

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

November 17, 2022

Dear Attorney General Garland,

We write with grave concern that your office has allowed the special counsel investigation led by John Durham, appointed by former President Donald Trump's Attorney General William Barr, to continue despite its politically motivated inception and its misguided and unsuccessful prosecutions, while simultaneously failing to prosecute Donald Trump for the multiple obstruction of justice crimes established by Special Counsel Robert Mueller's report.

### **Trump's crimes identified in the Mueller Report**

In Volume II of his 2019 report, Special Counsel Robert Mueller identified multiple instances or patterns of conduct in which he found "substantial evidence" that Trump committed (1) an obstructive act (2) with a nexus to a proceeding and (3) corrupt intent. These instances include, at *minimum*, the following:

- Trump's efforts to fire Mueller (Section II.E)
- Trump's efforts to curtail Mueller's investigation (Section II.F)
- Trump's order to White House Counsel Don McGahn to lie about Trump's attempt to fire Mueller (Section II.I)
- Trump's efforts to dissuade Paul Manafort from cooperating with the government (Section II.J)

Other offenses that likely also satisfy the evidentiary and legal thresholds of obstruction of justice include:

- Trump's attempt to persuade the FBI Director, James Comey, to stop investigating Michael Flynn (Section II.B)
- Trump's firing of Comey (Section II.D)
- Trump's attempt to persuade the Attorney General, Jeff Sessions, to reverse his recusal and take over supervision of the investigation (Section II.H)
- Trump's attempt to dissuade Michael Cohen from cooperating with the government (Section II.K)

Taken together, these sections of the Mueller report provide a roadmap for prosecuting obstruction of justice under 18 U.S.C. §§ 1503, 1505, and 1512.

Furthermore, Mueller explained in the report itself that he did not state *outright* that Trump had committed obstruction of justice only due to his interpretation of the Department of Justice policy against filing criminal charges against a sitting president.<sup>1</sup> Indeed, an open letter signed by over seven hundred former federal prosecutors, who served in both Democratic and Republican administrations, concluded that Trump's efforts to fire Mueller and to falsify evidence about that effort, to curtail the scope of Mueller's investigation, and to prevent witnesses from cooperating with investigators not only constituted criminal acts, but that they *would be prosecuted* if committed by anyone else:

Each of us believes that the conduct of President Trump described in Special Counsel Robert Mueller's report would, in the case of any other person not covered by the Office of Legal Counsel policy against indicting a sitting President, result in multiple felony charges for obstruction of justice. . . . We believe strongly that, but for the OLC memo, the overwhelming weight of professional judgment would come down in favor of prosecution for the conduct outlined in the Mueller Report.<sup>2</sup>

After the report issued, Mueller further explained:

[I]f we had had confidence that the president clearly did not commit a crime, we would have said so.

We did not, however, make a determination as to whether the president did commit a crime. The introduction to the volume two of our report explains that decision. It explains that under long-standing department policy, a president cannot be charged with a federal crime while he is in office. That is

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<sup>1</sup> Mueller Report, Vol. II, at 1-2. In Mueller's opinion, since Department policy precluded filing charges against a president, he could not even *state his conclusion* as to whether Trump committed these crimes, because doing so would not allow Trump to clear his name in a trial. *Id.* at 2.

<sup>2</sup> Statement by Former Federal Prosecutors, May 6, 2019, <https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1>.

unconstitutional. Even if the charge is kept under seal and hidden from public view, that, too, is prohibited.

The special counsel's office is part of the Department of Justice and by regulation, it was bound by that department policy. Charging the president with a crime was therefore not an option we could consider.<sup>3</sup>

But, the report emphasized, that same Department policy acknowledges that “a President does not have immunity after he leaves office.”<sup>4</sup> Indeed, in follow-up testimony to Congress, Mueller explicitly confirmed that his report did *not* exonerate Trump, and that Trump could be charged after leaving office.<sup>5</sup>

### **The Department's lack of follow-up**

Regardless of the merits of the Department policy upon which Mueller relied, or of Mueller's additional interpretation, Trump is no longer the president of the United States. Since January 20, 2021, Donald Trump has been a private citizen. By its own terms, the policy does not apply to him anymore, and the crimes that the Mueller report clearly identifies are now amenable to prosecution.

Furthermore, the evidence against Trump has only *increased* since then—in many cases, from his own mouth. For example, on December 5, 2021, Trump told Fox News host Mark Levin:

[A] lot of people say to me, ‘How you survived is one of the most incredible things.’ Don't forget, I fired Comey. Had I not fired Comey, you might not be talking to me right now about a beautiful book of four years at the White House. . . .

I was going to say before, if I didn't fire Comey, they were looking to take down the President of the United States. If I didn't fire him, and some people said, ‘He made a mistake when he fired Comey.’ And now

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<sup>3</sup> Amber Phillips, *Mueller's statement, annotated: 'If we had had confidence that the president clearly did not commit a crime, we would have said so'*, Wash. Post, May 29, 2019, <https://wapo.st/3TQ4n0k>.

<sup>4</sup> Mueller Report, Vol. II, at 1.

<sup>5</sup> Benjamin Siegel et al., *Report doesn't exonerate Trump, Mueller testifies, and he could be charged after leaving office*, ABC News, July 24, 2019, <https://abcn.ws/3DjnmJD>.

those same people said it was the most incredible instinctual moves that they've ever seen, because I wouldn't — I might be here with you, perhaps we'll be talking about something else. But I don't think I could have survived if I didn't fire him, because it was like a hornet's nest.<sup>6</sup>

Unfortunately, the Department has so far taken *no* discernible action with respect to any of these instances of obstruction of justice identified in the Mueller Report. The federal statute of limitations may have already lapsed for some of the earliest misconduct identified in the Mueller Report, and the limitations date is approaching for other misconduct. The Department's decision not to prosecute Trump for clearly identified crimes is, at this point, inexcusable.

### **The corrupt Durham investigation**

The Department's lassitude with respect to Trump's obstruction of justice stands in sharp contrast with the Durham investigation, ordered by Trump's attorney general for the improper purpose of discrediting and investigating those who conducted the very investigation into Russian election interference that Trump sought to obstruct.

Durham has investigated the Russia inquiry for over three years, but has failed to develop a single case that resulted in a conviction. Durham's first case launched with an indictment of attorney Michael Sussmann that recited a laundry list of extraneous insinuations, not pertinent to the particular charges against Sussmann, for the apparent sole purpose of appeasing Trump and certain of his political supporters. In the actual criminal justice system, as opposed to Durham's apparent intended audience on cable news and social media, Sussmann was acquitted.

Durham brought his second case against analyst Igor Danchenko. The judge found that most of the evidence Durham sought to introduce was inadmissible under the Federal Rules of Evidence, and ultimately the jury acquitted Danchenko on four counts of lying to the FBI. On the fifth charge, the judge granted a directed verdict of acquittal due to insufficient evidence.<sup>7</sup>

The circumstances in which the Durham investigation was launched and the prosecutions that it has spawned all suggest that Durham has carried out one of the

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<sup>6</sup> Transcribed by Steve Benen, *Trump says a bit too much about James Comey's FBI firing (again)*, MSNBC, Dec. 5, 2021, <https://on.msnbc.com/3fkzAJV>.

<sup>7</sup> Charlie Savage & Linda Qiu, *Acquittal of Russia Analyst Deals Final Blow to Trump-Era Prosecutor*, N.Y. Times, Oct. 18, 2022, <https://nyti.ms/3DKc8iV>.

most corrupt and politically-motivated investigations in Department history. It has brought discredit on the Department and unfairly upended the lives of many innocent Americans, not least the two who were subjected to unjust prosecutions. While it may have served its original intended political purpose, it has represented a gross miscarriage of justice and has concluded with a whimper: two completely failed prosecutions.

### **The contradiction and failures of your Department's approach**

Whatever the reasons for your continued support for the corrupt Durham investigation, the Department has been derelict in neglecting to pursue *any* of the criminal charges of obstruction of justice that Mueller identified, with evidence and analysis, in his report.

Furthermore, the Department's approach sets a disturbing precedent. Now, any president of the United States can commit federal crimes, including obstruction of justice, and (1) enjoy complete immunity against prosecution *during* his term in office (by virtue of official Department policy), (2) enjoy complete immunity from prosecution *after* he has left office (by dint of the precedent that you are now setting); and (3) "investigate the investigators" with flawed prosecutions, based on "speaking indictments" consisting largely of irrelevant and inadmissible material intended for political showmanship purposes.

Put another way, it is now legally riskier to tell the government truthfully that the president may have been connected to a crime than it is to be the president who actually *committed* a crime.

Finally, Trump's recent announcement that he intends to run for president in 2024 is no reason to decline prosecution of these obstruction of justice charges. Although there is some media speculation that Trump declared his candidacy precisely to achieve that result, the idea that the target of an investigation could evade prosecution simply by announcing his candidacy for president is anathema to the rule of law, and—given the ease with which one can file Federal Election Commission paperwork and announce candidacy—would be widely abused if it became precedent. Nor does it provide a reason to delegate these prosecutorial decisions to a special counsel. A special counsel *already* laid out the facts and legal analysis of Trump's guilt, and your office has had nearly two years to make any further discretionary decisions needed for a determination whether to prosecute. For all these reasons, Trump's announcement of his candidacy provides no basis for refusing to prosecute him for the crimes documented in the Mueller Report.

It is not too late to change course. Multiple instances of obstruction of justice identified in the Mueller Report are backed by “substantial” evidence as to all elements of the offense of obstruction, and they are still within the statute of limitations. We urge you to file charges now against Donald Trump for those crimes that he committed while in office and was temporarily immune from prosecution under Department policy—or if you will not, then publicly explain why you have decided not to do so.

Sincerely,

Ronald A. Fein, Legal Director

John C. Bonifaz, President

Ben T. Clements, Chairman and Senior Legal Advisor