



FROM: Protect Democracy
TO: Media and interested parties
SUBJECT: The illegitimacy of the coming “Durham report”

Since [at least](#) May 2019, and [likely much earlier](#), Connecticut United States Attorney John Durham has been reviewing the actions of the FBI and intelligence community (IC) personnel who investigated the Trump campaign’s ties to Russian interference in the 2016 election. During his appearance before the House Judiciary Committee on July 28, Attorney General William Barr [reiterated](#) that he would not wait until after the November election to release Durham’s “findings” (in whatever form), raising questions about his intention to use those findings to bolster President Trump and undermine former Vice President Joe Biden in the upcoming election.

The Trump administration will frame the conclusion and results of Durham’s probe as a significant news event. **But given the evidence in the public record and context essential to understanding Durham’s work, his investigation is *substantively baseless and irreparably tainted* by political interference from and other misconduct by President Trump.** (This is regardless of whether the *timing* of any announcement or other action by Durham constitutes a violation of [Department of Justice norms against election interference](#) and, thus, an abuse of power.) Any findings of criminal wrongdoing that Durham announces should therefore be viewed from that perspective.

There would be two overarching reasons to view the findings as illegitimate:

(1) There is no basis for suggesting that the 2016 Russia investigation was improperly pursued, much less that it was a crime.

Durham’s inquiry, which [morphed into a criminal investigation](#) at some unspecified date following its inception, is premised on the idea—promoted by both President Trump and Attorney General Barr—that FBI and IC personnel essentially fabricated a flimsy basis for investigating the Trump campaign. They then pursued the investigation, using faulty FISA warrants to surveil (or in Barr’s words “[spy on](#)”) members of the campaign, in order to “[sabotage](#)” Trump’s candidacy. Trump and many of his media supporters have linked [former Obama administration officials, including Democratic presidential nominee Joe Biden](#), to this effort.

While a review of the conduct of the 2016 Russia investigation by competent experts on intelligence-gathering techniques and procedures is not inappropriate, the aim of Durham’s inquiry is to establish that it was a purposeful and concerted effort to thwart Trump’s candidacy based on, as Barr put it, “[bogus](#)” evidence. On that score, the 2016

The Protect Democracy Project, Inc.
2020 Pennsylvania Ave., NW, Suite 163, Washington, DC 20006



Russia investigation has been repeatedly examined by neutral arbiters and found to be appropriately predicated. Moreover, it has produced voluminous evidence of criminal conduct—and threats to U.S. national security—by multiple actors. For example:

- The Department of Justice Office of the Inspector General (IG) conducted a thorough review of the FBI’s so-called “Crossfire Hurricane Investigation” and issued [multiple reports](#) finding both that the investigation into Trump’s campaign had adequate factual support and that the investigation was not tainted by anti-Trump animus. While the IG did find serious technical violations of the process for obtaining warrants under the Foreign Intelligence Surveillance Act, he referred only one person—a former career FBI lawyer—for criminal prosecution for altering the content of an email. He did not find any evidence to conclude that the government’s basis for investigating the Trump campaign was fabricated or improper.
- The Senate Intelligence Committee issued a [bipartisan report](#) concluding that the Russian government interfered in the 2016 election with the goal of helping to elect President Trump. In conjunction with the release of that report, Republican Senator Richard Burr said that there was no reason to dispute the intelligence community’s findings, which were based on “strong tradecraft” and “sound analytical reasoning.”
- Special Counsel Robert Mueller’s [investigation resulted in](#) 34 indictments, convictions, or guilty pleas, all of which have been examined and found sufficient by grand juries and courts, and none of which have been overturned for government misconduct of any kind. Indictments supported by probable cause, convictions secured by proof beyond a reasonable doubt, and guilty pleas secured by admissions of criminal conduct, all establish that the FBI and IC had a proper basis for their investigation.

(2) The Durham investigation is tainted by political interference from President Trump and improper guilt-presuming comments by Trump and AG Barr.

In addition to the lack of any factual predicate for Durham’s investigation, politically motivated criminal investigations that undermine due process [are unconstitutional and unethical](#), and Department personnel [cannot](#) lawfully pursue them. Durham’s investigation fits into this category because of Trump’s publicly expressed animus toward FBI and IC investigators, and public statements by Trump and Barr that have disparaged them and presumed their guilt.

The Protect Democracy Project, Inc.
2020 Pennsylvania Ave., NW, Suite 163, Washington, DC 20006



- [Article II](#), [various provisions of](#) the Bill of Rights, and [Department of Justice policies](#) all prohibit politically motivated criminal investigations and prosecutions. Department policy goes further and prohibits criminal enforcement activity that *appears to be* politically motivated. The Durham investigation violates these standards. First, Trump repeatedly and publicly called the Russia investigation a “hoax,” called the people who conducted it criminals, and demanded that the investigators be prosecuted and imprisoned. Barr initiated the Durham investigation in the midst of these public demands by Trump, and Durham is, of course, a political appointee. There is no possibility that an investigation that came to fruition in this manner could avoid the appearance that it is politically motivated and the product of Trump’s animus toward the Russia investigation.
- [The Constitution and Department of Justice policy](#) also prohibit conduct that interferes with the due process rights of individuals who are the subjects of criminal investigations. In particular, the Department’s [media policy](#) strictly prohibits Department personnel from commenting on ongoing investigations in any way that might prejudice a subject’s right to a fair trial—to include “observations about a defendant’s ... character” or “any opinion as to the defendant’s guilt.” Yet Trump and Barr have both done so repeatedly with respect to Durham’s investigation. Trump has routinely impugned the Russia investigators, many by name, at campaign rallies; White House speeches and press conferences; and on Twitter, accusing them of “[treason](#).” Barr, for his part, has [called](#) the Russia investigation “one of the greatest travesties in American history” and an effort to “sabotage the presidency.”

As Harvard Law School professor and former Bush administration official Jack Goldsmith [recently wrote](#), “No contemporary attorney general has, like Barr in the Durham investigation, offered such extended, opinionated, factually unsupported and damning public commentary, naming names and drawing conclusions, about an ongoing investigation that is at least in part a criminal investigation.” Furthermore, there is no reasonable possibility that the subjects of the Durham investigation could escape the poisonous effects on their due process rights from statements by the President of the United States, who, [as the Supreme Court has noted](#) “possesses an extraordinary power to speak to his fellow citizens and on their behalf.”

In sum, [as one expert commentator recently noted](#), given the extensive oversight of the Russia investigation that has already occurred, “Durham’s additional inquiry seems useful only to those unwilling to accept the facts that have been unearthed.” For that reason, and because of clear political bias and misconduct by Trump and Barr, any



findings from the Durham investigation that suggest the Russia investigators have committed criminal acts or that they sought to sabotage the presidency—and certainly any effort by Barr to summarize or characterize such findings—will lack any semblance of credibility and should be treated as such.