would you do if the President or Vice President White House staffer were to call and want to discuss a pending antitrust matter?"), <https://www.c-span.org/video/?428279-1/senate-judiciary-committee-considers-justice-department-nominations>; Letter from Sens. Whitehouse, Blumenthal, and Franken to White House Counsel Don McGahn (May 5, 2017) <https://www.whitehouse.senate.gov/imo/media/doc/Letter%20to%20McGahn%20on%20Law%20Enforcement%20Contacts.pdf>; Letter from Sen. Cortez-Masto to President Trump and Attorney General Sessions (Mar. 15, 2017) ("DOJ's policy across administrations has been to limit communications between the White House the DOJ and the FBI regarding pending Department investigations or criminal cases. Yet, recent reports raise serious concerns about whether White House officials recognize these principles.").

¹⁷ See, e.g., Kathleen Clark, *No, Presidents Should Not Ask FBI Directors If They're Under Investigation*, Wash. Post, May 12, 2017, https://www.washingtonpost.com/posteverything/wp/2017/05/12/no-presidents-should-not-ask-fbi-directors-if-theyre-under-investigation/?utm_term=.9b6c6960f56a; Andy Wright, *How Trump's Flynn Plea to Comey Offends the Constitution*, Newsweek, May 17, 2017, <http://www.newsweek.com/how-trumps-flynn-plea-comey-offends-constitution-610900>.

policy¹⁸ and the news media have reported on it extensively.¹⁹

DOJ Leadership’s Failed Enforcement of Communications Firewalls

DOJ’s leadership appears to have abdicated its obligation to protect the independence of the Department. The DOJ contacts policy allows only the Attorney General or the Deputy Attorney General to have initial communications on behalf of the Department with the White House regarding investigations.²⁰ As such, AG Sessions, then-Acting Deputy Attorney General Dana Boente (now Acting Assistant Attorney General of the National Security Division), and then Deputy Attorney General Rod Rosenstein, are the only DOJ officials who have had authority to have such conversations with President Trump’s White House. But, from what has been publicly reported, these Department leaders shrunk from this role and have failed to ensure compliance with the policy.

According to his written Senate testimony, Comey reported to AG Sessions that the President sought him out for private conversation, and Comey also asked AG Sessions for his assistance in preventing that from occurring again.²¹ AG Sessions did not give any reassurance or reply, and President Trump continued to call on Comey.²² Comey also reported a subsequent phone call he received from President Trump to Acting Deputy Attorney General Boente, and sought his guidance, but Boente did not respond and President Trump again called Comey.²³ Then, when Mr. Rosenstein was confirmed as Deputy Attorney General, Comey spoke to him to “explain[] my serious concern about the way in which the president is interacting, especially with the FBI,” but there was no evidence of Mr. Rosenstein’s actions to put an end to such interactions.²⁴ The apparent indifference of DOJ’s top leadership to blatant violations of the restrictions on White House – DOJ contacts are not acceptable.

¹⁸ Jane Chong, *White House Interference with Justice Department’s 2009 Holder Memo*, LawFare, Feb. 22, 2017, <https://www.lawfareblog.com/white-house-interference-justice-department-investigations-2009-holder-memo>; Isaac Arnsdorf, *Sessions Faces Decision on Politicizing Justice Department*, Politico, Jan. 9, 2017, <http://www.politico.com/story/2017/01/jeff-sessions-attorney-general-justice-233382> (citing former DOJ spokesman, Matt Miller); Adam Serwer, *When Does Contact Between the FBI and the White House Cross the Line?*, The Atlantic (Feb. 24, 2017) (Michael Bronwich, former DOJ IG, stating that “It’s quite inappropriate for anyone from the White House to have a contact with the FBI about a pending criminal investigation, that has been an established rule of the road, probably since Watergate.”), <https://www.theatlantic.com/politics/archive/2017/02/when-does-contact-between-the-fbi-and-the-white-house-cross-the-line/517845/>

¹⁹ Maggie Haberman and Charlie Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. Times, Mar. 11, 2017, <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html> (“[T]here are protocols governing a president’s direct contact with federal prosecutors.”); Isaac Arnsdorf, *Priebus Talk with FBI Appears to Break White House Rules*, Politico, Mar. 17, 2017, <http://www.politico.com/story/2017/03/reince-priebus-fbi-discussion-white-house-rules-236192>

²⁰ See *Holder Memo* at 2.

²¹ See *Comey Prepared Testimony* at 6.

²² *Id.*

²³ *Id.* at 7.

²⁴ *Open Hearing Before the S. Select Comm. for Intelligence.*, 115th Cong. (2017) (live testimony of James B. Comey) <http://www.politico.com/story/2017/06/08/full-text-james-comey-trump-russia-testimony-239295>

Comey's oral testimony before the Senate Intelligence Committee further indicates that the AG and the DAG have undermined the Department's independence by allowing President Trump to continue to violate policies restricting White House contacts with the Department. As Sen. Collins asked Comey, "[i]t's fundamental to the operation of our government, the FBI be insulated from this kind of political pressure. . . . [D]id you go to anyone at the Department of Justice and ask them to call the White House Counsel's Office and explain . . .?"²⁵ Comey stated that he had, in fact, done as Sen. Collins suggested, to the extent that the contacts policy allowed, by reporting inappropriate contacts to the AG and DAG. Given that the President kept contacting Comey, it appears the AG and DAG did not take effective action, if any action at all, to insulate the Department from political pressure.

Need for OIG Action

President Trump's repeated, aggressive course of action in initiating contacts with law enforcement have put DOJ's employees in an impossible situation. The attorneys and investigators of the Department rely on their leadership to protect them from wrongful White House interference with their work. Yet it appears that even when these inappropriate contacts have been reported to DOJ leadership, they have gone unaddressed. This allows the President to act with impunity, and gives license for anyone else in the White House to do the same.

Ensuring that the Department operates free from inappropriate political influence, as the contacts policy is intended to ensure, will require action from your office. Even though some of the factual circumstances described here are within the purview of the Special Counsel's investigation, and may rise to the level of criminal violations, the scope of the problem – failures by DOJ leadership to enforce the contacts policy – is wider than the Special Counsel's investigation. Also, this request, which focuses on current DOJ leadership, is not duplicative of the OIG's review of conduct from 2016 regarding DOJ and FBI actions in advance of the presidential election.

For these reasons, we ask the OIG to take immediate action to investigate and put a stop to inappropriate White House communications on specific enforcement matters. We request that the OIG investigate potential violations of the policy by DOJ leadership and assess DOJ's compliance protocol for ensuring that its leadership and staff abide by the contacts policy. In particular, we ask that you assess whether DOJ employees are aware of their obligations under the contacts policy, receive training on the rationales behind the policy and how to comply, and understand how to handle circumstances to either avoid a violation or, if one occurs through actions of the President, how to report and address it.

Simply having the contacts policy on the books at DOJ is not sufficient if it is not observed – the high-profile nature of the circumstances and individuals involved in recent failures to defend the Department from White House interference undermines the import of the policy. So long as President Trump continues to show disregard for the independence of DOJ

²⁵ *Id.* (question from Sen. Susan Collins).

and to demand loyalty to him instead of to the Constitution and the rule of law, DOJ must take affirmative steps to insulate its staff, who may be on the unsolicited end of a White House communication, and to reaffirm the principle of nonpartisan independence at the heart of the policy. In light of the AG's and DAG's apparent failures to act in the face of improper White House influence, the burden falls to your office to defend the integrity of the Department.

We look forward to your response and thank you for your important work.

Sincerely,

United to Protect Democracy

American Oversight

Center for American Progress

Color of Change

Common Cause

CREDO

Daily Kos

Free Speech for People

The Loyal Opposition

People for the American Way

Public Citizen

Women's Action for New Directions

cc: Senator Chuck Grassley
Chairman
Senate Judiciary Committee

Senator Dianne Feinstein
Ranking Member
U.S. Senate Judiciary Committee