

ROADMAP FOR RENEWAL

Preserving Non-Partisan and Independent Law Enforcement

V. Preventing improper White House interference with specific law enforcement matters at the Department of Justice and other law enforcement agencies

In a constitutional democracy, those in office should not wield the powers of the state to benefit their political allies and punish their opponents. In keeping with this principle, for 40 years Administrations of both parties have safeguarded that independence by maintaining policies limiting contacts between the White House and the Justice Department on law-enforcement matters involving specific parties. But that safeguard is failing. To address these concerns, Congress should:

- Prohibit improper White House interference in specific-party matters;
- Require agencies to report improper White House contacts to Congress;
- Ensure parties in enforcement proceedings are notified of information about contacts between the White House and the relevant enforcement agency; and
- Prohibit White House officials from publicly commenting on most pending specific-party legal matters.

The Problem

Since coming into office, President Trump and others in his administration have repeatedly violated longstanding practices restricting White House interference in specific-party matters. Most notably, the President and his aides have sought to interfere with the investigation of Russian meddling in the 2016 election, for instance by asking then-FBI Director James Comey to [“let\[\] this go”](#) with respect to the investigation of Michael Flynn.¹ The president has also called for criminal investigations of his political opponents, including [Hillary Clinton](#)² and [Huma Abedin](#)³, while [rebuking Attorney General Jeff Sessions](#)⁴ for allowing the Department of Justice to indict two Republican congressmen ahead of the midterms. He [threatened Harley Davidson](#)⁵ with tax hikes after the company

¹ Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation* (May 16, 2017), The New York Times. Available at

<https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>.

² Donald J. Trump (@realdonaldtrump), Twitter (Nov. 3, 2017, 7:57 am),

<https://twitter.com/realdonaldtrump/status/926403023861141504>

³ Donald J. Trump (@realdonaldtrump), Twitter (Jan. 2, 2018, 8:48 AM),

<https://twitter.com/realdonaldtrump/status/948174033882927104>

⁴ Donald J. Trump (@realdonaldtrump), Twitter (Sep. 3, 2018, 3:25 PM),

<https://twitter.com/realdonaldtrump/status/1036681588573130752>

⁵ Dartunorro Clark, *Trump attacks Harley-Davidson for moving production overseas to offset tariffs* (June 26, 2018), NBC News. Available at

<https://www.nbcnews.com/politics/white-house/trump-attacks-harley-davidson-moving-production-overseas-offse-t-tariffs-n886566>.

complained about his trade policies, and demanded action against [Amazon](#)⁶ and [Time Warner](#)⁷, whose owners control media outlets that he perceives as unfavorable.

These interventions are alarming. A disinterested, non-partisan law enforcement apparatus plays a central role in ensuring that the public maintains faith in the fundamental fairness of the criminal justice system. To that end, the Trump White House, like its predecessors, has implemented a [formal policy](#) limiting its communications with the Department of Justice.⁸ But this policy is limited and has failed to constrain the president from intervening (sometimes publicly) in specific law enforcement matters.

Of course, the President can set general law enforcement priorities consistent with his responsibility to “take Care that the Laws are faithfully executed.” For example, it would be entirely appropriate for the President to direct DOJ to prioritize white-collar crime or healthcare fraud prosecutions. But the President cannot act in individual cases to choose winners and losers based on his own political or personal preferences.

Congress can and should encode this important norm into law as part of its authority to regulate the executive agencies. There is historical precedent for such a move: During President Nixon’s time in office, he routinely directed the Internal Revenue Service to audit his political enemies. After he resigned, Congress responded by prohibiting specified executive-branch officials, including the President, from requesting that the IRS conduct or terminate an audit or other investigation. So too, Congress could permissibly regulate the situations in which the White House may interfere with DOJ’s handling of specific-party enforcement matters.

When law enforcement loses its reputation for non-partisanship and independence, then democracy and rule of law is itself under threat. Americans will start modifying their behavior to ensure that they don’t displease the party in power. Ensuring that law enforcement is seen as independent and non-partisan should be a top priority for Congress in strengthening our democracy.

Proposed Solutions

Congress, the federal courts, and the executive branch all have a role to play in ensuring that law enforcement is insulated from political interference. But there are several measures Congress should enact, all of which are within its constitutional authority:

⁶ Donald J. Trump (@realdonaldtrump), Twitter (July 23, 2018, 10:35 AM), <https://twitter.com/realdonaldtrump/status/1021388295618682881>

⁷ Ryan Knutson, *Trump Says He Would Block AT&T-Time Warner Deal* (October 22, 2016), Wall Street Journal. Available at <https://www.wsj.com/articles/trump-says-he-would-block-at-t-time-warner-deal-1477162214>.

⁸ Donald F. McGahn II, *Memorandum to All White House Staff* (January 27, 2018). Available at <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>.

Prohibit improper White House interference in specific-party matters

- Codify clear prohibitions on improper White House interference in specific-party matters. For example, Congress could specify which personnel at the White House can communicate with DOJ officials about particular law enforcement matters, and in what circumstances.

Require agencies to report improper White House contacts to Congress

- At a minimum, as Brennan Center's Rule of Law task force recently [recommended](#), Congress should require the White House to promulgate a policy on proper contacts, as Republican and Democratic administrations have done since the Ford Administration.⁹
- Congress should also require the Administration to report White House contacts with law enforcement agencies on specific matters to Congress and the relevant agency Inspector General.

Ensure parties in enforcement proceedings are notified of information about contacts between the White House and the relevant enforcement agency

- Congress should require that a privilege log reflecting communications between the White House and the Department of Justice, Department of Homeland Security, or other law enforcement agencies relating to enforcement matters be provided to defendants so that their attorneys are alerted to the potential of unlawful political interference.
- This will enable parties to raise various constitutional defenses such as First Amendment, selective enforcement, or due process violations for proper judicial consideration.

Prohibit White House officials from publicly commenting on most pending specific-party legal matters

- Preclude White House officials from publically commenting on pending criminal cases and law enforcement actions, with limited exceptions for national and homeland security or public health emergencies, subject to the penalties imposed for improper political activities pursuant to the Hatch Act.

⁹ National Task Force on Rule of Law & Democracy, *Proposals for Reform* (September 2018), Brennan Center. Available at https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf.