

September 14, 2020

Attorney General William Barr  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Attorney General Barr,

As a member of the United States Senate and a former U.S. Attorney, I have been disturbed to watch the Department of Justice (DOJ) stray from its mission of delivering “fair and impartial administration of justice for all Americans.” Under the Trump administration, DOJ has repeatedly used its authority to help the President’s friends and harm his enemies. DOJ’s recent intervention in a state court defamation lawsuit by E. Jean Carroll against President Trump continues this pattern.

On September 8, 2020, at the request of the White House, DOJ removed this state court lawsuit to federal court and moved substitute the United States for President Trump as the defendant. DOJ’s request came ten months after the lawsuit was filed, and only after the judge presiding over the case agreed to let the parties proceed with discovery, including a DNA test and deposition of President Trump, which could shed light on the allegations of rape made against him.

While the Federal Tort Claims Act (FTCA) allows DOJ to represent federal employees in lawsuits alleging misdeeds committed in the scope of their employment, DOJ rarely exercises this power to defend elected officials like the President.<sup>1</sup> DOJ claims that President Trump was a “federal employee” acting in his “official capacity” when he denied ever knowing Ms. Carroll and disparaged her appearance. Former DOJ attorneys<sup>2</sup> and numerous legal scholars<sup>3</sup> have questioned whether either claim will survive judicial scrutiny. DOJ’s legal brief filed with its motion points to no comparable case involving the President of the United States, or statements

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<sup>1</sup> Alan Feuer, *Justice Dept. Intervenes to Help Trump in E. Jean Carroll Defamation Lawsuit*, N.Y. Times, Sept. 8, 2020, <https://www.nytimes.com/2020/09/08/nyregion/donald-trump-jean-carroll-lawsuit-rape.html?action=click&module=Top%20Stories&pgtype=Homepage>; Amanda Robert, *DOJ files rare request to represent Trump in columnist’s defamation lawsuit*, ABA Journal, Sept. 9, 2020, <https://www.abajournal.com/news/article/doj-files-rare-request-to-represent-trump-in-authors-defamation-lawsuit>.

<sup>2</sup> Katie Benner & Charles Savage, *White House Asked Justice Dept. to Take Over Defamation Suit Against Trump, Barr Says*, N.Y. Times, Sept. 9, 2020, <https://www.nytimes.com/2020/09/09/us/politics/trump-e-jean-carroll-lawsuit.html>.

<sup>3</sup> Feuer, *supra* note 1; Alison Frankel, *Can Trump rape accuser block DOJ takeover of defamation suit?*, Reuters, Sept. 9, 2020, <https://www.reuters.com/article/legal-us-otc-carroll-idUSKBN2603C3>.

made by a federal employee about conduct decades earlier unrelated to the employee's federal service.

Putting aside the merits of DOJ's legal position, the timing of DOJ's intervention raises significant questions. Federal law requires federal employees to notify their supervisors, who must then notify DOJ, "promptly" of any suits regarding acts or omissions taken within the scope of their employment.<sup>4</sup> In this case, DOJ did not intervene until the parties had engaged in substantial motion practice and were poised to begin discovery. DOJ's pleadings do not explain why it did not intervene until this moment in the case, though the political benefits to the President are obvious.

DOJ's decision to intervene in the lawsuit within weeks of the election also seems at cross-purposes with its policies against election interference. DOJ has long recognized that the exercise of prosecutorial powers can influence elections, and has put in place rules to avoid such interference. Beginning in 2008, DOJ advised all employees that:

[P]olitics must play no role in the decisions of federal investigators or prosecutors . . . . Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission . . .<sup>5</sup>

Similarly, in your Feb. 5, 2020, memorandum, you noted that "the Department has long recognized that it must exercise particular care regarding sensitive investigations and prosecutions that relate to political candidates, campaigns, and other politically sensitive individuals and organizations—especially in an election year."<sup>6</sup>

It does not appear that DOJ exercised similar care in deciding when and whether to intervene in this case. Even though this matter is not a criminal prosecution, it undoubtedly has the possibility of affecting an election. Had procedures for prompt notification of this suit been followed, any legal questions raised by the Department's actions could have been resolved long before the election. DOJ's decision to intervene now creates the appearance that DOJ is participating in partisan politics.

The FTCA should not be used to shield the President from embarrassing revelations. As Congress conducts oversight and considers legislation related to political interference with DOJ<sup>7</sup>

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<sup>4</sup> 28 C.F.R. § 15.2; *see also* 28 U.S.C. § 2679.

<sup>5</sup> Loretta Lynch, Attorney General, U.S. Department of Justice, Memorandum for all Department Employees, Election Year Sensitivities, Apr. 11, 2016, 1; Eric Holder, Attorney General, U.S. Department of Justice, Memorandum for all Department Employees, Election Year Sensitivities, Mar. 9, 2012, 1; Michael Mukasey, Attorney General, U.S. Department of Justice, Memorandum for all Department Employees, Election Year Sensitivities, Mar. 5, 2008, 1.

<sup>6</sup> William Barr, Attorney General, U.S. Department of Justice, Memorandum for all United States Attorneys, Department Component Heads, and Law Enforcement Agency Heads, Additional Requirements for the Opening of Certain Sensitive Investigations, Feb. 5, 2020.

<sup>7</sup> *E.g.* Letter from Sen. Dianne Feinstein, et al. to Sen. Lindsey Graham, Feb. 13, 2020, *available at* <https://www.whitehouse.senate.gov/news/release/whitehouse-senate-judiciary-democrats-call-for-investigation-of->

and by DOJ, I request that you explain the timing of and circumstance behind DOJ's intervention in this case: specifically, how that decision is consistent with DOJ regulations governing the FTCA and actions taken by DOJ related to elected officials in the lead up to an election. Please also consider this letter formal notification of your obligation to identify, collect, and preserve any records identified in Appendix. These documents may be relevant to any further inquiries related to the issues raised in this letter.

Thank you for your prompt attention to this matter.

Sincerely,



Sheldon Whitehouse  
United States Senator

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[political-interference-at-doj](#); Letter from Sen. Dianne Feinstein, Sheldon Whitehouse, et al. to DOJ Inspector General Michael E. Horowitz, Feb. 19, 2020, *available at* <https://www.whitehouse.senate.gov/news/release/senators-call-for-expanded-investigation-of-giuliani-contacts-with-justice-department>; Letter from Sen. Kamala Harris, et al. to DOJ Inspector General Michael E. Horowitz, Feb. 27, 2020, *available at* <https://www.harris.senate.gov/news/press-releases/amid-apparent-pattern-of-political-influence-at-doj-harris-leads-judiciary-dems-in-call-for-investigation>.

## Appendix

From the period beginning May 2019 to the present, please provide all records in the custody of the U.S. Department of Justice (DOJ) (including emails; email attachments; notes; hard copy correspondence sent through any medium including courier service; telephone call logs; calendar invitations/entries; meeting notices; meeting agendas; talking points; any handwritten or electronic notes taken during any meetings, telephone calls, or other responsive communications; and summaries of any responsive communications) related to E. Jean Carroll, *E. Jean Carroll v. Donald Trump*, No. 160694/2019 (N.Y. Co. Sup. Ct., N.Y.), and/or the representation of President Trump in that matter or any related matter.

For the purposes of this request, the Department may limit its search to custodians within the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Office of the Assistant Attorney General for the Civil Division, the Civil Division, the Office of Legal Counsel, the Office of Legal Policy, and the Office of Legislative Affairs.