

CREW | citizens for responsibility and ethics in washington

February 24, 2017

Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Suite 4706
Washington, D.C. 20530-0001

Dear Inspector General Horowitz:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that you open an investigation into apparently improper communications between the leadership of the Federal Bureau of Investigation (“FBI”) and White House Chief of Staff Reince Priebus regarding the FBI’s pending criminal investigation of attempts by Russia to influence the 2016 elections, including links between Russian officials and associates of President Trump. These communications threaten the “evenhanded administration of justice,” a key tenet of our democracy, and an animating principle behind the Attorney General’s directive that prohibits this kind of communication.¹

White House officials today confirmed news reports that FBI Deputy Director Andrew McCabe and Mr. Priebus recently discussed the pending criminal investigation.² According to multiple news reports, the FBI and other law enforcement and national security agencies are actively investigating Russia’s efforts to influence the 2016 elections.³ One subject of the investigation is communications and connections between Russian officials and associates of President Trump.⁴ On February 14, 2017, the *New York Times* published a report asserting that phone records and intercepted calls showed campaign aides to President Trump “and other Trump associates had repeated contacts with senior Russian intelligence officials in the year before the election.”⁵ According to White House Press Secretary Sean Spicer, the next day, after a separate meeting at the White House, Deputy Director McCabe “took Priebus to the side and

¹ Communications With the White House and Congress, Memorandum for Heads of Department Components and All United States Attorneys from the Attorney General, May 11, 2009 (attached as Exhibit A).

² Jim Sciutto, Even Perez, Shimon Prokupecz, Manu Raju, and Pamela Brown, FBI Refused White House Request to Knock Down Recent Trump-Russia Stories, *CNN*, Feb. 24, 2017, available at <http://www.cnn.com/2017/02/23/politics/fbi-refused-white-house-request-to-knock-down-recent-trump-russia-stories/index.html>.

³ See, e.g., Peter Stone and Greg Gordon, FBI, 5 Other Agencies Probe Possible Covert Kremlin Aid to Trump, *McClatchy*, Jan. 18, 2017, available at <http://www.mcclatchydc.com/news/politics-government/article127231799.html>; Michael S. Schmidt, Matthew Rosenberg, Adam Goldman, and Matt Apuzzo, Intercepted Russian Communications Part of Inquiry Into Trump Associates, *New York Times*, Jan. 19, 2017, available at https://www.nytimes.com/2017/01/19/us/politics/trump-russia-associates-investigation.html?_r=0.

⁴ *Id.*

⁵ Michael S. Schmidt, Mark Mazzetti, and Matt Apuzzo, Trump Campaign Aides Had Repeated Contacts With Russian Intelligence, *New York Times*, Feb. 14, 2017, available at <https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html>.

said that the New York Times reports on contacts with Russians was overblown and not supported by any evidence the FBI had.”⁶ Other news reports do not identify whether Mr. Priebus or Deputy Director McCabe initiated the discussion.⁷

At the meeting, Mr. Priebus asked Deputy Director McCabe to publicly dispute the *New York Times* story.⁸ According to Mr. Spicer, Mr. Priebus asked Deputy Director McCabe if the FBI could “clear it up and get the real information out,” and Deputy Director McCabe responded he would think about it.⁹ Mr. Spicer also stated that Deputy Director McCabe called Mr. Priebus back later that afternoon and said that “even though it was bad information, they could not go on the record because the FBI did not want to get in the business of calling balls and strikes on reporting.”¹⁰ A CNN report, however, asserts that it was Mr. Priebus who later “reached out again to McCabe and FBI Director James Comey asking for the FBI to “at least talk to reporters on background to dispute the stories.”¹¹ According to CNN, Director Comey “rejected the request for the FBI to comment on the stories” because the alleged communications were the subject of an ongoing investigation.¹²

These facts strongly indicate violations of long-standing Department of Justice (“DOJ”) directives strictly limiting communications between DOJ officials and the White House regarding pending or contemplated criminal investigations. Those policies have been promulgated through memoranda issued by successive Attorneys General.¹³ The current version of the directive provides that DOJ will advise the White House of a pending or contemplated criminal investigation “when – but only when – it is important for the performance of the President’s duties and appropriate from a law enforcement perspective.”¹⁴ While the White House likely learned of the FBI investigation through public news reports, this standard should apply to determining whether communications about a pending criminal investigation are justified.

Under the directive, the individuals who may communicate about a pending criminal investigation are narrowly limited. The directive provides that initial communications between

⁶ Chuck Todd, Mark Murray, and Carrie Dann, *The White House: It Was the FBI Who Pulled Priebus Aside*, *NBC News*, Feb. 24, 2017, available at <http://www.nbcnews.com/politics/first-read/republicans-congress-are-still-looking-direction-trump-n725141>; Julie Pace, *White House Advisor Asked FBI to Dispute Russia Reports*, *Associated Press*, Feb. 24, 2017, available at <https://apnews.com/947a3d6577e34e87920381f4914e20d3>.

⁷ Jim Sciutto, Even Perez, Shimon Prokupez, Manu Raju, and Pamela Brown, *CNN*, Feb. 24, 2017.

⁸ Julie Pace, *Associated Press*, Feb. 24, 2017.

⁹ Chuck Todd, Mark Murray, and Carrie Dann, *NBC News*, Feb. 24, 2017.

¹⁰ *Id.*

¹¹ Jim Sciutto, Even Perez, Shimon Prokupez, Manu Raju, and Pamela Brown, *CNN*, Feb. 24, 2017.

¹² *Id.*

¹³ *Communications With the White House and Congress*, Memorandum for Heads of Department Components and All United States Attorneys from the Attorney General, May 11, 2009 (issued by Attorney General Eric Holder); *Communications With the White House*, Memorandum for Heads of Department Components and United States Attorneys from the Attorney General, Dec. 19, 2007 (issued by Attorney General Michael Mukasey), available at <https://www.justice.gov/sites/default/files/ag/legacy/2008/04/15/ag-121907.pdf>.

¹⁴ *Communications With the White House and Congress*, Memorandum for Heads of Department Components and All United States Attorneys from the Attorney General, May 11, 2009.

DOJ and the White House may only involve the Attorney General or the Deputy Attorney General from DOJ's side, and the President, the Vice President, the Counsel to the President, or the Deputy Counsel to the President from the White House side.¹⁵ Neither Mr. Priebus nor Deputy Director McCabe are covered by this list of officials, and thus their communications about the criminal investigation appear to have violated this provision of the directive.

The memorandum does provide that if continuing contact between DOJ and the White House on a particular matter is required, "the officials who participated in the initial communications may designate subordinates from each side to carry on such contact."¹⁶ It appears unlikely this delegation provision is applicable. There has been no assertion by White House or DOJ officials that initial communications took place between officials authorized to do so. In addition, even if a permitted initial communication took place, there has been no claim that those officials designated Mr. Priebus or Deputy Director McCabe to continue the communications. Moreover, it does not appear that the communications between Mr. Priebus and Deputy Director McCabe were "important for the performance of the President's duties and appropriate from a law enforcement perspective."

The memorandum also provides that the policy 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."¹⁷ Again, it appears unlikely this provision is applicable. Neither Mr. Priebus nor Deputy Director McCabe is in the communications, public relations, or press offices of DOJ or the White House. Furthermore, their communications were not for the purpose of coordinating efforts. Rather, Deputy Director McCabe communicated substantive information about the FBI's criminal investigation: that the *New York Times* report was not supported by any evidence the FBI had obtained in the investigation. While public relations may have been the purpose for Mr. Priebus' communications, they were not simply to "coordinate efforts" between the White House and the FBI. Their purpose was to pressure the FBI – despite its policy of not commenting on pending investigations – to publicly refute the *New York Times* story to provide political cover for President Trump. This certainly is not what DOJ's directive contemplated.

As a result, it appears that the communications between Mr. Priebus and Deputy Director McCabe violated DOJ's directive. They also suggest that other communications about the pending investigation may have occurred. Moreover, the communications raise the possibility that the FBI's investigation – which involves President Trump's campaign aides and associates – will be tainted by political pressure. As DOJ's policy makes clear, "[t]he legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration"¹⁸ Accordingly, you should immediately commence an investigation into these

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

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communications between Mr. Priebus and Deputy Director McCabe and into any other communications that have occurred between the White House and the FBI regarding the FBI's pending criminal investigation of attempts by Russia to influence the 2016 elections.

Sincerely,



Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics in Washington

Encl.

EXHIBIT A



Office of the Attorney General
Washington, D. C. 20530

May 11, 2009

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
ALL UNITED STATES ATTORNEYS

FROM:

 THE ATTORNEY GENERAL.

SUBJECT:

Communications with the White House and Congress

The rule of law depends upon the evenhanded administration of justice. The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration. It is a fundamental duty of every employee of the Department to ensure that these principles are upheld in all of the Department's legal endeavors.

In order to promote the rule of law, therefore, this memorandum sets out guidelines to govern all communications between representatives of the Department, on the one hand, and representatives of the White House and Congress, on the other, and procedures intended to implement those guidelines. (The "White House," for the purposes of this Memorandum, means all components within the Executive Office of the President.) These guidelines have been developed in consultation with, and have the full support of, the Counsel to the President.

1. Pending or Contemplated Criminal or Civil Investigations and Cases

The Assistant Attorneys General, the United States Attorneys, and the heads of the investigative agencies in the Department have the 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. As the Supreme Court said long ago with respect to United States Attorneys, so it is true of all those who exercise the Department's investigatory and prosecutorial powers: they are representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

a. In order to ensure the President's ability to perform his constitutional obligation to "take care that the laws be faithfully executed," the Justice Department will advise the White House concerning pending or contemplated criminal or civil investigations or cases when—but only when—it is important for the performance of the President's duties and appropriate from a law enforcement perspective.

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b. Initial communications between the Department and the White House concerning pending or contemplated criminal investigations or cases will involve only the Attorney General or the Deputy Attorney General, from the side of the Department, and the Counsel to the President, the Principal Deputy Counsel to the President, the President or the Vice President, from the side of the White House. If the communications concern a pending or contemplated civil investigation or case, the Associate Attorney General may also be involved. If continuing contact between the Department and the White House on a particular matter is required, the officials who participated in the initial communication may designate subordinates from each side to carry on such contact. The designating officials must monitor subsequent contacts, and the designated subordinates must keep their superiors regularly informed of any such contacts. Communications about Justice Department personnel in reference to their handling of specific criminal or civil investigations or cases are expressly included within the requirements of this paragraph. This policy does not, however, 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.

c. In order to ensure that Congress may carry out its legitimate investigatory and oversight functions, the Department will respond as appropriate to inquiries from Congressional Committees consistent with policies, laws, regulations, or professional ethical obligations that may require confidentiality and consistent with the need to avoid publicity that may undermine a particular investigation or litigation. Outside the context of Congressional hearings or investigations, all inquiries from individual Senators and Members of Congress or their staffs concerning particular contemplated or pending criminal investigations or cases should be directed to the Attorney General or the Deputy Attorney General. In the case of particular civil investigations or cases, inquiries may also be directed to the Associate Attorney General.

d. These procedures are not intended to interfere with the normal communications between the Department and its client departments and agencies (including agencies within the Executive Office of the President when they are the Department's clients) and any meetings or communications necessary to the proper conduct of an investigation or litigation.

2. National Security Matters

It is critically important to have frequent and expeditious communications relating to national security matters, including counter-terrorism and counter-espionage issues. Therefore communications from (or to) the Deputy Counsel to the President for National Security Affairs, the staff of the National Security Council and the staff of the Homeland Security Council that relate to a national security matter are not subject to the limitations set out above. However, this exception for national security matters does not extend to pending adversary cases in litigation that may have national security implications. Communications related to such cases are subject to the guidelines for pending cases described above.

3. White House Requests for Legal Advice

All requests from the White House for formal legal opinions shall come from the President, the Counsel to the President, or one of the Deputy Counsels to the President, and shall be directed to the Attorney General and the Assistant Attorney General for the Office of Legal Counsel. The Assistant Attorney General for the Office of Legal Counsel shall report to the Attorney General and the Deputy Attorney General any communications that, in his or her view, constitute improper attempts to influence the Office of Legal Counsel's legal judgment.

4. Communications Involving the Solicitor General's Office.

Matters in which the Solicitor General's Office is involved often raise questions about which contact with the Office of the Counsel to the President is appropriate. Accordingly, the Attorney General and Deputy Attorney General may establish distinctive arrangements with the Office of the Counsel to govern such contacts.

5. Presidential Pardon Matters

The Office of the Pardon Attorney may communicate directly with the Counsel to the President and the Deputy Counsels to the President, concerning pardon matters. The Counsel to the President and the Deputy Counsels to the President may designate subordinates to carry on contact with the Office of the Pardon Attorney after the initial contact is made.

6. Personnel Decisions Concerning Positions in the Civil Service

All personnel decisions regarding career positions in the Department must be made without regard to the applicant's or occupant's partisan affiliation. Thus, while the Department regularly receives communications from the White House and from Senators, Members of Congress, and their staffs concerning political appointments, such communications regarding positions in the career service are not proper when they concern a job applicant's or a job holder's partisan affiliation. Efforts to influence personnel decisions concerning career positions on partisan grounds should be reported to the Deputy Attorney General.

7. Other Communications Not Relating to Pending Investigations or Criminal or Civil Cases

All communications between the Department and the White House or Congress that are limited to policy, legislation, budgeting, political appointments, public affairs, intergovernmental relations, or administrative matters that do not relate to a particular contemplated or pending investigation or case may be handled directly by the parties concerned. Such communications should take place with the knowledge of the Department's lead contact regarding the subject

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All United States Attorneys

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under discussion. In the case of communications with Congress, the Office of the Deputy Attorney General and Office of the Assistant Attorney General for Legislative Affairs should be kept informed of all communications concerning legislation and the Office of the Associate Attorney General should be kept informed about important policy communications in its areas of responsibility.

As Attorney General Benjamin Civiletti noted in issuing a similar memorandum during the Carter Administration, these guidelines and procedures are not intended to wall off the Department from legitimate communication. We welcome criticism and advice. What these procedures are intended to do is route communications to the proper officials so they can be adequately reviewed and considered, free from either the reality or the appearance of improper influence.

Decisions to initiate investigations and enforcement actions are frequently discretionary. That discretion must be exercised to the extent humanly possible without regard to partisanship or the social, political, or interest group position of either the individuals involved in the particular cases or those who may seek to intervene against them or on their behalf.

This memorandum supersedes the memorandum issued by Attorney General Mukasey on December 19, 2007, titled *Communications with the White House*.