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Good morning. Thank you very much for inviting me to appear before you today to address the current administration of the Department of Justice and its effect on the rule of law in this country. As I will explain, I believe that Attorney General Barr is a major threat to our legal system and to public trust in it. That is because he does not believe in its central tenet – that no person is above the law. For the past sixteen months, he has been working hard to free the president from accountability under a broad range of checks and balances that have played a critical role in our system for many decades. He has also grossly misused his powers as Attorney General to advance the president’s personal and political interests, and to protect his friends. Based on events that have occurred over the last several months, I think that even more disturbing actions may lie ahead.

I am here today in part because I happened to be in law school while the Watergate scandal was unfolding. In the summer of 1973, while in Washington for the summer working at a law firm, I spent many hours in a steamy apartment watching the hearings on Capitol Hill. I had been an active supporter of Richard Nixon, and was appalled to learn of the ways that his administration had violated the public trust. Today Watergate is mostly remembered – by those who think about it at all – as a bungled burglary of democratic national headquarters by a group of bumblers, followed by elaborate efforts to cover it up. The lesson that people now mostly draw from it is that when bad things are done, there may be more peril in efforts to cover up the consequences than in facing up to the acts themselves. But much more than a bungled burglary and a failed cover-up were at issue.

While Richard Nixon did not invent the practice of misusing the powers of the Executive Branch to advance his own political fortunes, he did it on a broad scale and provided us with ample evidence and even a sound track demonstrating how the levers of power could be pulled to punish one’s enemies and advance one’s own political cause. Today we remember the clandestine group of “plumbers” who operated out of the White House Executive Office

Building, with the aid of a slush fund misdirected from campaign donations, and under the aegis of the president's closest aides – including a former Attorney General.

But the official channels of government, including the FBI, the CIA, and the IRS, were also brought to bear to conduct bogus investigations of political opponents and people viewed with suspicion. These agencies of the United States engaged for political reasons in covert and unlawful spying, illegal wire-tapping, and improper use of tax information and the tax audit process. And the Department of Justice itself was severely compromised by political pressure from the White House, including but not limited to the Saturday night massacre that resulted in the firing of Independent Counsel Archibald Cox. In all, the Watergate investigation resulted in convictions of 48 people, including two former Attorney Generals. And it led to a great loss of public trust in a government and legal system that most people had assumed was doing the public's business in an upright manner.

The Watergate Reforms

Nixon's successor, Gerald Ford, chose as his Attorney General Edward Levi, a distinguished legal scholar and professor who was then president of the University of Chicago. As Attorney General Levi's special assistant at the time, Jack Fuller, has said, "Levi took restoring faith in the legitimacy of government and adherence to the rule of law as his very highest priority."¹ Doing so demanded, again in Levi's words, that ours be "a government of laws and not men,"² and that people believe in their guts that no person is above the law. Given the extensive abuses that had been perpetrated, a great deal of attention was focused on the creation of mechanisms by which corrupt uses of executive power could be prevented while leaving the institutions in a position to function for the common good. This was a difficult challenge, and demanded both complex institutional reforms, and a new spirit, committed to doing everything necessary to restore public trust. That would only be possible, Levi stated, through the efforts of "dedicated men and women [working] to accomplish this through their zeal and determination, and also their concern for fairness and impartiality."³

¹ <https://today.law.harvard.edu/restoring-justice-the-legacy-of-edward-levi/> (comments of Jack Fuller).

² <https://www.amacad.org/news/restoring-justice-legacy-edward-h-levi> (comments of Mark Wolf).

³ <https://www.amacad.org/news/restoring-justice-legacy-edward-h-levi> (comments of Jack Fuller).

Numerous government-wide reforms emerged during Attorney General Levi's two year term of service and in the years that followed. These initiatives used a combination of prohibitions, procedures, and requirements of transparency to prevent people in and out of power from making government a tool of private or political advantage. Among them were statutes imposing campaign finance limitations, an ethics-in-government act, an act creating Inspectors General in major Federal agencies to act as watch-dogs within the executive branch who also report to Congress, a special counsel statute, amendments to expand citizen rights under the Freedom of Information Act, the Foreign Intelligence Surveillance Act, a statute providing for congressional oversight of intelligence activities, a Foreign Corrupt Practices Act outlawing bribes to foreign governments, and during the 1980s, the Whistleblower Protection Act.

For the Justice Department itself, Levi's leadership was transformative. He created guidelines to limit the FBI's use of intrusive investigative tactics. He also created new institutions, including a DOJ Office of Professional Responsibility focused on the proper ethical conduct of those within the Department itself, and a Public Integrity Section within the Department's Criminal Division, whose entire job was to police criminal conduct by government officials at all levels. But most of all, he inspired the men and women of the Department of Justice, at that time and for decades to come, to a new ideal of service.

Levi recognized that given the Department's extraordinary powers to affect lives, and often to do so long before any case goes to court, its actions should be viewed as having a "judicial nature,"⁴ and extraordinary efforts were necessary to protect against errant judgments and the injection of improper personal or political influences. His concept of "government by discussion" saw the making of important decisions as a collective endeavor in which the best thinking of multiple people is brought to bear, and decisions at one level must stand up to the scrutiny of both colleagues and higher-ups.⁵ He also recognized that the handling of sensitive matters such as criminal prosecutions must be scrupulously insulated from political or personal influence. Presidents since then, up until the current one, have respected the need for this separation, which consistently has been implemented through written policies guiding and

⁴ <https://www.amacad.org/news/restoring-justice-legacy-edward-h-levi> (comments of Virginia Seitz).

⁵ Restoring Justice: The Speeches of Attorney General Edward H. Levi (Jack Fuller, Ed. 2013) Ch. 3

limiting the nature of any contacts that take place between the White House and the Department.⁶

Ultimately, Levi recognized that the trustworthiness and integrity of the Department of Justice depended on the hearts and minds of the people who work there. Pursuing truth and fairness and equal justice under law is no easy thing, but the first steps are believing it is an essential goal and inspiring dedication to the hard work of achieving it. The pursuit of Edward Levi's goal of a legal system in which these are the goals and everyone knows that no person is above the law, has inspired the lives of thousands of Department of Justice lawyers during the intervening decades. It also restored public trust in our system of justice.

This Watergate settlement – by which I mean the way we settled the national angst that resulted from the scandals of Watergate – has dominated our legal system for my entire professional life. For me it was an inspiration and a career-shaping force. It inspired me to become a prosecutor – and not just any prosecutor but an Assistant United States Attorney in the Department of Justice. I chose that goal because, as I have said to many people at the time and since, I could go to work every day and just strive to do what is right. For most of the next dozen plus years, during the administrations of Jimmy Carter, Ronald Reagan, and George H.W. Bush, I was privileged to hold a series of very satisfying jobs in the Department, and while things got more complicated the higher I rose, my basic goal always remained the same. In the end, my decision to leave my position as deputy attorney general was as easy as had been my decision to go to the Department in the first place. In May of 1990, I was directed by the Attorney General to take an action that I believed was wrong, and, in the face of that, I decided to resign rather than to comply.⁷

Barr's Beliefs Concerning Executive Power

Clearly, Bill Barr experienced Watergate and its resolution differently than I did. By sometime in the 1980s, if not well before, he had formulated a concept of the presidency that would have cheered Nixon in his heyday. Discounting Levi's Watergate lesson that public trust depends on having a system of "laws and not men" in which no person is above the law, it is

⁶ <https://www.lawfareblog.com/importance-limiting-white-house-doj-contacts-its-not-just-about-obstruction>

⁷ <https://www.latimes.com/archives/la-xpm-1990-05-20-mn-162-story.html>

apparent from his advocacy and action when in government that Barr has long believed that the president's power should be virtually unchecked.

One aspect of those beliefs is his extreme reading of the unitary executive theory – the undisputed idea that the president is the head of a single executive branch and thus constitutionally entitled to wield substantial control over all activities of that branch. The critical question is how much control is enough, and the Supreme Court in a string of cases has made clear that presidential control may be limited in some ways when other legitimate goals demand it. For example, in *Morrison v. Olson*, a case that Bill Barr has expressly attacked, the Reagan Supreme Court ruled by a vote of 7-1 that the ability to remove an independent counsel for “good cause shown” is enough presidential control to satisfy the constitutional mandate. For Barr, any compromise of the president's total control in order to achieve the measure of independence necessary if the special counsel was to be more than a puppet, has always been anathema.

For many years, Barr has also argued much more broadly against the very idea that the president's prerogative to exercise unchecked discretion can be restricted in any way – including by the concept that some powers are “shared” by multiple branches, or through the mechanisms of congressional oversight and judicial review. As head of the Office of Legal Counsel in 1989 and 1990, Barr wrote opinions advancing his views on many of these topics, including one well-known memo, in which he sought to rally the heads of the Executive Branch departments to resist what he viewed as myriad incursions by congress upon their freedom to act.⁸ Happily, though, President George H.W. Bush had no aspirations to autocracy, and Barr's intellectual gambits did not at that time result in the radical expansions of presidential power that were his goal. Less happily, that fact allowed Bill Barr to emerge from his fourteen months as Attorney General with a totally unjustified reputation as an institutionalist who could be counted on to restrain another president's more extreme impulses.

So today we find ourselves in a difficult spot, completely unique in our history. We have a president who openly aspires – indeed expressly claims that his “Article II” gives him the right

⁸<https://www.justice.gov/file/24286/download>

– to “do anything he wants to.”⁹ And we have an Attorney General who has told him he is so entitled under the Constitution, and is working overtime to make real Nixon’s misconception that “when the president does it, that means it is not illegal.”

Don’t take my word for this. Just listen to what Barr has said and look at what he has been doing. In particular, he is emphatic that it is simply not possible for legal rules adopted by either congress or internally within the executive branch to restrain in any way the power of the president to make any and all Executive Branch decisions. As Barr said in the unsolicited 19-page memorandum that he submitted in June 2018¹⁰ addressing the impropriety of the Mueller investigation then under way, the president “*alone is the Executive Branch*” (all italics are his), and “the Constitution vests” in him personally all powers that belong to that branch. Barr made explicit that this necessarily includes “*all Federal law enforcement power, and hence prosecutorial discretion.*” Accordingly, there is no constitutional way that the law can foreclose the president even from “[exercising] supervisory authority over cases in which his own conduct might be at issue.”

How Attorney General Barr Has Worked To Create An Authoritarian President

It is thus no surprise that Barr’s current service as Attorney General has been filled with flagrant personal interventions carefully crafted to neuter the Watergate reforms and attendant institutions that have made the Department of Justice a trustworthy steward of a rule of law which no one, not even the president, can subvert.

Undermining the work of independent factfinders

Within a few weeks of taking office, Barr began leveling repeated accusations that the FBI investigation of Russian interference in our 2016 election involved improper “spying” on the Trump campaign, which he has said he regards as a “big deal.”¹¹ From that initial attack on the work of his own agency, he entered upon a pattern of conduct involving outright contradiction and active subversion of independent fact finders who had been given the job of exploring and examining the evidence relating to those issues. Last March, Barr’s written and verbal

⁹ <https://www.c-span.org/video/?c4809509/user-clip-trump-constitution-i-president>

¹⁰ <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf>

¹¹ <https://www.cnn.com/2019/04/10/politics/barr-doj-investiation-fbi-russia/index.html>

whitewashing of the report by Special Counsel Mueller, and especially its findings relating to obstruction of justice, was the first really rude shock that showed us where Barr was coming from.¹² But he quickly confirmed our worst fears, when in May, rather than rely on the long-underway DOJ Inspector General inquiry about the FBI investigation into Russian interference and possible Trump campaign involvement, Barr initiated a substantially redundant investigation of his own.¹³ When Barr's separate investigation was later denominated as criminal,¹⁴ and Barr was seen to be flying overseas apparently to question witnesses personally, his complete distrust of truly independent factual inquiries by unbiased professional investigators became even clearer. Then, in December, when Inspector General Horowitz announced his findings,¹⁵ including stating that there was ample factual basis for the initiation of the FBI investigation and that no evidence was found of bias in the FBI's oversight function, Barr and U.S. Attorney John Durham, who he had enlisted to run his investigation, each publicly announced their disagreement with that finding.¹⁶

Ignoring the Appropriation Clause

Beyond these direct personal intrusions by Barr to denigrate and subvert the legitimacy of independent fact finding processes of his own department, from the very start of his service, Barr has actively used the resources of the Department of Justice, and his own rhetorical megaphone, to negate the traditional checks and balances that have long constrained the president. Take for example the constitutional power of the legislature to appropriate (or withhold) funds for particular purposes. On February 15, 2019, the day after Barr was confirmed, the President issued an emergency declaration to justify the diversion of funds from other purposes to build the border wall.¹⁷ Congress had repeatedly refused to appropriate money for that purpose, and the President had personally confirmed that he "didn't need to do

¹² <https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html>;
<https://www.washingtonpost.com/politics/2019/04/19/what-attorney-general-barr-said-vs-what-mueller-report-said/>

¹³ <https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html>

¹⁴ <https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html>

¹⁵ <https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html>

¹⁶ <https://www.nytimes.com/2019/12/09/us/politics/barr-durham-ig-report-russia-investigation.html>

¹⁷ https://en.wikipedia.org/wiki/National_Emergency_Concerning_the_Southern_Border_of_the_United_States

this, . . . [but] just wanted to get it done faster, that's all."¹⁸ But never mind. Barr's DOJ has actively litigated the president's right to divert the funds and thus frustrate this explicit constitutional check on his power.

Stonewalling congressional oversight and state criminal subpoenas

More generally, Trump's total stone-walling of congress's traditional oversight power, normally exercised through subpoenaing documents and calling witnesses, has only been possible with the complicity of the Department of Justice, in the form of multiple Office of Legal Counsel opinions, and vigorous litigation in the courts. Barr's prior opinions as the head of the Office of Legal Counsel have played a prominent role in providing "authority" for new opinions issued by Barr's OLC to support many of his current initiatives.¹⁹

These outrageous assertions include the idea that executive branch officials need not raise a specific claim of executive privilege with regard to particular information, but rather can simply assert a sweeping prophylactic absolute immunity which excuses their need even to appear or raise any specific objection.²⁰ The Department has also stone-walled, so far successfully, the House Ways and Means Committee's request to the Treasury Department to turn over the President's tax returns, despite a statute that requires the Treasury to do so.²¹ And in a case now pending before the Supreme Court, this claim of immunity from any obligation of transparency is asserted to include a sweeping absolute immunity from process issued by State grand juries to investigate crimes under their laws, for records in the hands of a third party reflecting the President's personal affairs.²² Thus, as the Department's lawyer memorably argued in court, such State investigative efforts should be flatly barred even if the President shot someone in the middle of Fifth Avenue.²³

Undermining the inspectors general

In recent months, a severe conflict has developed between the administration's autocratic aspirations, and many elements of the Inspector General community whose basic job

¹⁸ <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>

¹⁹ See <https://prospect.org/power/40-year-war-bill-barr-oversight/>

²⁰ <https://assets.documentcloud.org/documents/6018928/OLC-McGahn-Opinion.pdf>

²¹ <https://www.lawfareblog.com/olc-opinion-treasurys-refusal-provide-trump-tax-returns>

²² <https://www.scotusblog.com/case-files/cases/trump-v-vance/>

²³ <https://www.usatoday.com/story/news/politics/2019/10/23/president-donald-trump-could-shoot-someone-without-prosecution/4073405002/>

is to review for propriety the conduct of affairs within agencies of the Executive Branch. During April and May, a total of five IG's were fired.²⁴ As the chief legal officer of the government, Barr is very likely to have at least been consulted in connection with all of these. But our lack of information about what goes on behind closed doors makes it impossible to say for sure what precise role he played in most of them. We do know that in September 2019, OLC issued an opinion directing the Inspector General for the Intelligence Community that the whistleblower complaint relating to the June 2019 phone call with the president of Ukraine was not a matter of urgent concern that was required by statute to be referred to the House Intelligence Committee.²⁵ That implausible conclusion was met by a letter of stern rebuke from the entire Federal inspector general community.²⁶ We also know that when Trump fired that same IG in April of this year, apparently just for doing his job, Barr spoke up publicly to endorse the action as justified.²⁷

Curtailing judicial review of the executive branch

The Department has also asserted the position – which Barr made a centerpiece of the November 2019 speech that he gave to the Federalist Society²⁸ – that courts have no jurisdiction to consider suits by congress to compel compliance with oversight subpoenas. Barr in that speech actually went beyond this extreme position to argue that the courts should have no role at all in constitutional disputes between the other two branches. Further, according to him, courts should never sit in review of executive action based on the exercise of “prudential judgment,” in areas of law that “cannot be reduced to tidy evidentiary standards and specific quantum of proof,” or that would involve any inquiry into the “motivation behind government action.” Such radically constrained judicial review would leave the President free, as he asserts he is, to do pretty much anything he wants to.

Barr's many abuses of authority, perhaps coupled with his explicit assertions that court's have no business inquiring about them, have even caused some Judge's to speak out. As U.S.

²⁴ https://en.wikipedia.org/wiki/2020_dismissal_of_inspectors_general

²⁵ <https://www.justice.gov/olc/opinion/urgent-concern-determination-inspector-general-intelligence-community>

²⁶ <https://www.documentcloud.org/documents/6523365-CIGIE-Letter-to-OLC-Whistleblower-Disclosure.html>

²⁷ <https://www.nytimes.com/2020/04/10/us/politics/barr-inspector-general-firing.html>

²⁸ <https://www.youtube.com/watch?reload=9&v=MeMwdtbPR6g;>
<https://www.americanrhetoric.com/speeches/williambarrfederalistsociety.htm>

District Judge Reggie Walton noted in March of this year, reflecting on the incongruities between Barr's comments on the Mueller report, and the report itself as it finally was released some weeks later, Barr's conduct had "cause[d] the Court to seriously question whether Attorney General Barr made a calculated attempt to influence public discourse" in favor of President Trump contrary to the actual content of the report.

Using political cronies to review or decide issues of special interest to the President

Perhaps not coincidentally, Judge Walton's comments came as Barr this Spring has taken a number of steps to dismantle and defy the principles of the Watergate reforms that Levi put in place. One key step is that he has now settled into a well-developed, scalable process for systematically subverting the independent decision making processes of the Department, which were central to Levi's reforms to secure evenhanded treatment of cases. He does it by using a cadre of ambitious conservative lawyers to second-guess or completely take over decision making from experienced career attorneys. By playing ball with Barr, these aspiring lawyers can look forward to the rewards of career advancement, including greater responsibilities, higher positions, and in more than a few cases to eventually receiving the reward of a life-tenured federal judgeship. While there is no way to know the full extent of this abuse, it clearly has been instrumental in the Roger Stone and Michael Flynn cases. It is also admittedly being used to receive information from Rudy Giuliani relating to the Ukraine situation,²⁹ to evaluate possible investigations of presidential candidates or campaigns,³⁰ and to inquire into "unmasking" requests during the latter part of the Obama administration.³¹

Reversing the government's position in the Stone and Flynn cases

To achieve the 180-degree reversal of the government's position in the cases of Trump loyalists, Roger Stone and Michael Flynn, Barr had to go to the extreme length of engineering the removal and replacement of Trump appointee District of Columbia United States Attorney Jesse Liu, who had been vigorously pursuing those cases, and who also ended the investigation of Andrew McCabe in January of this year based on insufficient evidence. The machiavellian

²⁹ https://www.washingtonpost.com/national-security/barr-acknowledges-justice-dept-has-created-intake-process-to-vet-giulianis-information-on-bidens/2020/02/10/0fba553a-4c1e-11ea-bf44-f5043eb3918a_story.html

³⁰ <https://www.nytimes.com/2020/02/05/us/politics/barr-2020-investigations.html>

³¹ <https://www.wsj.com/articles/barr-names-prosecutor-to-investigate-unmasking-11590674190>;
<https://www.cnn.com/2020/05/27/politics/william-barr-unmasking-investigation/index.html>

path of her removal involved the President first nominating her to a Treasury Undersecretary position in December, having her move, apparently voluntarily, to Treasury to await confirmation, and then withdrawing the Treasury nomination in February. Meanwhile, her departure as U.S. Attorney had cleared the way for Barr to make an interim appointment of Tim Shea, who Fox News described as “Barr’s right-hand man.”³²

In the instance of the Roger Stone sentencing, the government undertook to reverse the position it had reached through a routine, unbiased and thoroughly-reviewed sentencing recommendation process. While this botched effort gave rise to such overwhelming uproar that the government was obliged to actually withdraw its reduced sentencing recommendation,³³ Barr was not deterred – in the face of presidential tweeting – from again reversing course in the Flynn case. This time, following review of the case by Missouri U.S. Attorney Jeffrey Jensen, the government filed a motion to dismiss the case, on which Shea’s name and signature appears as the only government attorney. After two guilty pleas, and many months during which Liu’s U.S. Attorney’s Office argued vigorously that Flynn is guilty of a crime with serious implications for the national interest, the government now advances the position that the prosecution is unfair and also not one that it would be able to prove in court. Meanwhile, as that litigation proceeds, Shea has left the scene, having been promoted to the position of head of the Drug Enforcement Administration.³⁴

How Barr Is Using The Department of Justice As A Tool Of The President’s Election Campaign

Even more alarming than this institutionalization of a process to achieve political outcomes in sensitive cases, is the fact that Barr has now clearly signed on as an active participant in the Trump campaign. I mean that in the usual sense – that he is serving as a spokesman and advocate for campaign positions being advanced by the President. It is troubling in general that the nation’s chief law enforcement officer would attempt to double as a campaign spokesman. But here it is far more pernicious, since Barr is also using the Department’s litigation and other tools to advance the President’s narrow political interests.

³² <https://www.foxnews.com/politics/william-barr-timothy-shea-top-prosecutor-dc>

³³ <https://talkingpointsmemo.com/muckraker/read-doj-files-new-watered-down-sentencing-memo-for-roger-stone>

³⁴ <https://www.providencejournal.com/news/20200520/timothy-shea-fall-river-native-named-to-head-drug-enforcement-administration>

Trying to add a citizenship question to the census

One of the first and still the among the most egregious instances of such abuse involved DOJ handling of the lawsuit about the proposed citizenship question to be added to the 2020 census. Plaintiffs had complained that doing so would discourage responses and result in an undercount and underrepresentation in apportionment of areas where many Hispanics live.³⁵ The government denied any such political purpose, and claimed that it was acting in order to comply with Voting Rights Act. Chief Justice Roberts June 2019 opinion for the Court ruled for the plaintiffs, saying that the “evidence showed that [Secretary Wilbur Ross] was determined to reinstate a citizenship question from the time he entered office,” and that the supposed Voting Rights Act rationale was a “contrived” “pretext.”³⁶

Undeterred that the only justification ever offered by the government had been found by the Supreme Court to be an invalid, made-up reason, Barr stated publicly a few weeks later that he still saw a way that the question could be added, and proceeded to replace the original litigation team.³⁷ He also continued to stonewall the House’s demands for documents showing what in fact occurred, and on July 17, the House held Barr and Ross in contempt.³⁸ Evidence continued to accumulate for the rest of the year, and ultimately made it quite clear that Department lawyers had been complicit in helping Commerce concoct the phony rationale in response to Commerce’s explicit request to come up with a legal justification. The stench of these events appears to have resulted in abandonment of the effort to include the question.

Interfering with state decisions concerning reopening the country

Recently Barr has made repeated statements in support of Trump’s urgent priority to get the economy reopened. Conduct limitations to protect the public safety in a health crisis are uniquely within the province of state and municipal government, and the choices here are highly local and tragically difficult. But that has not stopped Barr from using his powers as Attorney General to actively meddle. Back in April, when virtually the entire country was under

³⁵ <https://slate.com/news-and-politics/2019/11/hofeller-document-census-citizenship-question-supreme-court-consequences.html>

³⁶ https://www.supremecourt.gov/opinions/18pdf/18-966_bq7c.pdf

³⁷ <https://www.cbsnews.com/news/barr-census-citizenship-question-sees-legal-way-to-add-it/>

³⁸ <https://www.nytimes.com/2019/07/17/us/politics/barr-ross-contempt-vote.html>

orders to shelter in place, Barr went on Hugh Hewitt's radio show³⁹ to say that "the idea that you have to stay in your house is disturbingly close to house arrest. . . . We're looking carefully at a number of these rules that are being put into place." He said that if they saw rules in place which "we think . . . go too far," DOJ would "jawbone the governors" or side in court with any plaintiffs complaining that these emergency measures violate their constitutional rights. The Department actually intervened in some cases where churches brought claims challenging the limitations.⁴⁰ It is unclear whether they are still considering such actions, following a ruling by the Supreme Court rejecting one such challenge at the end of May.⁴¹

Disputing the utility of mail-in voting

Another sensitive area where Barr has seen fit to weigh in publicly concerns voting by mail, which could be an important way that more Americans can be afforded a realistic opportunity to vote, especially in these Coronavirus times when standing in line at the polls can present a very real risk of exposure. While voting by mail is already used to some degree in virtually every state, and is the way everyone votes in five states, Barr nonetheless has seen fit recently to express his own unsupported view that voting by mail is susceptible to fraud and manipulation by foreign governments. In doing so, he echoed a recent unsubstantiated tweets issued by the President.⁴²

Clearing peaceful protestors from Lafayette Park

Probably the abuse of Barr's powers in support of Trump's campaign efforts that has most shocked the public conscience up to now has been his role in directing law enforcement forces on June 1 to violate the First Amendment rights of peaceful protestors by forcibly clearing them out of Lafayette Park and making way to stage a media event with the President

³⁹ <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/840262570/barr-open-to-legal-action-if-governors-restrictions-go-too-far>

⁴⁰ https://www.washingtonpost.com/local/legal-issues/doj-claims-virginia-governor-is-violating-religious-freedom-with-pandemic-order/2020/05/04/2c083b18-8e35-11ea-9e23-6914ee410a5f_story.html;
<https://www.usatoday.com/story/news/politics/2020/04/14/coronavirus-doj-sides-miss-church-amid-coronavirus-restrictions/2990975001/>

⁴¹ <https://www.npr.org/sections/coronavirus-live-updates/2020/05/30/866097231/supreme-court-rejects-churchs-challenge-of-california-s-coronavirus-rules>

⁴² <https://lawandcrime.com/high-profile/ag-barr-casually-floated-new-mail-in-ballot-fraud-conspiracy-theory-that-experts-say-just-couldnt-happen/>

holding a Bible for pictures in front of St. John’s Church.⁴³ Barr did this by amalgamating a collection of enforcement officers from various agencies, including some that wore unmarked uniforms so that their identity was not discernible. The officers on hand included many from components of the Department of Justice – including the FBI, the Bureau of Prisons, the Bureau of Alcohol Tobacco and Firearms, and the Drug Enforcement Administration.⁴⁴ The disturbing events of that evening unleashed a wave of outraged responses from the likes of James Mattis, John Kelly, Colin Powell, and others. Barr has disputed the evidence that demonstrators conduct that night was peaceful, and echoed the President’s unsupported assertions blaming “Antifa” for violent behavior while making no mention of the presence of violent right-wing groups. He also denied that he ordered the enforcement action in order to facilitate a photo opportunity – even though it occurred just minutes before the President walked across the square – and quibbled about the difference between pepper balls and tear gas, at least the first of which was undeniably used by police.⁴⁵

Suing to keep John Bolton’s information secret and firing Geoffrey Berman

Just last Friday, the Department went to court with a facially meritless motion seeking a prior restraint on the publication of John Bolton’s book. Such action would be a clear violation of the First Amendment, and would deny the public information central to their role as citizens. Thus the motion was denied the next day.⁴⁶ And also last Friday, apparently following a meeting with SDNY U.S. Attorney Geoffrey Berman, who has been actively pursuing investigations and prosecutions embarrassing to the President, Barr took action to have Berman removed.⁴⁷ In both respects, Barr used his powers as Attorney General in an effort to prevent information politically detrimental to the President and his campaign from coming to light.

⁴³ <https://www.nbcnews.com/politics/white-house/memo-front-lines-different-america-n1222066>

⁴⁴ By the June 1, the head of DEA was Barr’s “right-hand man” Timothy Shea, and by executive order, the agency had been given a broad array of extraordinary powers not conferred by statute, including the right to conduct “covert surveillance” in connection with the demonstrations.

<https://www.documentcloud.org/documents/6935297-LEOPOLD-DEA-Memo-George-Floyd-Protests.html>

⁴⁵ <https://www.washingtonpost.com/politics/2020/06/08/attorney-general-barrs-dishonest-defense-clearing-lafayette-square/>

⁴⁶ https://www.washingtonpost.com/local/legal-issues/us-judge-declines-to-block-release-of-book-by-former-national-security-adviser-john-bolton/2020/06/20/e14842f2-b301-11ea-8758-bfd1d045525a_story.html

⁴⁷ <https://www.nytimes.com/2020/06/19/nyregion/us-attorney-manhattan-trump.html>

Misusing the Durham investigation to support the President's deep-state campaign narrative

Even more disturbing than these misuses of power to keep the American people in the dark, is the role that Barr has assumed this Spring as the primary spokesman advancing Trump's conspiratorial vision of the FBI investigation that uncovered clear Russian interference in our 2016 election. Barr has been headed down this road since shortly after he took office, with his repeated assertions of "spying" on the President's campaign. But in recent weeks, those allegations have become a frequent, high-profile drumbeat, no doubt intended to give substance to the President's tweeted "Obamagate" narrative, and to expressly foreshadow retribution ahead for unnamed wrongdoers. Barr seems totally obsessed with the need to get the attention of the American people focused on Trump's allegations that he was done a grave wrong by the 2016 investigation, and he is doing it through grossly inappropriate claims that an on-going DOJ investigation has so concluded.

In an early-April interview with Fox News's Laura Ingraham, Barr called the Russian-interference investigation "one of the greatest travesties in American history," and said that it was undertaken "without any basis" by investigators who were trying "to sabotage the presidency."⁴⁸ "We're not dealing with just mistakes or sloppiness. There is something far more troubling here, and we're going to get to the bottom of it." Over the next several weeks, Barr spoke on the same subjects with the radio host Hugh Hewitt⁴⁹ and CBS's Catherine Herridge,⁵⁰ including noting that there would be no limitation on bringing charges to avoid influencing the election, since he did not envision indicting any candidate.⁵¹ On June 8, in an extended

⁴⁸https://www.realclearpolitics.com/video/2020/04/09/ag_bill_barr_media_on_a_jihad_to_discredit_trump_and_hydroxychloroquine.html

⁴⁹<https://www.hughhewitt.com/attorney-general-william-barr-on-the-crisis/>

⁵⁰<https://www.cbsnews.com/news/attorney-general-william-barr-on-michael-flynn-obamacare-and-coronavirus-restrictions-transcript/>

⁵¹ On May 18, 2020, a day on which he made headlines by stating he did not anticipate investigating either President Obama or Vice President Biden, <https://www.cnn.com/2020/05/18/politics/william-barr-obama-biden-investigation-durham/index.html>, Barr also stated that "what happened to the president, and I've said this many times, . . . in the 2016 election and throughout the first two years of his administration was abhorrent. It was a grave injustice and it was unprecedented in American history. . . . The proper investigative and prosecutive standards of the department of justice were abused, in my view, in order to reach a particular result. We saw two different standards of justice emerge, one that applied to President Trump and his associates and the other that applied to everybody else. We can't allow this ever to happen again." <https://kerrypicket.com/william-barr-obama-admin-actions-against-trump-were-unprecedented-and-abhorrent/>

interview with Fox News' Bret Baier,⁵² he expanded further: ""For the first time in American history, police organizations and the national security organizations were used to spy on a campaign, and there was no basis for it. . . . We can't discuss future charges. . . .But people should not draw from the fact that no action has been taken yet, that that means that people are going to get away with wrongdoing." Indeed, he said that they are "looking at" some people whose names some may find familiar, though, he noted, they don't include President Obama or Vice President Biden.

Then again, just last Sunday, June 21, talking with Fox's Maria Bartiromo, Barr quite amazingly complained that not enough people seem to be paying attention to his efforts to alarm them.⁵³ "So that has been surprising to me, that people aren't concerned about civil liberties and the integrity of our governmental process in terms of the future of Durham's investigation. You know, he's pressing ahead as hard as he can. And I expect that, you know, we will have some developments hopefully before the end of the summer."

So much for not discussing future charges, or adhering to established rules about the confidentiality of on-going investigations. Here, the basis for all of Barr's claims is acknowledged to be the ongoing criminal probe into the Russian-interference investigation, which he is personally overseeing with the help of U.S. Attorney John Durham. Thus his entire public discussion including the flamboyant innuendos of still-uncharged wrongdoing plainly violates Rule 1-7.400 of the *Justice Manual*, which prohibits comment on "the existence of an ongoing [criminal] investigation" or on "its nature or progress before charges are publicly filed." In pursuing this running narrative to reinforce Trump's tweeted claim of a conspiracy against him, Barr is in blatant violation of not just time-honored norms of political detachment and evenhandedness, but of an explicit, long-standing Department rule. Clearly he wants us all to believe that between now and the election, charges will be filed "bringing to justice people who were engaged in abuses." Whether that will actually happen, or rather is simply a PR bluff advanced at the President's insistence for campaign effect, it is plainly one more gross abuse of

⁵² <https://www.foxnews.com/politics/barr-says-familiar-names-among-those-doj-is-investigating-in-durham-probe>

⁵³ <https://www.foxnews.com/politics/barr-durham-probe-should-have-some-developments-this-summer>

the broad powers that the Attorney General is able to exercise long before his actions ever come before a court of law for judicial review.⁵⁴

Conclusion

Barr's current behavior brings to mind the speech that then-Attorney General Robert H. Jackson gave in 1940 to the assembled United States Attorneys:⁵⁵

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.

. . .

With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. . . . [T]he real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

It was precisely to avoid fears of such abusive conduct that Edward Levi in the wake of Watergate put in place a broad array of reforms and thus restore public trust in the justice system and inspire several generations of Department lawyers to an ideal of evenhanded justice. It is now entirely clear that Bill Barr is Edward Levi's polar opposite, and is working diligently to dismantle what Levi and his successors put in place. Levi's overriding concern was to create a government of laws that apply equally to everyone, and to make clear to all that no person, not even the president, is above the law. Barr's central goal is the opposite – to systematically dismantle the system of checks and balances that stand between this President and unchecked power.

Where Levi insisted on orderly deliberative processes and respect for the integrity of a dedicated professional staff working within a clear oversight framework, Barr has relied without hesitation on irregular processes and ad hoc decision making by his personal confidantes.

⁵⁴ I learned after this testimony was finalized that Barr brought up the subject again with Fox's Maria Bartiromo on June 21.

⁵⁵ <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>

Where Levi emphasized the need for clear detachment of sensitive matters – especially those of a criminal nature – from political and personal influence, Barr has repeatedly allowed just such influence to be brought to bear, and in the most flagrant cases of personal associates of the President. Where Levi emphasized transparency and accountability for one’s views as necessary to be deserving of trust, Barr’s long record of opaque, conclusory pronouncements, and assertions that do not square with the facts as they become known, have justly made him a figure of widespread distrust.

In addition to quite a number of statements related to official action that seem contrary to the facts, Bill Barr regularly shrouds himself in the rhetoric and trappings of the rule of law, even as he desecrates and undermines the institutions that make it possible. But to me, his crowning deception to date is the portrait of Edward Levi that a June 1, 2020 New York Times article showed hanging on the wall of Barr’s conference room, as though the current incumbent had anything but disdain for the great achievements of his predecessor.⁵⁶

⁵⁶ <https://www.nytimes.com/2020/06/01/magazine/william-barr-attorney-general.html>