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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

May 14, 2021

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Attorney General Garland:

We write to express serious concerns about the Trump-era Department of Justice's (DOJ) apparent misrepresentations to a federal court regarding an Office of Legal Counsel (OLC) memorandum that was written to downplay President Trump's obstruction of Special Counsel Mueller's investigation. DOJ's actions in this case, and in another recent Freedom of Information Act (FOIA) case seeking information about President Trump's activities, have raised doubts about DOJ's candor when characterizing potential evidence of President Trump's misconduct to courts. To be clear, these misrepresentations preceded your confirmation as Attorney General, but the Department you now lead bears responsibility for redressing them. In that light, and in order to help rebuild the nation's trust in DOJ's independence after four years of turmoil, we urge DOJ not to appeal D.C. District Judge Amy Berman Jackson's May 3 decision to order the release of this OLC memo.

On May 3, Judge Jackson directed DOJ to release a 2019 OLC memorandum purporting to aid then-Attorney General William Barr in determining whether the Mueller Report contained facts that would support charging President Trump with obstruction. In doing so, Judge Jackson faulted DOJ for being "disingenuous to this Court" by mischaracterizing the nature and contents of the OLC memo in an effort to shield it from public disclosure through FOIA.¹ Among other misrepresentations, she pointed to DOJ "affidavits[] so inconsistent with the evidence in the record, they are not worthy of credence" and "redactions and incomplete explanations [that] obfuscate the true purpose of the [OLC] memorandum."

This was not the first time that a court faulted DOJ for mischaracterizing facts in an effort to obfuscate Special Counsel Mueller's true findings. Last year, D.C. District Judge Reggie Walton concluded that Attorney General Barr "distorted the findings" of the Mueller Report

¹ *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, No. 19-1552, 2021 WL 1749763 at *13 (D.D.C. May 3, 2021).


when he transmitted a misleading summary of Mueller’s findings to Congress.² Judge Jackson echoed this conclusion following her review of the OLC memo, which she wrote “reveals” that Judge Walton’s suspicions were “well-founded” because “the Attorney General [was] being disingenuous then.”³


Nor was this the first time during the Trump Administration that DOJ appears to have misled a court in FOIA litigation seeking to expose evidence of President Trump’s abuses of power. In a FOIA case seeking Office of Management and Budget (OMB) documents related to Trump’s efforts to pressure Ukraine into investigating then-candidate Joe Biden—efforts that led to Trump’s first impeachment—the District Court for the District of Columbia recently noted “obvious differences between the affiants’ description of the nature and subject matter of the documents, and the documents themselves.”⁴ The court faulted DOJ’s summary judgment motion for relying on “statements of [OMB] declarants who lacked personal knowledge” that “were contradicted by other evidence in the record.”⁵

We are deeply troubled by these recent FOIA opinions and the pattern of DOJ misrepresentation they portray. Relying on inaccurate statements to support baseless assertions of the deliberative process privilege is problematic in any case; it is all the more indefensible when DOJ is arguing against the disclosure of documents related to serious abuses of power by President Trump. Given the gravity of the misconduct underlying OLC’s March 2019 memo and DOJ’s apparent misrepresentations when attempting to conceal the memo from the public, we urge you not to appeal Judge Jackson’s May 3, 2021 opinion.

Thank you for your time and consideration. We look forward to a prompt reply.

Sincerely,


RICHARD J. DURBIN
Chair

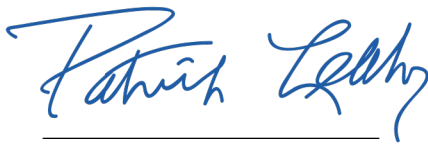

SHELDON WHITEHOUSE
United States Senator

² *Elec. Priv. Info. Ctr. v. U.S. Dep’t of Justice*, 442 F. Supp. 3d 37, 49 (D.D.C. 2020).

³ *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Justice*, No. 19-1552, 2021 WL 1749763 at *13 (D.D.C. May 3, 2021).

⁴ *New York Times Co. v. Office of Management and Budget*, No. CV 19-3562, 2021 WL 1329025 at *8 (D.D.C. Mar. 29, 2021).

⁵ *Id.*



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