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To Interested Parties

From United to Protect Democracy

White House Communications with the DOJ and FBI

The promise that every American will be treated equally under the law and that none is above the law is a bedrock principle of American democracy. The freedom from political influence — real or perceived — on law enforcement underpins all of our other freedoms. By contrast, political influence or interference in law enforcement has been a clear hallmark distinguishing authoritarian regimes from true democracies around the globe.¹

For decades, to prevent *even the appearance* of political meddling in federal law enforcement, Republican and Democratic administrations alike have had written policies governing White House contacts with agencies and offices within the executive branch that have investigatory and enforcement responsibilities. To ensure the impartial application of the laws, these policies have extended to White House contacts with any executive branch agency or office regarding investigations, enforcement actions, regulatory decisions, grants and contracts involving specific parties.

To date, the Trump Administration has not articulated publicly a White House policy on agency contacts. Further, multiple reported contacts between senior political staff at the White House and enforcement officers at the Department of Justice (DOJ) appear to have violated forty years of accepted, bipartisan policy. In light of the questions that its actions have raised, and in order to demonstrate its commitment to upholding the rule of law, the Trump White House must release and abide by an agency contacts policy that is consistent with accepted, bipartisan norms.

Background on Trump White House Contacts with DOJ

¹ See, e.g., Azul América Aguilar Aguilar, *Institutional Changes in the Public Prosecutor's Office: The Cases of*

In recent weeks, a number of reports have raised questions regarding whether the White House has in place and is abiding by an agency contacts policy like ones that have governed White House agency contacts for the past forty years in both Democratic and Republican administrations. This past weekend, *The New York Times* reported that White House Counsel Donald McGahn “was working to secure access to what Mr. McGahn believed to be an order issued by the Foreign Intelligence Surveillance Court authorizing some form of surveillance related to Mr. Trump and his associates.”² (The White House later attempted to walk back claims of such an effort). Last month, multiple publications reported that the White House asked the FBI to refute reports that Trump campaign advisors had contacts with Russia during the presidential campaign.³ A week prior to that, the *New York Daily News* reported that White House senior Adviser Stephen Miller, who is not a lawyer, called the home of Robert Capers, the U.S. Attorney for the Eastern District of New York, to dictate how he should defend the Administration’s travel ban.⁴

The Longstanding Bipartisan Policy Limiting White House Contacts with DOJ

There is a long-standing and bipartisan belief that the laws of the United States should be administered and enforced in an impartial manner and, accordingly, that there should not be an appearance that politics plays any part in the Department of Justice’s investigative and enforcement operations.⁵ This is because the effectiveness of the Department of Justice rests on

² Michael D. Shear and Michael S. Schmidt, *Trump, Offering no Evidence, Says Obama Tapped His Phones*, N.Y. Times (March 4, 2017), https://www.nytimes.com/2017/03/04/us/politics/trump-obama-tap-phones.html?_r=0.

³ See, e.g., 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>; Spencer Ackerman, *White House confirms conversation with FBI about Trump and Russia*, The Guardian (Feb. 24, 2017), <https://www.theguardian.com/us-news/2017/feb/24/donald-trump-russia-reince-priebus-fbi-talks-james-comey>; Massimo Calabresi, *The FBI Talked to the White House About Its Russia Probe. That Was Probably Against the Rules*, Time (Feb. 25, 2017), <http://time.com/4682791/fbi-russia-reince-priebus-andrew-mccabe-justice-rules/>.

⁴ Harry Siegel, *Stephen Miller Called Brooklyn U.S. Attorney At Home and Told Him How To Defend Travel Ban in Court*, NY Daily News (Feb. 18, 2017), <http://www.nydailynews.com/opinion/stephen-miller-called-u-s-attorney-travel-ban-defense-article-1.2975873>.

⁵ See, e.g., Address by Attorney General Griffin B. Bell to Department of Justice Lawyers, Sept. 6, 1978, available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf> (“in our form of government, there are things that are non-partisan, and one is the law and one is foreign intelligence”) (“Bell Address”); Lara jakes Jordan, *Mukasey to Restrict Case Discussions*, Washington Post (Dec. 19, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/19/AR2007051900015.html> (citing memorandum by Attorney General explained that limiting contacts with the White House is essential to “ensuring that there is public confidence that the laws of the United States are administered and enforced in an impartial manner”); *Political Activities*, Dep’t of Justice, <https://www.justice.gov/jmd/political-activities> (last visited Mar. 1, 2017) (political activities of DOJ staff are curtailed in order “to ensure there is not an appearance that politics plays any

the public's confidence — and the reality — that DOJ is above ideology and partisanship in its enforcement of the law.⁶

The need for the Department of Justice to be insulated from the reality and the appearance of politics is reinforced in federal law. The Hatch Act places restrictions on the political participation of government employees in certain agencies where it is particularly important that there is no appearance of politicization, like the military and intelligence agencies.⁷ These restrictions apply to career and political appointees in the Department of Justice and FBI.

Stemming from this basic principle that the investigative and prosecutorial powers of the DOJ should be free of partisan influence, it has been *consistent policy for forty years* to limit communications between the White House and the DOJ, including the FBI.⁸

First, it has been consistent policy that communications between the White House and DOJ about any ongoing case, investigation, or adjudicative matter should take place only when necessary for the discharge of the President's constitutional duties and appropriate from a law enforcement perspective.⁹ For example, the White House Counsel might discuss a pending Supreme Court case with the Solicitor General, request a formal legal opinion from the Office of Legal Counsel, or discuss clemency matters with the Pardon Attorney. Similarly, on national security matters, it is expected that the FBI will be in regular contact with the National Security Advisor and his staff on matters of national security, which could include information about ongoing investigations.

part in the Department's day to day operations.”).

⁶ See, e.g., U.S. Attorney's Manual § 3-2.140 (a U.S. Attorney's “professional abilities and the need for their impartiality in administering justice directly affect the public's perception of federal law enforcement.”); Politicization of Department of Justice, Center for Public Integrity (last updated May 19, 2014), <https://www.publicintegrity.org/2008/12/10/6285/politicization-department-justice>.

⁷ See 5 U.S.C. § 7323.

⁸ See Bell Address (implementing the policy in 1978). See also Massimo Calabresi, *The FBI Talked to the White House About Its Russia Probe. That Was Probably Against the Rules*, Time, Feb. 25, 2017, <http://time.com/4682791/fbi-russia-reince-priebus-andrew-mccabe-justice-rules/> (reporting that these rules date back at least to the Carter Administration); Isaac Arnsdorf, *Priebus request to FBI violated norms, if not rules; Longstanding White House and DOJ policy prohibits contact without clearance from lawyers*, Politico, Feb. 24, 2017, <http://www.politico.com/story/2017/02/reince-priebus-fbi-contact-trump-235351> (same).

⁹ See, e.g., Michael B. Mukasey, *Communications with the White House*, Memorandum for Heads of Department Components and U.S. Attorneys, Dec. 19, 2007, available at <https://assets.documentcloud.org/documents/3371650/Mukasey-12-19-07.pdf> (“Mukasey Memo”).

It is also entirely appropriate for the White House to coordinate with the DOJ on issues of policy, such as criminal justice reform or enforcement priorities. Where the DOJ is concerned, policy decisions can have implications for pending litigation or investigations. For example, the DOJ's enforcement policy on medical marijuana in states in which it is legalized is a policy question of broad application on which some coordination is appropriate, even though it could have implications for pending matters.

It would be wholly inappropriate, however, for the White House to try to direct the use of law enforcement to investigate or prosecute an individual matter, or to drop an investigation.¹⁰ Such political influence would raise due process and equal treatment concerns and could be seen as in conflict with the law that “the conduct of litigation in which the United States is a party is reserved to officers of the Department of Justice, under the direction of the Attorney General.”¹¹

Indeed, White House lawyers have long recognized that even sharing information on the status of an investigation or case can be inappropriate. A White House inquiry about a case can inherently communicate the White House's political desires and pressure the DOJ to act in a certain manner. Moreover, in many cases such information sharing is neither necessary for the President to perform his constitutional duties nor appropriate from a law enforcement perspective.¹² For example, it would be inappropriate from a law enforcement perspective for the DOJ to share information with the White House where the ongoing investigation or prosecution involves the President or Administration officials.¹³

Second, in addition to the substantive rules, both the White House and DOJ have instituted prophylactic restrictions on who from the White House can contact whom at the DOJ, in order to ensure that communications in this sensitive area are appropriate. Under long-standing policy, communications from the White House to the DOJ (including the FBI) about an ongoing case, investigation, or adjudicative matter may be made only by the President, Vice President, White House Counsel or the Principal Deputy White House Counsel (or a designee

¹⁰ See, e.g., The White House Transition Project and Rice University's James A. Baker III Institute for Public Policy *Smoothing the Peaceful Transfer of Democratic Power; The White House Counsel*, Report No. 2017-29, at 35, available at <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-29-Counsel.pdf> (“The White House Counsel's oversight is meant to ensure that communications between the White House and the Justice Department are properly conducted. Any effort to influence the legal judgments of the Department in ongoing cases would generate significant difficulties for an administration.”).

¹¹ 28 U.S.C § 516.

¹² Mukasey Memo.

¹³ See, e.g., The Attorney General's Guidelines for Domestic FBI Operations, 39-41.

once a conversation is initiated at senior levels).¹⁴ Communications also may only be directed, as an initial matter, to the senior leadership of the DOJ (*i.e.*, the Attorney General, Deputy Attorney General, or Associate Attorney General’s offices) or the offices where such communications are necessary and routine (*e.g.*, the Office of Legal Counsel or Pardon Attorney).¹⁵

By channeling all communications through a small number of high-level officials, and especially through the White House Counsel’s Office, this policy has helped ensure that the officials most familiar with this policy and the reasons underlying it are the only ones to engage in these communications in order to ensure proper compliance. Lawyer-to-lawyer communications also help avoid the appearance of politicization or the perception of pressure by law enforcement officials on the receiving end of such communications. Even if political officials disclaim any intent to apply pressure to act one way or the other, such pressure can come across as implicit.

These prohibitions apply only to communications that can potentially be viewed as influencing a case or investigation. Therefore, the DOJ policy explains that it does not “prevent officials in the communications, public affairs, or press offices of the White House and the Department of Justice from communicating with each other to coordinate efforts.”¹⁶ This is limited, however, to pure press coordination. Moreover, the Obama Administration’s White House contacts policy permitted communications for the purposes of “public affairs,” but explained that this was only true where it did “not relate to a particular contemplated or pending investigation or case.”¹⁷

¹⁴ There is an exception, not applicable in either of the current instances, for national security matters. In the Obama Administration, for example, the Deputy Counsel to the President for National Security Affairs, the staff of the National Security Council and Staff of the Homeland Security Council were permitted to freely discuss matters of national security. See 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”); Kathryn Ruemmler, *Prohibited Contacts with Agencies and Departments*, Memorandum for All White House Office Staff, March 23, 2012 (“Ruemmler Memo”).

¹⁵ See, *e.g.*, Jack Quinn, Memorandum for White House Staff, Contacts with Agencies, Jan. 16, 1996, available at <https://clinton.presidentiallibraries.us/items/show/27001> (“Quinn Memo”); Ruemmler Memo; Mukasey Memo.

¹⁶ Holder Memo ¶ 1(b).

¹⁷ Ruemmler Memo at 10.

Agency Contacts Policies Have Traditionally Applied to All Agencies

While this memorandum focuses on White House contacts with the Department of Justice, concerns about the impartiality of government action extend beyond just the DOJ. There are equally important impartiality considerations with investigations, enforcement actions and adjudications undertaken by other agencies (*e.g.*, an Environmental Protection Agency (EPA) or Department of Labor (DOL) enforcement action) as well as other agency decisions that could impact individual parties, like licensing decisions.

To ensure the impartiality of actions by agencies across the Executive Branch, the White House policy on agency contacts in the Obama Administration therefore provided:

White House staff should not contact agencies or departments about the merits of a specific adjudication (including a licensing, permitting or approval proceeding or similar regulatory action), benefit determination, investigation, litigation or enforcement matter involving specific parties. Depending upon the agency involved and the nature of the proceeding, such contacts may be prohibited by law, implicate due process concerns, trigger disclosure requirements, or create an appearance of inappropriate influence — all of which could prompt litigation or investigations, or generally undermine public confidence in the integrity of government decision-making.¹⁸

There are also legal and appearance reasons that the White House should avoid interfering with grant making, procurement, or other funding decisions. The Obama Administration therefore similarly advised that White House staff should not contact an agency or department about the merits of a particular grant or other funding decision involving specific parties.¹⁹

¹⁸ *Id.* 4-5.

¹⁹ *Id.* 6-7.

As with communications with the DOJ, these prophylactic restrictions are aimed at impeding the exercise of unaccountable influence targeted at specific transactions that may have personal or political interest to the President or White House (e.g., specific legal disputes, specific investigations, specific matters and cases). These rules are not intended to impede policy coordination between White House and executive agencies, which is to be encouraged not discouraged.

Assessment of Recent Trump White House Contacts With DOJ

The recent reported communications by senior Trump White House officials, if true, would appear to violate both the White House and DOJ contacts policies. Under long-established policies, neither the White House Chief of Staff nor a Senior Advisor would be authorized to communicate with the DOJ or FBI about a specific matter without involvement by the White House Counsel.

A call from one of those individuals directly to a U.S. Attorney or the FBI about a particular matter would be especially problematic. Under DOJ policy, the U.S. Attorneys are vested with independence and authority, within their districts, to prosecute or defend all crimes and civil actions.²⁰ U.S. Attorneys are expected to have independence from the White House to choose which cases to prosecute and how to argue cases.²¹ Investigative agencies like the FBI are similarly independent. DOJ policy has therefore long sought to insulate the U.S. Attorneys and the FBI from direct political intervention by the White House.²²

Nor would the “public affairs” exception apply to communications from the Chief of Staff to the leadership of the FBI. The DOJ policy — which, as far as we know, is still in effect despite the change in administrations — makes clear that the public affairs exception is only applicable to communications between press professionals.²³ Because the limited press-relations

²⁰ U.S. Attorney’s Manual § 3-2.140.

²¹ See, e.g., DOJ Office of the Inspector General report, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* at 194, available at <https://oig.justice.gov/special/s0809a/final.pdf> (discussing the “longstanding tradition of integrity and independent judgments by Department [of Justice] prosecutors” and risk that, due to politicization, “the confidence that the Department of Justice decides who to prosecute based solely on the evidence and the law, without regard to political factors, will disappear.”).

²² See, e.g., Bell Address; Holder Memo ¶ 1 (“The Assistant Attorneys General, the United States Attorneys, and the heads of investigative agencies in the Department have primary responsibility to initiate and supervise investigations and cases. These officials, like their superiors and their subordinates, must be insulated from influences that should not affect decisions in particular criminal or civil cases.”)

²³ Holder Memo.

nature of such a call might not be clear, calls between senior officials who also have the authority to influence an investigation do not fall within that carve-out.

As a substantive matter, it is clearly inappropriate for the White House and FBI to be discussing the FBI's ongoing investigation of Trump campaign advisers. The FBI should never have been discussing the details of an ongoing investigation that directly impacts the White House with the White House. Even assuming that the FBI was reporting information that was appropriate to share, which is doubtful, the White House should have only been in listening mode so as not to be perceived as directing the FBI's conduct in an investigation relating to the White House. The fact that the FBI official reportedly spoke first does not relieve the Chief of Staff of his obligations to ensure that the White House is not inquiring into actual or potential investigations at the FBI, or suggesting the FBI take action on a matter that directly impacts the White House.

In addition, were the White House Counsel to seek to obtain a FISA court order or documents related to such an order in a particular investigation, especially one he believes might involve the President, his associates, or his campaign, it would raise similar concerns that the White House was seeking to influence the conduct or outcome of the matter.

Equally, if not more, important to evaluating actions taken so far, is the recognition that the culture throughout a White House and across an entire Administration can be set early on through actions like this at senior levels. Well beyond the DOJ, federal agencies have broad enforcement powers that can be used (or abused) against private citizens and private businesses, or to reward political allies at taxpayer expense. Temptations to infringe on these lines can emerge even in the most well-intentioned administrations. Clear rules and vigilant examples set from the top are absolutely essential to preventing a culture where these lines are crossed with impunity.

The Trump Administration Must Take Measures to Protect Impartial Law Enforcement

The policies limiting contacts between the White House and DOJ were implemented in the wake of the Watergate scandal. At the time, Attorney General Griffin Bell issued a clarion call about the important need both for the Department of Justice to be independent and that the public perceive it to be independent. His remarks remain true today, that “the Department [of Justice] must be recognized by all citizens as a neutral zone, in which neither favor nor pressure nor politics is permitted to influence the administration of the law.”²⁴

²⁴ Bell Address.

The early weeks of the Trump Administration raise serious questions about whether its officials recognize these important principles.

United to Protect Democracy therefore calls on the Trump White House to issue publicly a policy on White House contacts with federal agencies that makes clear that it will abide by the long-standing policies limiting contacts with law enforcement agencies. As has been the case with prior administrations, this policy should also limit contacts about particular matters involving specific parties between White House officials and officials at other executive branch agencies with investigatory, regulatory, enforcement, grant-making, or contract-making power to ensure those functions are carried out independently and free of the reality or appearance of political interference.