

July 21, 2022

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

Dear Attorney General Garland:

The undersigned organizations write to urgently request that you clarify the Department of Justice's position on the applicability of criminal statutes generally, and of 18 U.S.C. § 1512(c)(2) specifically, to presidents of the United States. We are specifically concerned about the Office of Legal Counsel's position on whether the "clear statement rule" prevents certain criminal laws from being applied to former President Donald Trump regarding his attempt to overturn the 2020 election. To the extent that nonpublic Justice Department memoranda related to this subject exist, we strongly urge you to make such memoranda available to Congress and the public.

To date, the Justice Department has charged over 280 defendants with "corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so" in connection with the January 6, 2021, attack on the U.S. Capitol.<sup>1</sup> U.S. District Judge David O. Carter concluded in March that former President Trump more likely than not violated the same criminal law, 18 U.S.C. § 1512(c)(2), as well as the federal conspiracy statute, 18 U.S.C. § 371. Since then, the House Select Committee investigating January 6 has presented a wealth of new evidence that Trump and his co-conspirators violated these and other criminal laws.<sup>2</sup>

Special Counsel Robert Mueller previously found that Trump might have committed obstruction of justice under the same statute, 18 U.S.C. § 1512(c)(2), when he took various actions to interfere with law enforcement investigations of Russia's role in the 2016 election. Because of the Office of Legal Counsel's previous determination that a sitting president could not be indicted, Mueller stopped short of deciding whether Trump had committed obstruction of justice or other federal offenses. But then-Attorney General William Barr concluded that even after Trump left office, he could never be charged based on the evidence Mueller gathered.

In reaching that conclusion, Barr relied on the legal reasoning contained in a memo co-authored by Steven Engel, then-head of the Office of Legal Counsel. The Justice Department has refused to release that memo to the public or Congress and is fighting a court battle against being required to disclose it, recently appealing a federal judge's order to publicly disclose the memo. Our best guess at its contents comes from a memo Barr wrote before he became attorney

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<sup>1</sup> U.S. Attorney's Office for the District of Columbia, "18 Months Since the Jan. 6 Attack on the Capitol," July 6, 2022, <https://www.justice.gov/usao-dc/18-months-jan-6-attack-capitol>.

<sup>2</sup> Noah Bookbinder, Norman L. Eisen et. al, "The January 6th Hearings: Criminal Evidence Tracker Sixth Edition," *Just Security*, June 30, 2022, <https://www.justsecurity.org/82177/the-january-6th-hearings-criminal-evidence-tracker-sixth-edition/>.

general, in which he argued that it would be improper and unconstitutional to apply 18 U.S.C. § 1512(c)(2) to the president under an OLC doctrine known as the “clear statement rule.”<sup>3</sup> This “rule” is, in truth, a bare assertion by OLC that a statute cannot be construed to apply to the president if it would limit presidential power, unless Congress has explicitly named the president in the statute.

We believe that argument is completely without merit. Nonetheless, without transparency from the Department of Justice, we can only assume that the Office of Legal Counsel has not withdrawn or repudiated Engel’s memo to Barr.

If the Justice Department believes that presidents of the United States are exempt from 18 U.S.C. § 1512(c)(2) or from any other criminal law based on a “clear statement rule,” it must tell the public and Congress, to give Congress the opportunity to close this indefensible loophole. If our fears are groundless, and the Justice Department believes that former presidents are subject to the same criminal laws as every other citizen, it is entirely appropriate to reassure the public of that fact.

Thank you for your consideration.

Sincerely,

American Oversight

Citizens for Responsibility and Ethics in Washington (CREW)

Common Cause

Constitutional Accountability Center

Demand Progress Education Fund

Digital Democracy Project

Free Speech For People

Oregonizers

Project On Government Oversight

Public Citizen

Revolving Door Project

Stand Up America

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<sup>3</sup> Memorandum from Bill Barr, attorney general, to Rod Rosenstein, deputy attorney general, and Steve Engel, assistant attorney general, titled “Mueller’s ‘Obstruction’ Theory,” June 8, 2018, <https://www.documentcloud.org/documents/5638848-June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction>.