Amended Complaint — Corrected Identifiers/No Change In Content
Delivered by email

Hamilton P. Fox, III
Office of Disciplinary Counsel
Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

July 23, 2020

Re: Professional Responsibility Investigation of William P. Barr

Dear Mr. Fox:

As members in good standing of the District of Columbia Bar (DC Bar) and officers of the court, we write to express our concern about actions taken by the Attorney General of the United States, William P. Barr, that we believe undermine the rule of law, interfere with the administration of justice, and diminish public confidence in the legal system. We believe that these actions are in contravention of the D.C. Rules of Professional Conduct (DCRPC or "Rules") and Disciplinary Rules. Consequently, we respectfully urge the DC Bar's Office of Disciplinary Counsel to commence an investigation to determine whether Mr. Barr, who is a member of the DC Bar, should be subject to disciplinary action under the Rules.

I. INTRODUCTION

To enable the American people to have confidence in the fairness, justice and impartiality of the legal system and enable clients to have confidence in their lawyers, members of the D.C. Bar are subject to important ethical obligations. These include the duties to avoid dishonesty, deceit, misrepresentation, or serious interference with the administration of justice under DCRPC 8.4(c) and 8.4(d). Moreover, lawyers are bound by a duty of loyalty that requires every lawyer to zealously represent the lawyer's own client's interests – not a third party's interests or the lawyer's own personal interest. *See* DCRPC 1.3 and 1.7.(b)(4). In addition, lawyers take an oath to support the laws and Constitution, and violations of that oath can be sanctioned under Disciplinary Rule XI.

As described in this complaint, Attorney General Barr has violated these ethical obligations. *Mr. Barr's client is the United States, and not the President*. Yet, Mr. Barr has consistently made decisions and taken action to serve the personal and political self-interests of President Donald Trump, rather than the interest of the United States. In dealing with the Mueller Report and the report of the Justice Department's Inspector General on the FBI's investigation of Russian interference in the 2016 election, Mr. Barr has been dishonest, misrepresenting facts and law

to Congress and the public. In the course of the events at Lafayette Square on June 1, 2020, according to impartial accounts, Mr. Barr oversaw, ordered and supported a gross violation of Americans' foundational rights under the First and Fourth Amendments to the Constitution.

These violations of Mr. Barr's ethical duties are not haphazard or by chance. They embody a consistent pattern. As the New York City Bar Association's June 23, 2020, letter to Congress stated:[1]

> Mr. Barr's recent actions … continue – and exacerbate – a pattern of conduct that has undermined public confidence in the role of the Department of Justice (DOJ) in enforcing the rule of law in our nation. That is the exact opposite of the Attorney General's proper role, which Mr. Barr correctly acknowledged at his Senate confirmation hearing must be to lead a DOJ that is the "place in government where the rule of law – not politics – holds sway and where [the American people] will be treated fairly based solely on the facts and an even handed application of the law."

The DCRPC and Disciplinary Rules reflect the norms and expectations about the conduct of lawyers in our society. Importantly, Mr. Barr, as our chief law enforcement officer, occupies a position that serves as a model for other lawyers, particularly government lawyers. Thus, serious ethical deviations on his part carry enormous consequences for our profession as a whole. Where a lawyer in Mr. Barr's position has violated the basic standards of honesty, trustworthiness, and other guideposts of ethical conduct governing lawyers, the Office of Disciplinary Counsel is in a unique, independent position to investigate his conduct.[2]

To protect the ethical standards of our profession, its integrity, and the public's confidence in the law, we urge the Office of Disciplinary Counsel to undertake a prompt investigation of Mr. Barr's conduct and impose discipline appropriate to the gravity of his violations.

---

[1] Quotations and factual sources throughout this complaint are in blue underlined hyperlinks.

[2] As members of the DC Bar, we are guided by the spirit of DCRPC 8.3(a) to report certain violations of the Rules of Professional Conduct by fellow members of the Bar. Specifically, Rule 8.3(a) provides:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

The kinds of violations to which DCRPC 8.3(a) speaks are the very kinds of violations in which Mr. Barr has engaged: "dishonesty," "misrepresentations" and lack of "trustworthiness." Without implying a broad mandatory reporting duty here, we emphasize that the rule is particularly salient because Mr. Barr's violations have been so serious and repetitive, and his role as Attorney General has such a profound impact on the integrity of the American system of justice and the legal profession.

II. SUMMARY OF COMPLAINT

This complaint alleges four actions by Attorney General Barr that violate the DC Bar Rules of Professional Conduct. Those violations involve dishonesty, deceit and misrepresentation; interference with the impartial administration of justice; conflict of interest; and violation of the lawyer's oath to support the Constitution. Understanding the serious nature of Mr. Barr's misconduct requires the detailed, factual examination that the body of this complaint undertakes.

Underlying each violation runs a central theme: Mr. Barr breached his duty to loyally and zealously advocate for his client, the United States, representing the American people, not the president. And while each of the violations stands individually, the *pattern* of professional misconduct they form as a whole is greater than the sum of their parts.

1. In absolving the president of criminal liability for obstructing justice upon receiving the Mueller Report last year, Mr. Barr repeatedly engaged in dishonest and deceitful conduct. His Senate defense of his determination of insufficient evidence to prove Mr. Trump's obstruction was transparently untenable, as 1000 prosecutors publicly stated.

2. In abandoning all precedent by attacking an inspector general's report, Mr. Barr acted in alignment with the president's narrative that the FBI's investigation into his campaign was illegitimate. Mr. Barr rested his "beyond unusual" attack on half-truth, mischaracterization and deceptive concealment of facts.

3. Asked in a televised interview about any FBI misconduct during the investigation of the Trump campaign, Mr. Barr abandoned the rules of his Department and of professional responsibility by publicly maligning the conduct of FBI personnel who are the subject of a criminal investigation; Mr. Barr thereby undermined the fairness of future criminal proceedings involving those individuals. He did so using language that no ethical prosecutor would use in public comments about individuals under investigation.

4. In overseeing and ordering the unconstitutional attack on citizens peacefully protesting in Lafayette Square, the attorney general violated his lawyer's oath. With the whole world watching, he demonstrated the starkest, anti-constitutional harm that a conflict of interest can cause.

We are dealing here with no ordinary lawyer. This is the highest law enforcement officer in the nation. His violations of professional responsibility bring more damage to the reputation of our profession and its integrity than violations by any other attorney in the country. As eminent ethics expert Stephen Gillers has stated, "We don't have an attorney general now. We have an additional lawyer for the President."

III. ARGUMENT

A. COUNT ONE: Mr. Barr's Statements that the Mueller Report's Evidence Was Insufficient to Prove the President Guilty of Obstructing Justice Violated DC Rule of Professional Responsibility 8.4(c).

1. FACTUAL BACKGROUND

a. Mr. Barr's Pre-Appointment Memo on Obstruction

On June 8, 2018, as an attorney still in private practice, Mr. Barr sent an unsolicited memo to then-Deputy Attorney General Rod Rosenstein. The memo set forth Mr. Barr's view of presidential authority, characterizing as outside constitutional bounds most obstruction of justice charges the special prosecutor was reportedly investigating. Mr. Barr did note one important exception:

> Obviously, the President and any other official can commit obstruction in this classic sense of sabotaging a proceeding's truth-finding function. Thus, for example, if a President knowingly destroys or alters evidence, suborns perjury, or *induces a witness to change testimony*, or commits any act *deliberately impairing the integrity or availability of evidence*, then he, like anyone else, commits the crime of obstruction. [Italics added.]

b. The Mueller Report's Volume II: Obstruction

Following Mr. Barr's February 2019 confirmation as attorney general, on March 22, 2019, Special Counsel Mueller delivered to Mr. Barr a 448-page report containing the evidence adduced in his 22-month Russia investigation. The second half of the report set out ten episodes of conduct that could form the basis for charging Mr. Trump with obstructing justice —were he not a sitting President whose prosecution while in office is barred by the Justice Department's preexisting interpretation of the Constitution.[3]

The special counsel refrained from expressing a view on whether the president committed obstruction of justice.[4] Nevertheless, the special counsel concluded that:

> [I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state.

---

[3] The Mueller Report stated that "multiple acts by the President were capable of exerting undue influence over law enforcement investigations, including the Russian-interference and obstruction investigations." Mueller Report, Vol. II (MR-II) at 157.

[4] He reasoned that: 1) a DOJ Office of Legal Counsel memorandum advises against prosecution of a sitting president; and 2) accusing the President of a crime without "a neutral adjudicatory forum to [determine guilt or innocence until after he had left office] . . . counseled against" reaching a conclusion that the President had committed crimes . . . . MR-II at 1-2.

> Based on the facts and the applicable legal standards, however, we are unable to reach that judgment.

MR-II at 2.

For purposes of Mr. Barr's March 24, 2019, decision of insufficient obstruction evidence, we focus on his treatment of two intertwined episodes of possible obstruction of justice by the president. Those episodes, examined in detail, illustrates how the attorney general's conduct violated DCRPC 8.4(c).[5]

i. Episode E: The President's Instruction to McGahn to have Mueller Fired

Episode E involved a late May or early June 2017 presidential instruction to White House counsel Don McGahn to have Deputy Attorney General Rod Rosenstein remove Mueller because of his purported conflicts of interest. The alleged conflict centered on: (1) Mueller's conversation with the president, before Mueller's appointment, about the directorship of the FBI; (2) a purported fee dispute Mueller had at a Trump golf club; and (3) Mueller's prior law firm's having represented a potential subject in the Russia investigation. Presidential advisor Steve Bannon told the president that the first two claims were "ridiculous," and that "none was real." MR-II at 81. On May 18, 2017, the day after Mueller's appointment, the Justice Department's ethics office had cleared Mueller of the third ground of conflict asserted by the President.

ii. Episode I: The President's Attempt to Alter the Evidence of Episode E

With Episode E as backdrop, Episode I involved the most egregious evidence of obstruction: Mr. Trump's June 2017 order to McGahn (a) to change his account — already provided to Special Counsel Mueller — of Mr. Trump's instruction to fire Mueller and (b) to memorialize the change.

The Report set forth an overview of the episode:

> In late January 2018, the media reported that in June 2017 the President had ordered McGahn to have the Special Counsel fired based on purported conflicts of interest but McGahn had refused, saying he would quit instead. After the story broke, the President, through [others], sought to have McGahn deny that he had been directed to remove the Special Counsel. . . . . McGahn responded that *he would not refute the press accounts because they were accurate* in reporting on the President's effort to have the Special Counsel removed. The President later personally met

[5] Detailed analysis of both the evidence and Mr. Barr's presentation of it is required to evaluate how that presentation constituted dishonesty and serious interference in the administration of justice.

> with McGahn . . . and *tried to get McGahn to say that the President never ordered him to fire the Special Counsel. McGahn refused* and insisted his memory of the President's direction to remove the Special Counsel was accurate. In that same meeting, the President challenged McGahn for taking notes of his discussions with the President and asked why he had told Special Counsel investigators that he had been directed to have the Special Counsel removed. (MR-II at 113.)

The Report stated at page 120:

> *Substantial evidence indicates that* in repeatedly urging McGahn to dispute that he was ordered to have the Special Counsel terminated, *the President acted f*or the purpose of influencing McGahn's account in order *to deflect or prevent further scrutiny* of the President's conduct towards the investigation . . . .
>
> The President made repeated attempts to get McGahn to change his story . . . . The President had already laid the groundwork for pressing McGahn to alter his account by telling [presidential aide, Rob] Porter that it might be necessary to fire McGahn if he did not deny the story, and Porter relayed that statement to McGahn.

In that conversation with Porter in February 2018, the president said he wanted McGahn to write, "for our records," a letter denying that Mr. Trump had said he wanted Mueller fired. MR-II at 115:

> McGahn told Porter that the President had been insistent on firing the Special Counsel and that McGahn had planned to resign rather than carry out the order . . . . *McGahn said he would not write* the letter the President had requested.

MR-II at 116. Mueller found McGahn, who took contemporaneous notes and had a reputation for truthfulness, to be "a credible witness." MR-II at 88 (All italics above added.)

The Report also included evidence of a February 2018 statement by the president to McGahn after the president had read press accounts of McGahn's interviews with the special counsel. In the president's statement, he maintained that his May or June 2017 instruction had actually been that McGahn "raise the conflicts issue with Rosenstein and leave it to him to decide what to do." MR-II at 117.

McGahn disputed that account:

> McGahn told the President he did not understand the conversation that way and instead had heard, "Call Rod. There are conflicts. Mueller has to

> go." The President asked McGahn whether he would "do a correction," and McGahn said no.

MR-II at 117.

c. Mr. Barr's Presentations of the Mueller Report and Mr. Barr's Decision to Absolve the President

On March 24, 2019, two days after receiving the Mueller Report, the attorney general sent a four-page letter to Congress. It purported to describe the Report's principal conclusions. In the letter, Mr. Barr announced that he was absolving the President of any criminal responsibility for obstruction of justice:

> After reviewing the Special Counsel's final report on these issues [and] consulting with Department officials . . . Deputy Attorney General Rod Rosenstein and I have concluded that *the evidence* developed during the Special Counsel's investigation *is not sufficient* to establish that the President committed an obstruction-of-justice offense. Our determination was made without regard to, and *is not based on, the constitutional considerations* that surround the indictment and criminal prosecution of a sitting president. [Italics added.]

On March 27, 2019, Mueller sent a letter to Mr. Barr. It stated that Mr. Barr's March 24, 2019, letter to Congress "did not fully capture the context, nature, and substance of this Office's work and conclusions." Mueller urged Mr. Barr to release immediately the Report's executive summaries: "There is now public confusion about critical aspects of the results of our investigation."

Mr. Barr did not release any materials from the Report until April 18, 2019, when he sent Congress the redacted Report. Before doing so, he held a press conference in which he repeated that the Deputy Attorney General and he had determined that the Mueller evidence was insufficient to charge the president with obstruction of justice. In the course of his statement, Mr. Barr asserted:

> The White House fully cooperated with the Special Counsel's investigation, providing unfettered access to campaign and White House documents, directing senior aides to testify freely, and asserting no privilege claims. And at the same time, the President took no act that in fact deprived the Special Counsel of the documents and witnesses necessary to complete his investigation.

Mr. Barr made no mention that the president, himself, refused to be interviewed. In addition, Mr. Barr emphasized the Report's reference to evidence that "the President believed that the erroneous perception he was under investigation harmed his ability to manage domestic and for-

eign affairs." The attorney general made no mention of the passage that immediately followed: "Other evidence . . . indicates that the President wanted to protect himself from an investigation into his campaign."[6]

d. Mr. Barr's May 1, 2019, Senate Testimony Explaining His Decision

In his May 1, 2019, testimony before the Senate Judiciary Committee, Mr. Barr explained his determination that the evidence of obstruction was insufficient:

> We felt that that episode [involving the President directing McGahn to create a document that McGahn regarded as false], the government would not be able to establish obstruction.
>
> McGahn's version . . . is quite clear . . . that the instruction said, "Go to Rosenstein, raise the issue of conflict of interest and Mueller has to go because of this conflict of interest . . . ."
>
> The President later said that what he meant was that the conflict of interest should be raised with Rosenstein but the decision should be left with Rosenstein.
>
> On the other end of the spectrum, it appears that McGahn felt it was more directive, and that the President was essentially saying, "Push Rosenstein to invoke a conflict of interest to push Mueller out . . . ."

Mr. Barr then explained his reasoning with respect to what he described as the Special Counsel's inability to prove two elements of obstruction -- an obstructive act and corrupt intent:

> [T]he [January 25, 2018] *New York Times* story was very different . . . The *New York Times* story said flat out that the President directed the firing of Mueller. He told McGahn, "Fire Mueller." Now there's something very different between firing a Special Counsel outright*, which suggests ending the investigation,* and having a Special Counsel removed for conflic*t, which suggests you are going to have another Special Counsel* . . . . [Emphasis Mr. Barr's in C-Span recording.]
>
> And then, as the Report says and recognizes, there is evidence that the President truly felt that the *Times* article was inaccurate, and he wanted McGahn to correct it.

---

[6] On page 20 of a March 5, 2020, opinion, quoted more fully below at page 12, District Court Judge Reggie Walton described Mr. Barr's presentations as "misleading."

> So we believe that it would be impossible for the government to establish beyond a reasonable doubt that the President understood that he was instructing McGahn to say something false because it wasn't necessarily false.

Next, Mr. Barr pointed to a fact that he regarded as undermining another element of obstruction – an obstructive act's "nexus" to a proceeding:

> Moreover, *McGahn had weeks before already given testimony* to the Special Counsel and the President was aware of that . . . . And as the Report indicates, it could also have been the case that he was primarily concerned about press reports and making it clear that he had never outright directed the firing of Mueller.
>
> So in terms of the request to ask McGahn to memorialize that fact, we did not think in this case that the government could show corrupt intent beyond a reasonable doubt. [Italics added.]

On the issue of the difference between an outright firing and having a special counsel removed for a conflict, the attorney general also testified:

> The difference between them is that if you remove someone for a conflict of interest, then there would be, *presumably*, another person appointed. [Italics added. 55.18.]

Later in the hearing, Mr. Barr elaborated on his prior testimony that McGahn had "already given evidence to the special counsel":

> [I]t's hard to establish the nexus to the proceeding because he already had testified to the special counsel, he'd given his evidence. [2:05:46]

Days after this testimony, more than 1000 former prosecutors signed a statement strongly disputing Mr. Barr's conclusion that the Mueller report set forth insufficient evidence to result in prosecution:

> We emphasize that *these are not matters of close professional judgment*. [T]o look at these facts and say that a prosecutor could not probably sustain a conviction for obstruction of justice — the standard set out in Principles of Federal Prosecution — runs counter to logic and our experience. [Italics added.]

2. LEGAL ANALYSIS

As a preliminary matter, the DCRPC applies to the attorney general. 28 U.S.C. § 530B;

28 C.F.R § 77.2. Mr. Barr has been a member of this Bar since 1978.

DCRPC 8.4(c) provides: "It is professional misconduct for a lawyer to . . . (c) [e]ngage in conduct involving dishonesty . . . deceit, or misrepresentation."

a. DCRPC 8.4(c)'s Legal Standards

Under the Rule,

> "[D]ishonesty" . . . encompasses fraudulent, deceitful, or misrepresentative behavior. In addition to these, however, it encompasses "a lack of probity . . . integrity . . . fairness and straightforwardness"; statements that are "technically true" but fail to state the whole truth qualify as "conduct . . . of a dishonest character."

Matter of Shorter, 570 A.2d 760, 768 (DC 1990) (italics added).[7] Thus, lies, half-truths, and misrepresentative behavior, including legal advice premised upon inaccurate representations of the law, violate DCRPC 8.4(c). *See In re Kline*, 298 Kan. 96, 199 (Kan. 2013) (attorney general leaving grand jury with "mistaken impression as to the law" violated Kansas PRC 8.3(c).).

These principles apply with special force to government officials and prosecutors who owe an even higher duty to the public than ordinary lawyers, government officials having been entrusted with authority granted by the people. *People v. Larsen*, 808 P.2d 1265, 1267 (Colo. 1991). As the Court stated in *Lawyer Disciplinary Bd. v. Clifton,* 236 W.Va. 362, 378(W. Va. 2015):

> Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office.

---

[7] The *Shorter* court wrote:

> [Deceit is t]he suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact," 26 CJS *Deceit* (1956), and is thus a subcategory of fraud. "[Misrepresentation is] the statement made by a party that a thing is in fact a particular way, when it is not so; untrue representation; false or incorrect statements or account.

Id. at 768 n.13.

Accord Plaquemines Par. Com'n Council v. Delta Dev., 502 So. 2d 1034, 1039-40 (La. 1987).[8] Thus, sworn Congressional testimony by a government lawyer is a circumstance where "failure to make a disclosure is the equivalent of an affirmative misrepresentation." *See* DC Bar Legal Ethics Op. 336 (2006); *State ex rel. Nebraska State Bar Association v. Douglas,* 227 Neb. 1, 25 (Neb. 1987) (state attorney general, "[i]f he speaks at all, *must make a full and fair disclosure."*).[9] All the more so for the *head* of the Justice Department, given its "truth-seeking mission." Justice Manual, §9.5002.

Two closely related, basic duties that members of the bar owe their clients are the duty of loyalty, DC Bar Legal Ethics Op. 272 (1997), and the duty to "represent a client zealously and diligently within the bounds of the law." DCRPC 1.3(a). As to the first duty, in the case of the attorney general, his "client is the United States." Green and Roiphe, "*May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L.REV. 1817, 1828 (2019); *see Berger v. United States,* 295 U.S. 78, 88 (1935) (The U.S. Attorney "is the representative not of an ordinary party . . . but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.")

Central to a federal prosecutors' duty of client loyalty is the United States' interest that justice be done and the United States government's obligation to serve "the public interest." *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987); *accord*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). Under the US Justice Department's "Principles of Federal Prosecution," the public interest in prosecutorial practices is in advancing the "fair, evenhanded administration of federal criminal laws." Justice Manual §9-27.001.

For purposes of the attorney general's ethical responsibilities, while the president has a proper role in setting general prosecutorial policy, "the president is not the federal prosecutor's client." Green and Roiphe, *supra, at* 1827-28. In particular, "partisan concerns . . . are considered impermissible motivating factors in prosecutorial decision-making." *Id*. at 1826; *see In re Members of State Bar of Ariz., Thomas et al.,* No. 09-2293, PDJ-2011-9002 at 232 (Ariz. Apr. 10, 2011) (county prosecutor disbarred for charging political rival with a crime); *accord, In re*

---

[8] The Court stated:

> Public officials occupy positions of public trust . . . . The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.

Accord, ABA Model Rule 8.4(c), Comment 7: "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."

[9] In *Douglas*, the Nebraska Supreme Court emphasized that the then-Attorney General was being questioned as a suspect in the matter. While suspects generally have no obligation to volunteer the whole truth, the court emphasized that the situation was different for an attorney general: "When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud." 227 Neb. at 23.

Christoff, 690 N.E.2d 1135, 1141 (Ind. 1997).

As the Supreme Court stated in *Young,* 481 U.S. at 810:

> It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a *rigorously disinterested* fashion . . . . We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that *threaten to compromise the performance of their duty*. [Italics added.]

The Justice Department Manual, §1-8.100, makes the same point:

> 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 f*ree from partisan consideration*. [Italics added.]

Finally, the US Justice Department's "Principles of Federal Prosecution" set the following standard for initiating a prosecution:

> The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will *probably* be sufficient to obtain and sustain a conviction . . . . [Italics added.]

DOJ Justice Manual, § 9-27.220.

b. Mr. Barr's Public Presentations of the Mueller Report and His Senate Testimony Explaining His Rationale for Absolving the President Failed DCRPC 8.4(c)'s Standards of Honesty and Integrity.

Both in Mr. Barr's (i) public presentations of the Mueller Report on March 24 and April 18, 2019, and in his (ii) May 1, 2019, Senate Judiciary Committee testimony defending his decision to absolve Mr. Trump of criminal liability for obstructing justice, his conduct demonstrated "a lack of probity . . . integrity . . . fairness and straightforwardness," *Matter of Shorter,* 570 A.2d at 760, in violation of Rule 8.4(c).

i. Mr. Barr's March 24 and April 18, 2019, Mueller Report Presentations Fail DCRPC 8.4(c)'s Standards

In a March 5, 2020, opinion reviewing Mr. Barr's handling of the Mueller report, District Court Judge Reggie Walton cited Mr. Barr's "lack of candor" when he "distorted the findings of the Report" to the public. In a scathing rebuke of the Attorney General's veracity, Judge Walton

stated:

> [T]he Court cannot reconcile certain public representations made by Attorney General Barr with the findings in the Mueller Report. Inconsistencies between Attorney General Barr's statements, made at a time when the public did not have access to the redacted version of the Mueller Report to assess the veracity of his statements, and portions of the redacted version of the Mueller Report that conflict with those statements cause the Court to seriously question whether Attorney General Barr made a calculated attempt to *influence public discourse about the Mueller Report in favor of President Trump* despite certain findings in the redacted version of the Mueller Report to the contrary. [Italics added.]

The misconduct that Judge Walton pinpointed was significant: Distorting the Mueller Report in ways as to which even the special counsel felt compelled to take issue — all while the public had no opportunity to evaluate the truth of Mr. Barr's characterizations against actual text for more than three weeks. By that time, the attorney general's absolving Mr. Trump had become entrenched in the public mind.

On April 18, 2019, in his press conference just before releasing the redacted Report, Mr. Barr made the deceptive statement that Mr. Trump "took no act that in fact deprived the Special Counsel of the documents and witnesses necessary to complete his investigation." Substantial portions of the public audience not following the investigation closely might well not have in mind — or even been aware of — Mr. Trump's refusal to be interviewed. That is even more so as to Mr. Trump's multiple, behind-the-scenes efforts to undermine the investigation. Mr. Barr mentioned neither.

Even Harvard Law School Professor (and former Assistant Attorney General) Jack Goldsmith, who defended Mr. Barr in other respects, wrote that here, the attorney general "went too far":

> The truth is that the president himself — in his refusal to give a personal interview, and especially in his tweets and actions to harass and threaten and try to impact the Justice Department and special counsel — did not cooperate, much less fully cooperate.

Further, Mr. Barr singled out the Report's reference to evidence favorable to Mr. Trump, making no mention of a contrary reference that immediately followed. *See* pp. 7-8, *ante.* In the circumstance of a public unlikely to read a 448-page report, these half-truths and deceptive statements failed the standards of DCRPC 8.4(c).

Again, critique from Professor Goldsmith, no foe of Mr. Barr, is revealing:

> Barr opened himself up to legitimate criticism when he assiduously avoided commenting on the merits of extra-criminal conduct that would be harmful to the president but appeared to comment on such conduct when it was helpful to the president. "We are not in the business of exoneration," Barr testified. But in some places, especially with respect to the Trump campaign and Russia, he seemed to try to do just that.

ii. Mr. Barr's May 1, 2019, Rationale for Determining that the Special Counsel's Evidence Was Insufficient Rested Upon Flatly Erroneous Legal Premises, Half-Truths and Misrepresentations, Failing DCRPC 8.4(c)'s Standards.

Even more seriously, in the Attorney General's May 1, 2019, Senate Judiciary Committee testimony, Mr. Barr relied upon blatantly erroneous legal principles and half-truths and engaged in "misrepresentative behavior" — as described in detail immediately below — that violates Rule 8.4(c) under *Shorter,* 570 A.2d at 760. An honest application of the relevant facts and law, as is a government lawyer's professional responsibility, would have cut the legs from under Mr. Barr's determination that the evidence was insufficient to prove obstruction in Mr. Trump's attempts to induce McGahn to falsify evidence.

(a) Mr. Barr's Dishonest Senate Presentation Regarding the "Obstructive Act" and "Corrupt Intent" Elements Violated DCRPC 8.4(c).

Mr. Barr's defense of his insufficient evidence determination, quoted above at pages 8-9, corresponded to the three elements of an obstruction violation under 18 USC § 1512(c): 1) an obstructive act, 2) a "nexus" to a legal proceeding, and 3) "corrupt intent." *See, e.g.*, *United States v. Gordon, 7*10 F.3d 1124, 1151 (10th Cir. 2013). His presentation as to each was deceptive and dishonest.

When Mr. Barr explained why he believed the government could not prove "an obstructive act," he credited an implausible defense: that Mr. Trump was simply asking McGahn to correct a news story. Mr. Barr minimized, and generally ignored, the true obstructive act, the one for which Mueller reported compelling evidence: Mr. Trump was working overtime, even *threatening* McGahn, to get McGahn to say, and make a record, that the president had not given an order to have Mueller fired. *See* MR-II at 117-119 and pp. 5-6 *infra.*

At the very least, it was "probable," DOJ Justice Manual, § 9-27.220, that a reasonable jury would disbelieve that the president wanted a "record made" to correct a news story. Most obviously, he wanted a document created to "cover" him from charges of interfering with the investigation and thereby obstructing justice. Even if the president also hoped to correct the news article, mixed motives are no defense if one motive is corrupt. *United States v. Fayer*, 523 F.2d

661, 663 (2d Cir. 1975).[10] Mr. Barr's argument ignored that settled law, which completely undercuts the purported defense which the attorney general said would make prosecution impossible. Such conduct before Congress demonstrated "a lack of probity . . . integrity . . . fairness and straightforwardness." *Matter of Shorter,* 570 A.2d at 760.

In addition, the attorney general argued that the president's focus on Mueller's purported conflict was a very big deal that "presumably" signified that the president intended to have a replacement special counsel appointed. Mr. Barr's argument was irreconcilable with settled law directing fact-finders to look to the "pattern of conduct" and "totality of the evidence" in assessing intent. *See, e.g.*, *United States v. Watt*, 911 F.Supp. 538, 558 (DDC 1995). Here, no common sense juror would believe that, had the president succeeded in getting Mueller removed, he would have tolerated a replacement.

In any trial, if a pattern of conduct like Mr. Trump's exists, jurors would be directed to consider it. He had previously made many elaborate efforts to terminate the investigation altogether. For example, he asked Corey Lewandowsky, an outside advisor, to carry an instruction for then-Attorney General Sessions to "un-recuse" and direct Mueller to limit his investigation to *future* election meddling. MR-II at 91, 97-98. Simultaneously, the president publicly "attacked Sessions and raised questions about his job security." MR-II at 98. "Taken together, the President's directives indicate that Sessions was being instructed to tell the Special Counsel to *end the existing investigation into the President and his election campaign*." *Ibid.* (Italics added.)

In essence, in attempting to justify a legally insupportable decision, Mr. Barr's Senate presentation failed to properly follow and apply the law and thus, he violated DCRPC 8.4(c). *In re Kline*, 298 Kan. at 199. Under D.C. Bar Disciplinary Rule XI, Section 2(b), "Acts or omissions by an attorney . . . which violate the . . . the rules or code of professional conduct . . . shall constitute misconduct and shall be grounds for discipline."

A final point illustrates the attorney general's dishonesty in stating to the Senate that the president's evidence of non-corrupt intent was so significant as to prevent the government from proving guilt. For Mr. Barr's conclusion to be sound, there would have to be reasonable doubt about (a) whether McGahn was telling the truth when he stated repeatedly that Mr. Trump had directed him to have Mueller fired; and similar doubt about (b) McGahn's truthfulness in denying that Trump had told him simply to let Rosenstein decide. For there to be such doubt would depend upon a jury's believing that McGahn was lying and Mr. Trump was telling the truth. In fact, McGahn took contemporaneous notes, and Mueller specifically found McGahn to be "a credible witness." MR-II at 88. By contrast, Mr. Trump's false statements (on many subjects)

---

[10] *Accord*, *United States v. Smith*, 831 F.3d 1207, 1217 (9th Cir. 2016) ("A defendant's unlawful purpose to obstruct justice is not negated by the simultaneous presence of another motive for his overall conduct."); *see* Daniel Hemel & Eric Posner, *Presidential Obstruction of Justice*, 106 CAL. L.REV. 1277, 1319–20 (2018) (mixed motive for an obstructive act is not a defense if, but for the improper motive, the act would not have been taken).

during his presidency number in the thousands upon thousands.

It strains credulity to believe that a lawyer as experienced, savvy and critically intelligent as Mr. Barr would honestly conclude that a jury would "probably," DOJ Justice Manual, § 9-27.220 have reasonable doubt about the truth of McGahn's testimony in a "credibility battle" with Mr. Trump over his instruction to fire Mueller. Contemporaneous notes corroborated McGahn's version. McGahn's insistence on sticking to it despite presidential firing threats powerfully bolstered his credibility.

By contrast, Mr. Trump's denial of an attempt to fire Mueller — which the attorney general credited as creating reasonable doubt about the president's "corrupt intent" — was a denial that any reasonable juror would recognize as self-serving — and coming from a man with a long history of self-serving falsehoods. Mr. Barr's Senate testimony about the supposed difficulty of proving Mr. Trump's corrupt intent was patently dishonest.

Former General CIA Counsel Jeffrey H. Smith concisely summarized Mr. Barr's dishonest Senate presentation:

> His answers to many questions were deeply troubling. He appeared to be struggling to find a way to say no when the truthful answer was yes. In doing so he seemed to act as an advocate for the president rather than an Attorney General whose first duty is to the rule of law, regardless of the political consequences.
>
> Our system of government will not work if our most senior officials cannot tell the truth to Congress. Integrity is the essential lubricant of the machinery of government. Sadly, it was not evident in many of Mr. Barr's responses.

In deploying misrepresentation to act as "an advocate for the president" — and particularly, to create a public misimpression of Mr. Trump's innocence — Mr. Barr abandoned a preeminent interest of his client, the United States, as described by his own Department's Justice Manual, §1-8.100: "The evenhanded administration of justice . . . [where] the legal judgments of the Department of Justice must be impartial and insulated from political influence . . . and . . . free from partisan consideration."

(b) Mr. Barr's Dishonest Senate Presentation of the "Nexus" Element Violated DCRPC 8.4(c).

Mr. Barr attempted to undermine the government's ability to prove the nexus element on the ground that "McGahn . . . had already given . . . evidence [to the Special Counsel]." Again, Mr. Barr's presentation distorted settled obstruction law. It provides that a "nexus" exists notwithstanding a witness's having already given her testimony, so long as the proceeding is not complete. *United States v. Jackson*, 513 F.2d 456, 460 (DC Cir. 1975) (because trial was not over, nexus still existed where witness was threatened after he had testified at trial and *been ex-*

cused); *Kloss v. United States*, 77 F.2d 462, 464 (8th Cir. 1935). The special counsel could have: (1) recalled McGahn any time for further questioning during the investigation, or (2) called him as a witness should the investigation proceed to a grand jury or a trial. *See* MR-II at 119. Mr. Barr's presenting an argument wholly contradicted by applicable and material law violates DCRPC 8.4(c). *See In re Kline*, 298 Kan. at 211.

Mr. Barr's "lack of probity . . . integrity . . . fairness and straightforwardness," *Matter of Shorter*, 570 A.2d at 760, demonstrates an abandonment of his obligations under DCRPC 8.4(c) to conduct himself with honesty; and to devote himself loyally to the interests of the United States to enforce the law even-handedly without fear or favor to the powerful. Whatever Mr. Barr's motives in absolving the president on obstruction of justice, the public record demonstrates flagrant violations of his duty as a government lawyer to conduct himself with unimpeachable integrity. Telling Congress and the American people "the half-truth, the whole half-truth and nothing but the half-truth" breaches a lawyer's professional responsibility under DCRPC 8.4(c).

B. COUNT TWO: Mr. Barr's Attack on the Inspector General's Report Violated DC Rule of Professional Conduct 8.4(c).

1. FACTUAL BACKGROUND

On December 9, 2019, the Justice Department's independent Inspector General (IG) issued a Report determining that the FBI had legitimately initiated "Crossfire Hurricane," the Bureau's 2016 investigation into whether the Trump campaign coordinated with Russia in its election interference efforts. In technical terms, the IG concluded that the FBI opened Crossfire Hurricane with proper "predication" — an "authorized purpose" and an "articulable factual basis."[11]

The day after the Report was released, in a televised interview, the attorney general did something "beyond unusual": He attacked an independent IG Report. In particular — and consistent with Mr. Trump's longstanding narrative that the Russia investigation was "illegal," a "witch hunt" and a "hoax" — Mr. Barr challenged the Report's determination regarding the legitimate origins of the FBI investigation.

In the words of William Webster, retired judge and former FBI and CIA Director under President Reagan, "The country can ill afford to have a chief law enforcement officer dispute the Justice Department's own independent inspector general's report."

[11] The IG made his determination pursuant to authority that Congress has vested in inspectors general. The IG also determined that individual agents' conduct in obtaining Crossfire Hurricane's FISA warrants failed on multiple occasions to comply with Departmental policy.

a. The IG Report Found That The FBI's Initiation of "Crossfire Hurricane" Was Properly "Predicated" Because It Fully Complied With Department Policy

The IG Report, on pages 49-50, set forth the context of the FBI's July 31, 2016, decision to open Crossfire Hurricane.

1. In spring 2016, the FBI identified "a spear phishing campaign by the Russian military intelligence agency . . . targeting email addresses associated with the DNC [Democratic National Committee] and the Hillary Clinton campaign . . . ."

2. "In June and July 2016, stolen materials were released online through [Russian military intelligence's] fictitious *personas,* 'Guccifer 2.0' and 'DCLeaks.'"

3. On July 22, 2016, "Wikileaks released emails obtained from DNC servers as part of its 'Hillary Leak Series,'" and the FBI "had reason to believe that *Russia may have been* connected *to the WikiLeaks disclosures* . . . ." (IG Report, p. ii and 346) [Italics added.]

4. Starting in March 2016, "the FBI became aware of numerous [Russian] attempts to hack into state election systems."

After identifying these events, the Report stated at page 50:

> *It was in this context* that the FBI received information on July 28, 2016, about a conversation between [Trump campaign advisor George] Papadopoulos and an official of a Friendly Foreign Government (FFG) in May 2016 during which Papadopoulos "suggested the Trump team had received some kind of suggestion" from Russia that it could assist this process with the anonymous release of information during the campaign that would be damaging to candidate Clinton and President Obama . . . . [T]he FBI opened the Crossfire Hurricane investigation 3 days after receiving this information. [Italics added.]

The Report described "predication" at page 351:

> For full counterintelligence investigations such as Crossfire Hurricane . . . , Section 11.B.4 of the AG Guidelines and Section 7 of the DIOG [Domestic Investigation and Operations Guide] state that the required level of predication is an "articulable factual basis" that "reasonably indicates" that any one of three defined circumstances exists, including:

> An activity constituting a federal crime or a *threat to the national security* has or may have occurred, is or may be occurring, or will or may occur and the investigation *may obtain information* relating to the activity or the involvement or role of an individual, group, or organization in such activity.
>
> The AG Guidelines and the DIOG *do not provide heightened predication standards* for sensitive matters, or for allegations potentially impacting constitutionally protected activity, such as First Amendment rights . . . . [Italics added.]

The Report concluded at pages 351-2:

> Given the *low threshold* for predication in the AG Guidelines and the DIOG, we concluded that the FFG information, provided by a government the [US Intelligence Community] deems trustworthy, and describing a first-hand account from an FFG employee of the content of a conversation with Papadopoulos, was sufficient to predicate the full counterintelligence investigation because it provided the FBI an articulable factual basis that, if true, reasonably indicated activity constituting either a federal crime or a threat to national security may have occurred or may be occurring. [Italics added.]

Regarding the context, the Report stated that FBI Assistant Director Bill Priestap, the official who authorized opening Crossfire Hurricane, told the IG "that the *combination* of the FFG information *and* the FBI's ongoing cyber intrusion investigation of the DNC hacks created a counterintelligence concern that the FBI was 'obligated' to investigate." IG Report at 53 [Italics added]. Every FBI official involved in the discussions that led to the opening agreed that "their evaluation of the FFG information was informed by the FBI's ongoing cyber investigation involving Russia and the DNC hack." IG Report at 54.

b. The Attorney General's Attack on the IG's Finding of Proper Predication

On December 10, 2019, the day after the IG Report's release, Attorney General Barr challenged the Department's independent inspector general. In a press statement, Mr. Barr asserted that the IG's Report "makes clear that the FBI launched an intrusive investigation . . . on the thinnest of suspicions." Georgetown and American University law professors described the press release as "willfully inaccurate" and "a misleading statement, if not a deliberate distortion."

The IG determined that the FBI fully complied with written Department policy for predication. Notably, in the December 10, 2019, interview, Mr. Barr did not argue otherwise. Instead he argued that opening the investigation based merely on a foreign source's "suggestion of a suggestion" was at odds with the Department's "rule of reason":

> There has to be a basis before we use these very potent [counterintelligence surveillance] powers in our core First Amendment activity. And here, I felt this was very flimsy.
>
> Basically, I think the Department has a rule of reason . . . is what you're relying on sufficiently powerful to justify the techniques you're using? And the question there is, "How strong is the evidence? How sensitive is the activity you're looking at? And what are the alternatives"?[12]
>
> And I think when you step back here and say, "What was this all based on," it's not sufficient.
>
> Remember, there was and *never has been* any evidence of collusion. And yet this campaign and the president's administration have been dominated by this investigation that turns out to be *completely baseless* . . . .

The Attorney General then discussed his view of the "predication":

> Let's look at what the basis of it was. So in May 2016, apparently a 28-year-old campaign volunteer . . . this is George Papadopoulos, and this was described by the foreign official who heard him . . . as a "suggestion of a suggestion." He *suggested* that there had been a *suggestion* by the Russians that they had some adverse information to Hillary that they might dump in the campaign . . . .
>
> From the very first day of this investigation, which was July 31, 2016, all the way to its end in September 2017, there was not *one* incriminatory bit of evidence to come in, it was *all* exculpatory. The people that they were taping denied any involvement with Russia, and denied any of the specific facts that the FBI was relying on . . . .
>
> I think our nation was turned on its head for three years, I think based on a completely *bogus* narrative that was largely fanned and hyped by an irresponsible press. [Emphases original in Mr. Barr's voice.][13]

The Mueller Report's detailed and voluminous evidence contradicted these assertions. Among

---

[12] We note that Mr. Barr omitted mention of the seriousness of the threat and the risk to national security, factors that DIOG §10.1.3 sets forth as bases for predication. As pointed out by Mr. Barr's NBC interviewer, the threat to national security should a presidential campaign be compromised is severe.

[13] A January 8, 2020, letter from the New York City Bar Association to congressional leaders described the interview as "reminiscent of Mr. Barr's earlier mischaracterizations of the Mueller Report." On April 9, 2020, Mr. Barr repeated many of his December 10 assertions in an April 9, 2020, Fox TV interview, calling the Russia investigation "one of the greatest travesties in American history."

the Report's findings were these:

- There were as many as 100 contacts between the Trump campaign and persons linked to the Russian Government, with its confirmed interest in helping to elect Mr. Trump." MR-I at 5.

- During the campaign, candidate Trump was negotiating with Russia to build a hotel in Moscow. MR-I at 67-78.

- Trump campaign chairman Paul Manafort shared polling data from battleground states with a known Russian intelligence operative. MR-I at 7, 136.

- The third party who, on June 3, 2016, initiated the June 9, 2016, Trump Tower meeting had emailed that, in connection with Russia's support for Mr. Trump's candidacy, Russia's chief prosecutor had incriminating information on Hillary Clinton. MR-I at 113. Upon receiving that message, Donald Trump, Jr., responded, "If it's what you say, I love it." *Ibid.* The meeting featured a Russian lawyer who once worked for Russia's chief prosecutor, MR-I at 112, along with Donald Trump, Jr., Jared Kushner and Paul Manafort. MR-1 at 117.

- Russia hacked Hillary Clinton's personal account hours after candidate Trump publicly invited the Russians to find her "missing emails." MR-I at 49.

- Trump operative Roger Stone had direct email communications with Guccifer 2.0, the online *persona* that Russian military intelligence operatives used to release thousands of documents stolen from the Democratic National Committee. MR-I at 43-49.[14]

At the time of the attorney general's December 10, 2019, interview, he was (and today is still) overseeing a criminal investigation that he had previously initiated and that included the same subject as the inspector general's investigation — the origins of Crossfire Hurricane. In May 2019, Mr. Barr had appointed U.S. Attorney John Durham to conduct that investigation. A January 8, 2020, letter from the New York City Bar Association referred to above, strongly criticized Mr. Barr's December 10, 2019, public statements, citing the attorney general's violation of Justice Department rules that prosecutors avoid comment on pending investigations.

2. LEGAL ANALYSIS

We incorporate here the legal standards discussed at pages 10-11 above concerning the obligations of government lawyers to tell the whole truth, even in non-representational settings.

Mr. Barr's concealing central facts in his December 10, 2019, NBC interview demon-

[14] Testimony at Stone's trial showed that he also had communications with Wikileaks, and that, immediately after talking by phone with Stone, Mr. Trump stated that more anti-Clinton information would soon be disclosed. Evidence further showed that on July 31, 2016, after a five-minute call, from Mr. Trump's home phone, Mr. Stone wrote a message directing an associate to see ˜[Julian] Assange, head of Wikileaks."

strates a continuing pattern of conduct running afoul of DCRPC 8.4(c): "A lawyer shall not . . . [e]ngage in conduct involving dishonesty . . . deceit, or misrepresentation."

a. Mr. Barr's Deception Regarding the Context for Opening Crossfire Hurricane Violated DCRPC 8.4(c).

In attacking the IG Report, Mr. Barr asserted on national television that Crossfire Hurricane's original basis, "or predication," was "very flimsy." But in making that assertion, Mr. Barr disregarded and withheld the critical facts that the IG had emphasized: The *context* corroborating the "predication" that Mr. Barr argued was "flimsy."

When the FBI received information from a trusted source that Russia may have reached out to the Trump campaign offering negative information about Mrs. Clinton, the FBI already knew of: (i) Russian hacking of DNC and Clinton campaign servers; (ii) Russia's attempts to hack into several state election computer systems; and (iii) WikiLeaks' release, nine days earlier, of material stolen from the DNC servers by individuals connected to Russia. *See* pp. 17-18 *infra.* That disclosed information helped the Trump campaign by hurting its opponent.

While the electronic communication opening the FBI investigation focused exclusively on the friendly foreign government's information, the IG Report stated that FBI Assistant Director Bill Priestap, the official who authorized opening Crossfire Hurricane, had said that it was "the *combination* of the friendly foreign government's information *and* the FBI's ongoing cyber intrusion investigation of the DNC hacks created a counterintelligence concern that the FBI was 'obligated' to investigate." In other words, the FBI's knowing about the ongoing cyber intrusion — prior information that the attorney general did not mention — was essential to the concern leading to initiation of Crossfire Hurricane. There was complete consensus among FBI leadership. IG Report at 53-55.

By burying the prior information — three months' evidence of Russian hacking and data dumping against the Trump campaign's opponent — Mr. Barr flagrantly misrepresented the basis for the FBI investigation. The FBI's knowledge of that prior conduct corroborated the new, trusted-source information that Russia may have been offering that kind of help directly to the Trump campaign.

Importantly, those facts were central to the public's understanding of the counterintelligence need to determine the size and shape of any national security threat to the country. His statement was especially misleading for the overwhelming portion of the public that was not following the Mueller investigation's every detail in December 2019. Virtually no one was aware (or remembered) that at the time the FBI opened Crossfire Hurricane in 2016, the Bureau already knew that Russia was behind the hacking and data disclosure aimed against Mr. Trump's political opponent.

There was nothing inadvertent about Mr. Barr's misrepresentation. Not only did he avow "flimsiness" on national television, Mr. Barr repeated his allegation in his press statement that day — stating that the FBI launched Crossfire Hurricane "on the thinnest of suspicions." That statement, according to Georgetown and American University law professors, was also "willfully inaccurate" and "a misleading statement, if not a deliberate distortion."

Given that honesty in all settings is expected of lawyers — and particularly government lawyers, *see* cases cited at pages 10-11 above — failing to take account of the critical backdrop that gave meaning to the sequence of events underlying the FBI investigation showed "a lack of . . . probity . . . integrity . . . fairness and straightforwardness" that qualify as "conduct . . . of a dishonest character." There is no reasonable justification for Mr. Barr's conduct: A "statement made by a party that a thing is in fact a particular way, when it is not so" is a misrepresentation, plain and simple. *Matter of Shorter*, 570 A.2d 768 n.13.

For Mr. Barr to engage in deceitful conduct contrary to Rule 8.4(c) is particularly egregious, as he is the chief law enforcement officer of the United States. It bears emphasis that, had the attorney general been loyal to the interest of his client, the United States, in "truth-seeking," *see* Justice Manual, §9.5002, he would not have made this dishonest attack upon the IG Report in the first place.

b. Mr. Barr's Deceptive, *Ex Post Facto* Statements in Attacking the IG Report Violated DCRPC 8.4(c).

The attorney general violated DCRPC 8.4(c) in a second way. He asserted that Crossfire Hurricane "turns out to be baseless," and "was based on a completely bogus narrative."

Those assertions reflect a lawyer engaging in deceptive and "misrepresentative behavior" in violation of DCRPC 8.4(c). *See Shorter,* 570 A.2d at 768. The special counsel's investigation — which developed Crossfire Hurricane's evidence — produced powerful, abundant proof of the mutually reinforcing: 1) Russian efforts to elect Mr. Trump via hacking and disinformation and 2) the Trump campaign efforts to encourage, receive and pass information to Russian agents and intermediaries to advance a mutual goal. *See* MR-I at 36, 41-47, 51-66.

It is not consistent with a public lawyer's duty of truthfulness to equate a) Mr. Mueller's ultimate determination that he could not establish proof beyond a reasonable doubt with b) a conclusion that Crossfire Hurricane was "baseless" and based on a "completely bogus narrative" when the investigation produced substantial evidence of attempted or actual coordination. Such an investigation did *not* "turn out to be baseless," even if the substantial evidence produced did not satisfy the law's highest burden of proof — proof beyond a reasonable doubt.[15]

---

[15] The FBI and Mueller investigations also produced eight guilty pleas by those associated with the Trump campaign, indictments of more than 20 Russian agents involved in hacking and election media influence campaigns, and millions of recovered dollars in assets.

Indeed, the notion that the legitimacy of an FBI investigation's initiation should be judged by its end, if applied broadly, could easily chill the initiation of wholly legitimate inquiries for fear of being second-guessed. As the then-Director of National Intelligence's general counsel has written, "[T]he FBI would have been derelict in its duty if it failed to investigate [Russia's election] interference and the credible information suggesting that Americans might be working with the Russian government or its agents."[16]

Moreover, the attorney general's assertion that "the investigation turns out to be baseless" cannot be reconciled with the special counsel's multiple indictments and criminal convictions. In particular, Crossfire Hurricane ultimately led to Roger Stone's jury conviction for obstructing Congress via false statements (as well as for witness tampering). Those false statements involved Stone hiding his connection to Wikileaks, his source for apparently informing the president in advance of soon-to-be-released, anti-Clinton information derived from Russia's hacking. *See* Mueller Report, App. D at D-3, and n. 14 *infra.* Judge Amy Jackson Berman called Stone's conduct "covering up for the President."[17]

Finally, Mr. Barr's misrepresentations here do not exist in a vacuum. It is the pattern of deceptive statements and actions that is central to the gravity of Mr. Barr's misconduct. He was not engaging in harmless exaggeration. His misconduct did not just happen once.

Throughout Mr. Barr's tenure, this pattern of dishonesty fits what Judge Walton described as a "lack of candor" and "a calculated attempt to influence public discourse . . . in favor of the president despite . . . findings . . . to the contrary." Such behavior is beneath the standard of integrity owed the public by any government lawyer, much less the head of the Department of Justice. Mr. Barr has violated DCRPC 8.4(c).

C. COUNT THREE: Mr. Barr's Public Comments Disparaging Potential Targets of Prosecution Violated DC Rule of Professional Conduct 8.4(d).

DCRPC 8.4(d) provides: "It is professional misconduct for a lawyer to: . . . (d) [e]ngage in conduct that seriously interferes with the administration of justice."

1. Factual Background

On May 7, 2020, the government filed a motion to dismiss General Michael Flynn's prosecution and guilty plea. The day of the filing, in a CBS interview, the attorney general purported to explain the government's reasons and described the problems he saw with the FBI's

[16] The danger of chilling initial investigative steps would be particularly significant to national security if applied to counterintelligence inquiries and assessments. Their purpose is protective, often requiring prompt action and agility upon receiving threat information. *See* AG's Guidelines for Domestic FBI Investigations, page 17.

[17] Mr. Barr's April 9, 2020, statement in a Fox TV interview that the Mueller investigation was "one of the greatest travesties in American history," was a variation on the "baseless/bogus" theme.

General Flynn interview, which gave rise to Flynn's guilty plea for lying to the FBI.

When asked what would happen to senior FBI officials, or former officials, who had authorized Flynn's January 2017 interview and investigation, Mr. Barr indirectly raised the possibility of the Durham investigation resulting in their prosecution and pointedly disparaged the conduct of the investigation's targets:

> [J]ust because something may even *stink to high heaven* and . . . appear [to] everyone to be *bad,* we still have to apply the right standard and be convinced that there's a violation of a criminal statute. [Italics added.]

As noted, at the time, the attorney general was (and is still) overseeing the John Durham criminal investigation Mr. Barr, himself, initiated. On April 9, 2020, with the investigation still pending, Mr. Barr also raised the prospect that FBI personnel "involved would be 'prosecuted.'"

2. Legal Principles Underlying DCRPC 8.4(d)

DCRPC 8.4(d) is read broadly to "uphold the integrity and competence of the legal profession.'' *See In re Hopkins,* 677 A.2d 55, 59 (DC 1996). The rule "encompass[es] derelictions of attorney conduct considered reprehensible to the practice of law." *In re Alexander,* 496 A.2d 244, 255 (D.C. 1985).

The elements of a DCRPC 8.4(d) violation are as follows:

- First, there must be an improper action or a failure to take a proper action. *Hopkins*, 677 A.2d at 60-61.
- Second, "the conduct itself must bear directly upon the judicial process (*i.e*., the 'administration of justice') with respect to an identifiable case or tribunal." *Id.* at 61 . . . .
- Third, the conduct must "at least potentially impact upon the process to a serious and adverse degree." *Hopkins*, 677 A.2d at 61. In other words, "the attorney's conduct must taint the judicial process in more than a *de minimis way.*

In re Mason, 736 A.2d at 1023.

As to the first element, an action "may be improper simply because, considering all the circumstances in a given situation, the attorney should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice." *Hopkins*, 677 A.2d at 61.

As to the second element, a direct effect upon the judicial process "will very likely be the

case where the attorney is acting either as an attorney or in a capacity ordinarily associated with the practice of law." *Hopkins,* 677 A.2d at 61. A violation of Rule 8.4(d) "does not have to be affiliated specifically with the judicial decision-making process; the conduct simply must bear on the administration of justice." *In re Mason*, 736 A.2d 1019, 1023 (D.C. 1999).

As to the third element, conduct that seriously interferes with the administration of justice equates to 'conduct unbecoming a member of the bar.'" *In re Mason*, 736 A.2d at 1023. Courts have "not required a showing of actual prejudice to violate [Rule] 8.4(d)." *In re Kline*, 298 Kan. at 201. Rather, all that is required is harm or disadvantage to "the legal system generally." *Ibid.*

The Justice Manual strongly expresses the Department's interest in "protect[ing] the fair and impartial administration of justice." DOJ Justice Manual, § 9-27.001. Among other things, the Manual generally prohibits a prosecutor's comments on "the existence of an ongoing [criminal] investigation" or on "its nature or progress before charges are publicly filed." Rule 1-7.400(B).[18]

A primary reason for this general prohibition is set forth in §1-7.100 (General Need for Confidentiality). Disseminating non-public, sensitive information about DOJ matters could . . . *prejudice the rights of a defendant; or unfairly damage the reputation of a person*. (Italics added.) The Manual's section 1-7.600 (Release of Information in Criminal, Civil, and Administrative Matters—Non-Disclosure) protects the identical interest in the fair administration of justice:

> DOJ personnel shall not make any statement or disclose any information that reasonably could have a *substantial likelihood of materially prejudicing an adjudicative proceeding*. [Italics added.]

DC Bar DCRPC 3.8 is to the same effect:

> The prosecutor shall not: . . . (f) [e]xcept for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused.

---

[18] The concerns of DCRPC 8.4(d) are further emphasized in the section of the Justice Department Manual discussing Congressional and White House Relations:

> 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.

Section 1-8.100 [Introduction]

3. Mr. Barr's Televised Comments Violated DCRPC 8.4(d).

As described, in a CBS interview, the attorney general stated that FBI agents' conduct being investigated for prosecution under Mr. Barr's supervision "stink[s] to high heaven"; it appears to everyone to be "bad." The criticism that the New York City Bar Association's January 8, 2020, letter to Congress leveled against Mr. Barr's previous public comments applies with special force here:

> These public statements by Mr. Barr also contravene the norms applicable to his office and warrant further investigation by Congress as part of an inquiry into Mr. Barr's conduct as Attorney General more generally. They may even implicate ethical considerations . . . .

In this case, Mr. Barr's conduct *does* implicate ethical rules. Publicly characterizing the conduct of individuals under criminal investigation as "bad" and "stink[ing]" satisfies the three elements of DCRPC 8.4(d). That conduct is: (i) an improper act that an attorney general should know to avoid, (ii) potentially and directly bearing on the judicial process in which indictments are tried, and (iii) having more than *de minimis,* potentially prejudicial impact. *See* p. 24 *infra.* The attorney general made his prejudicial comments on national television. In such situations, it is commonplace for Justice Department officials to comply with Justice Department Manual §1.7.400(B) and DC Bar Rule 3.8(f) by simply stating, "I cannot comment on a pending investigation."

That is exactly what an attorney general scrupulously serving solely his client, the United States, and its interest that justice be done, should have said. Had Mr. Barr properly limited his comments about the alleged misconduct of current or former FBI officials being investigated for prosecution, he would have avoided any potential future prejudice to criminal defendants and to the legal system generally. The extrajudicial statements by Mr. Barr about the conduct of those under criminal investigation constitute conduct "unbecoming a lawyer" in violation of DCRPC 8.4(d). *See In re Mason*, 736 A.2d at 1023. The profession and the public require more of an attorney general.

D. COUNT FOUR: Mr. Barr Violated the Constitution, His Attorney's Oath, and DC Rules of Professional Conduct 1.3 and 1.7(b)(4) By Ordering the Forcible Dispersal of Peaceful Protestors at Lafayette Square.

As Attorney General, a central responsibility Mr. Barr owes the American people is to uphold the principles and protections guaranteed by the Constitution of the United States. At the heart of these protections are the First Amendment rights "peaceably to assemble," "to petition the government for a redress of grievances," and to exercise "freedom of speech," U.S. Const. amend. §1, as well as the Fourth Amendment right to be free from the government's "unreasonable searches and seizures." U.S. Const. art. 4. The attorney's oath taken by Mr. Barr to join the D.C. Bar requires him to "support the Constitution of the United States of America." D.C. Bar

Rule 46(L).

By overseeing and ordering the forcible dispersal of peaceful protesters in Lafayette Square by police and military forces, Mr. Barr violated the Constitution and his attorney's oath of office. In so doing, Mr. Barr also violated his D. C. Bar ethical obligation to avoid conflicts of interest. Here, the personal interest of a "third party" – President Trump – was diametrically opposed to that of Mr. Barr's "client" – the United States. The United States, as the Attorney General's client, represents the American people. While Mr. Trump wanted to walk through Lafayette Square for a photo op at a time and place that would require forcibly dispersing a peaceful protest, the interest of the American people was in protecting their fundamental constitutional rights to assemble, speak and petition for redress of grievances. Mr. Barr, by choosing to serve the conflicting interest of "third party" Trump rather than the interest of his client — the United States — violated his ethical duties under DCRPC 1.3 and 1.7.(b)(4).

These violations constitute "misconduct" under D.C. Bar Disciplinary Rule XI.

1. FACTUAL BACKGROUND

a. The "Interest of the Client": The United States, representing the American People

The central interest of the United States, representing the American people, involved here is the protection and upholding of the people's constitutional rights and liberties. The Constitution is the supreme law of the United States. *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

In the specific context of the Lafayette Square protest, the American people's constitutional interest was in upholding and protecting the protesters' rights to assemble, speak and petition under the First Amendment, as well as their Fourth Amendment right to be free from governmental obstruction while exercising their First Amendment rights.

b. The "Interest of the 'Third Party'": Donald Trump

The president's interest was in publicly projecting strength as a "law and order" president after reports he interpreted as showing weakness. His means of serving this interest was by walking through Lafayette Square for a photo op in front of St. John's Church at a particular time on June 1, 2020.

c. What Occurred at Lafayette Square

During the May 30-31 weekend, the U.S. Park Police developed a plan to fence in a large area around the White House to protect against possible protest-related violence. "The Secret Service told the Park Police that 'anti-scale fencing' would be procured and potentially delivered on Monday for installation along H Street[.]"

On the morning of June 1, "the president asked [Attorney General William] Barr to coordinate the federal government response 'to the violence and arson and in that role supported a plan to move the perimeter north of H Street," quoting Kerri Kupec, Director of Communications and Public Affairs for the U.S. Department of Justice. Kupec explained more generally that: "President Trump directed Attorney General Barr to lead federal law enforcement efforts to assist in the restoration of order to the District of Columbia." "Barr approved the perimeter expansion Monday morning."

At a 2:00 p.m. meeting that afternoon, Mr. Barr notified military and police officials of the plan to expand the perimeter. But no time was set for carrying out the expansion, and there was no suggestion that protesters would be forcibly dispersed to accomplish the expansion. The U.S. Park Police asked the Arlington County Police Department to help expand the perimeter "'at some point' later in the evening… [but that] would have to wait [in part] until … [there were] contractors to install the temporary new perimeter fence [.]"

That same afternoon, Mr. Trump met in the White House with some of his closest advisers, including Chief of Staff Mark Meadows, to talk "about staging an event to show he was in command. One idea: a visit by Trump to the damaged St. John's Church." Later that afternoon, White House staff worked on plans for a possible walk to the church. At the same meeting, it was decided that, prior to walking through Lafayette Square to the church, Mr. Trump would speak in the Rose Garden.

During the day, Mr. Barr and Mr. Meadows spoke periodically about expanding the perimeter. By 4:00 p.m., peaceful protesters started returning to the northern edge of Lafayette Square. They presented no recognized threat to the police, to anybody else, or to property. Under Mayor Muriel Bowser's 7:00 p.m. curfew, the protesters would have to leave Lafayette Park by 7:00 p.m. or be subject to arrest.

By about 6:00 p.m., "[t]here were dozens of Secret Service officers . . . 50 Arlington County police clad in SWAT gear . . . over 80 [U.S. Park Police] officers with shields and 15 mounted on horseback [massed] along the northern edge of Lafayette Square. Behind them were D.C. National Guard and Air National Guard members with shields saying, 'military police'. Coming across the middle of Lafayette Square were U.S. Marshals in camouflage with an armored personnel carrier. Some officers holding canister launchers and pepper ball guns [.]" *See also* "How Trump's Idea for a Photo Op Led to Havoc in a Park," 6/2/20 *New York Times*.

Sometime around 6:00 p.m., shortly before he was to give his Rose Garden speech, Mr. Trump decided that "[h]e wanted to visit the church immediately afterward[.] 'It had been talked about all afternoon, but that's when the final decision was made,' the senior administration official said."

Also at about 6:00 p.m., "[w]hen Attorney General William P. Barr strode out of the

White House for a personal inspection early Monday evening, he discovered that the protesters were still on the northern edge of the square . . . [He found] that the plan to expand the security perimeter had not been carried out." "For the president to make it to St. John's Church, they would have to be cleared out. Mr. Barr gave the order to disperse them." He "ordered the law enforcement officials on the ground to complete the expansion, which would mean dispersing the protesters, but there was not enough time to do so before the president's planned statement."

Mr. Barr "gave the order to move people out before the president arrived." At the time Mr. Barr ordered the dispersal of the protesters, he knew that the dispersal would be by force. At 6:08 p.m., a *Post* reporter spotted Mr. Barr arriving at Lafayette Square, where he was seen on camera conferring with other officials, including [White House Deputy Chief of Operations Anthony] Ornato . . . . [Ornato had] alerted the Secret Service that the president was going to make a brief appearance outside St. John's Church [.]" DOJ Director of Communication "Kupec said that the men were having '*a brief discussion of the need to stay out of a range of projectiles* and why the movement had not already occurred and when it would occur." (Emphasis added) In other words, before the dispersal Mr. Barr ordered began, Mr. Barr knew that the law enforcement officers would be firing projectiles at the protesters.

"What ensued was a burst of violence unlike any seen in the shadow of the White House in generations."

"The push to clear the areas began shortly after 6:30 p.m. – roughly 10 minutes before Trump began speaking in the Rose Garden."

"'Then all of a sudden it got crazy,' [Stephen] Starks [a witness quoted by the *Washington Post*] said. 'You could hear people screaming, followed by loud cracks, you started to see smoke – people rubbing their eyes, people running.'"

"As the push continued north, east and west, clouds of smoke filled the air. Park Police officers fired smoke canisters and pepper balls, a projectile munition that shoots irritant powder. A *Post* reporter witnessed protesters along H Street coughing, their eyes streaming with tears, and some of them vomiting. While the Park Police has said it did not use tear gas, the chemical agents it deployed cause intense irritation to the eyes and skin." Attacking officers also shot rubber bullets at protesters and "used riot shields, batons, and officers on horseback to shove and chase people gathered to protest the death of Floyd."

"At 6:43 p.m., Mr. Trump made his statement in the Rose Garden, finishing seven minutes later, and then headed back through the White House to emerge on the north side and walk out the gates and into the park." Mr. Barr joined Mr. Trump's entourage, walking from the White House to St. John's Church and posed with Mr. Trump for a photograph in front of the church.

"When he reached St. John's, Mr. Trump made no pretense of any intent other than posing

for photographs. He held up the Bible carried by his daughter, then gathered a few top advisers next to him in a line. He made no remarks and then, having accomplished his purposes, headed back to the White House [.]"

"The use of such aggressive force startled some veteran former officers of the Secret Service and other federal agencies, because it appeared to be rushed and unprovoked by protesters. The line of officers rushing protesters, many of whom were standing still with their arms in the air, violated the normal protocol for clearing protesters, something the Secret Service accomplishes dozens of times a year in Lafayette Square without ever tossing smoke canisters or using riot shields. 'Usually officers hold a line, and don't move forward unless there is provocation,' said one former Secret Service agent who spoke on condition of anonymity to describe operational procedures. 'The officers give constant warnings and communicate clearly with the crowd. But here it seems like there is some time pressure; they were acting like a bomb is about to go off.'"

"By Tuesday morning, Mr. Trump boasted of success. 'D.C. had no problems last night,' he wrote on Twitter. 'Many arrests. Great job done by all. Overwhelming force. Domination."

2. LEGAL ANALYSIS

a. Mr. Barr's Ordering the Forcible Removal of Peaceful Protesters Violated the First and Fourth Amendments.

The First Amendment declares in part that "Congress shall make no law … abridging the freedom of speech . . . or the right of the people peaceably to assemble [and to petition the government for a redress of grievances]." U.S. Const. amend. I. The Amendment embodies and encourages our national commitment to robust political debate, *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988), by protecting both free speech and associational rights. *See, e.g., id*. (freedom of speech); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (freedom of association); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The right of peaceable assembly is a right cognate to . . . free speech and . . . is equally fundamental."). *Jones v. Parmley,* 465 F.3d 46, 56 (2d Cir. 2006)

As *Parmley,* 465 F.3d at 56 (2d Cir. 2006) further stated:

> The Supreme Court has declared that the First Amendment protects political demonstrations and protests – activities at the heart of what the Bill of Rights was designed to safeguard. *See Boos v. Barry*, 485 U.S. 312, 318 (1988) (calling organized political protest 'classically political speech' which 'operates at the core of the First Amendment').

Moreover, courts have held that public parks – and especially public parks in Washington, D.C., near the White House – have a particularly close connection to the First Amendment right to public protests:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, community thoughts between citizens, and discussing public questions." [*quoting Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)] . . . "The general concepts of First Amendment freedoms are given added impetus as to speech and peaceful demonstration in Washington, D.C., by the clause of the Constitution which assures citizens of their right to assemble peaceably at the seat of government and present grievances." [*quoting A Quaker Action Group v. Morton*, 460 F.2d 854 (D.C. Cir. 1971)] . . . [T]he White House sidewalk, Lafayette Park and the Ellipse constitute a unique situs for the exercise of First Amendment rights.

A Quaker Action Group v. Morton, 516 F.2d 717, 724-25 (D.C. Cir. 1975).

As the Supreme Court has noted, "'public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be 'public forums.' [citations omitted] In such places, the government's ability to permissibly restrict expressive conduct is very limited [.]" *United States* v, *Grace*, 461 U.S. 171, 177 (1985). Where protesters had already begun a peaceful protest in a lawful location, they "had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law. *Claiborne Hardware*, 458 U.S. at 908." *Parmley,* 465 F.3d at 60.

At Lafayette Square, what happened after the forcible dispersal order shocked the conscience of Americans and people throughout the world. The very federal and local law enforcement officers the American people rely on to protect them from violence were inflicting violence on them. The order here was unconstitutional both because of the *failure to give protesters audible and repeated warnings and time to leave peacefully and voluntarily and because of the violent way it was carried out.*

The standard Secret Service procedure for dispersing peaceful demonstrations is to form a police line, give protesters clear and frequent warnings to leave, and advance toward the protesters only in response to provocation. (This is presumably the standard procedure for dispersing peaceful protesters who run afoul of legitimate "time, place and manner" restrictions.) By contrast, here, at about 6:30 pm without any provocation, the officers started charging toward the protesters, exploding toxic chemical gas canisters, shooting rubber bullets, using riot shields and riot batons to force protesters to leave. To the extent the police gave any warnings prior to their attack, the warnings were not audible to protesters or reporters.

The unprovoked and effectively unwarned armed assault on peaceful protesters in Lafayette Square was similar in key respects to what was held unconstitutional in *Parmley*. There, "defendants concede[d] that they issued no dispersal order [.]" Because

> "[p]laintiffs still enjoyed First Amendment protection, . . . absent imminent harm, the [New York State] troopers could not simply disperse them without giving them fair warning. *City of Chicago v. Morales*, 527 US 41, 58 (1999) ("The purpose of the fair notice requirement [in disorderly conduct statutes] is to enable the ordinary citizen to conform his or her conduct to the law.") . . . . *accord Dellums* v. *Powell*, 566 F.2d 167, 184 n. 31 (DC Cir 1977) (Where '[t]he record … indicates that not all of the arrestees were violent or obstructive or noisy … [and] only a small minority of the demonstrators were involved in any mischief,' notice and time to comply with a dispersal order is required). *Parmley*, 465 F.3d at 60.

Likewise here, the failure to have given clear, audible and repeated warnings for protesters to disperse was unconstitutional. What occurred in Lafayette Square June 1 is strikingly similar to the facts of *Parmley*. There, the officers also started standing in a "skirmish line… As soon as the troopers received the 'go ahead' order, the defendants charged into the demonstration and began . . . assaulting plaintiffs, beating them with their riot batons [.]" *Parmley*, 465 F.3d at 53.[19]

In *Parmley*, then-Judge Sotomayor ruled for the Second Circuit that on these facts, "the defendants violated plaintiffs' clearly established First Amendment rights 'of which a reasonable person would have known.'" *Id.* at 61 (*quoting Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). The court found, in effect, that the unprovoked and unwarned violent New York State Police assault on peaceful protesters was such a clear violation of the First Amendment that even a layman would have known that such behavior was unconstitutional. The same applies to the police behavior in Lafayette Square.

As attorney general, Mr. Barr was obligated not to give an unconstitutional order. Nonetheless, there is at bare minimum a *prima facie* case, supported by evidence of sufficient reliability and gravity, that that is just what Mr. Barr did. The White House Press Secretary and others, including the New York Times and Fox News, confirmed multiple times that it was Mr. Barr who

---

[19] Such unprovoked attacks on non-threatening, peaceful protesters also violate the Fourth Amendment prohibition against "unreasonable searches and seizures." Numerous circuits have held that it is a Fourth Amendment violation to use pepper balls, projectile bean bags and pepper spray against individuals "who were suspected of only minor criminal activity, offered only passive resistance, and posed little to no threat of harm to others." *Nelson v. City of Davis*, 685 F.3d 867, 885 (9th Cir. 2012); *see also Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) (officers' use of pepperball guns against nonviolent protesters who did not flee or actively resist arrest constituted unreasonable force); *Ciminillo v. Streicher*, 434 F.3d 461, 466-67 (6th Cir. 2006) (use of beanbag gun on individual who was not armed and did not pose a threat to officers was not reasonable); *Park v. Shiflett*, 250 F.3d 843, 853 (4th Cir. 2001) (use of pepper spray from close range on an unarmed and nonthreatening individual was excessive). The unprovoked assault on peaceful protesters with rubber bullets, tear gas, pepperball projectiles, riot batons and shields in Lafayette Square likewise violated the Fourth Amendment.

ordered the dispersal.[20] As described in the Factual Background above, Mr. Barr was on site at 6:08 p.m., right before the forcible dispersal began, conversing with other officials about "the need to stay out of the range of projectiles and why the movement had not already occurred and when it would occur."[21]

In addition, as the appointed leader of all federal law enforcement officers engaged in controlling the Floyd demonstrations in D.C., Mr. Barr was responsible for overseeing how these officers would be deployed to protect the White House and the President. The appointment made him accountable for how the federal police and military forces would be used on June 1. Mr. Barr was responsible for overseeing the forces that carried out the forcible dispersal and publicly admitted he supported the forcible dispersal.

The unprovoked dispersal of peaceful protesters at Lafayette Square violated the protesters' First Amendment rights to assemble, speak and petition. The further use of pepper-ball projectiles, rubber bullets, noxious chemical gases, riot shields and riot batons against peaceful, non-threatening protesters violated their Fourth Amendment rights. Former General and Secretary of Defense James Mattis put the point bluntly:

> We know that we are better than the abuse of executive authority that we witnessed in Lafayette Square. We must reject and hold accountable those in office who would make a mockery of our Constitution.[22]

b. Mr. Barr's Unconstitutional Order Violated His Attorney's Oath.

Because Mr. Barr's dispersal order was unconstitutional, he violated his D.C. "attorney's oath of office" in which he committed "that I will support the Constitution of the United States." As a bi-partisan group of Supreme Court practitioners have written:

---

[20] Mr. Barr subsequently admitted that he supported the dispersal order, but denied that he, personally, gave it. "[M]y attitude was get it done, but I didn't say, 'Go do it.'" *Ibid*.

[21] Comparable to his denial in the previous footnote, "Barr insisted there was no connection between the heavy-handed crackdown on the protesters and Trump's walk soon after to St. John's Church." In light of contrary news reports and White House statements, there is substantial reason for skepticism regarding Mr. Barr's denials here and in the previous note. At minimum, there is a strong, *prima facie* case for this Office to initiate an investigation.

[22] More completely, General Mattis's statement was as follows:

> When I joined the military, some 50 years ago, I swore an oath to support and defend the Constitution. Never did I dream that troops taking the same oath would be ordered under any circumstances to violate the Constitutional rights of their fellow citizens – much less to provide a bizarre photo op for the elected commander-in-chief, with military leadership standing alongside…. We know that we are better than the abuse of executive authority that we witnessed in Lafayette Square. We must reject and hold accountable those in office who would make a mockery of our Constitution.

> As the chief law enforcement officer of the United States, the Attorney General takes an oath to protect these constitutional rights [free speech, assembly and petition] and safeguard the rule of law for all…. [On June 1,] the Attorney General violated his oath by overseeing violence against peaceful protesters exercising their First Amendment rights. Those actions are irreconcilable with the unbiased administration of justice and the rule of law.

c. Mr. Barr's Disregard of His Client – the United States – In Favor of Representing Third Party Donald Trump's Interests Violated DCRPC 1.3 and 1.7(b)(4).

DC Bar Rule of Professional Conduct 1.3(a) provides: "A lawyer shall represent a client zealously and diligently within the bounds of the law."

DCRPC 1.7(b) ("Conflict of Interest") provides in relevant part:

> [A] lawyer shall not represent a client with respect to a matter if . . . (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party[.]

Conflict of interest Rule 1.7(b)(4) is typically applied in advance of a lawyer's being retained to avoid having a lawyer represent a new client when the lawyer already represents another client who has a potentially adverse interest. However, the critical theme animating DCRPC 1.3 and 1.7(b)(4) is that a lawyer owes a fundamental duty to zealously represent the lawyer's client, rather than the interests of a third party.

By overseeing, ordering and supporting the forcible dispersal of peaceful demonstrators, Attorney General Barr has failed to represent the interest of his client — the United States — in protecting the American people's ability to exercise their constitutional rights to protest free from government interference and physical assault. Instead, Mr. Barr has served the personal and political interest of a third party – Mr. Trump. By failing to zealously protect the interest of his client because of the conflicting interest of a third party, Mr. Barr has violated DC Bar DCRPC 1.3 and 1.7(b)(4).

Mr. Barr's disloyalty to the interests of the American people in Lafayette Square is part of a disturbing and serious pattern. His actions described in Counts One - Three above also reflect conduct favoring Mr. Trump's personal and political self-interests over his client's interests in honesty and the fair and impartial administration of justice. *See* discussions at pp. 16, 22 and 26 *infra*.

d. Mr. Barr's Violation of His Attorney's Oath and DCRPC 1.3 and 1.7(b)(4) Constitute Disciplinable "Misconduct" Under Rule XI.

DC Bar Disciplinary Rule XI, Section 2(b) provides:

> Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

Because Mr. Barr's Lafayette Square behavior has violated both his attorney's oath and the "rules . . . of professional conduct," by the express terms of Rule XI, he has engaged in "misconduct" that "shall be grounds for discipline." When he led federal law enforcement officers in expanding the White House's perimeter and subsequently ordered the forcible dispersal, under Rule XI it is immaterial whether or not he was serving in an attorney-client capacity. Under Rule XI, when an attorney violates the oath or the rules, this "shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship." As an attorney licensed in D.C., Mr. Barr is subject to the D.C. Bar's professional responsibility rules regardless of the capacity in which he was acting.

IV. CONCLUSION

A law-abiding society depends upon public confidence in the administration of justice and in the integrity of our Department of Justice. As the district court stated in *Matter of Doe,* 801 F. Supp. 478, 479-80 (D.NM. 1992):

> When a Government lawyer, with enormous resources at his or her disposal, abuses th[e] power [entrusted to the Government] and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice.

This conclusion applies with special force to the nation's highest legal officer. Serious violation of ethical standards by the Attorney General of the United States erodes public faith in our legal system. Guarding against such a threat is a shared responsibility of members of the American legal profession.

That threat is upon us. The grounds described above call out for a disciplinary proceeding to be initiated under DC Bar Rule XI, Section 2(b) governing lawyer misconduct, and for the imposition of appropriate sanctions from among the alternatives in Rule XI, Section 3. We respectfully urge the Office of Disciplinary Counsel to do so.

Respectfully submitted,

Gershon (Gary) Ratner
Co-Founder, Lawyers Defending American Democracy
Former HUD Associate General Counsel for Litigation

Roy L. Austin, Jr.
Former DOJ Deputy Assistant Attorney General
Former Assistant United States Attorney (DC)

Dori Bernstein
Retired Director, Supreme Court Institute, Georgetown Univ. Law Center
Former appellate attorney, Office of General Counsel, U.S. Equal Employment Opportunity Commission

Charles R. Both
Law Offices of Charles R. Both

John C. Brittain
Olie W. Rauh Professor of Law
University of the District of Columbia
David A. Clarke School of Law

Katherine S. Broderick
Dean Emerita and Joseph Rauh Chair of Social Justice
University of the District of Columbia David A. Clarke School of Law

Paul Butler
The Albert Brick Professor in Law
Georgetown University Law Center

Susan Carle
Professor of Ethics Law and Vice-Dean
American University
Editor of *Lawyers' Ethics and the Pursuit of Social Justice* (NYU Press 2005)

Angela J. Davis
Distinguished Professor of Law
Criminal Justice Ethics and Criminal Law and Procedure
American University
Author of *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press, 2007)

Ruthanne M. Deutsch
Partner, Deutsch Hunt PLLC

Daniel B. Edelman
Senior Counsel
Katz Marshall & Banks LLP

Nicholas Fels
Former partner (retired) Covington & Burling
Lawyers Defending American Democracy Steering Committee

Andrea C. Ferster
Former DC Bar President
Law Offices of Andrea C. Ferster

Marc Fleischaker
Former DC Bar Foundation President
Chair Emeritus Arent Fox

Michael S. Frisch
Georgetown University Law Center
Ethics Counsel and Adjunct Professor
Senior Assistant and Assistant Bar Counsel (now Disciplinary Counsel) to the DC Court of Appeals (1984 - 2001)

Richard B. Herzog
Senior Counsel, Harkins Cunningham LLP

Debra S. Katz
Partner, Katz Marshall & Banks LLP

Philip Allen Lacovara
Former D.C. Bar President
Former Deputy Solicitor General
Former Counsel to the Watergate Special Prosecutor

Simon Lazarus
Former Associate Director, White House Domestic Policy Staff (1977-81)
Former Senior Counsel, Constitutional Accountability Center

Ariel Levinson-Waldman
Former Chief Oversight Counsel, U.S. Department of Labor
Former Senior Counsel to the Attorney General for the District of Columbia
Former Assistant Counsel, U.S. House of Representatives

William L Robinson
Founding Dean and Emeritus Distinguished Professor of Law
UDC David Clarke School of Law
Former Associate General Counsel for Litigation, EEOC.

Stephen A. Saltzburg
Wallace and Beverley Woodbury University Professor of Law
The George Washington University
Former Deputy Assistant Attorney General, Criminal Division

Joseph Sellers
Former President, Washington Council of Lawyers
Former Co-Chair, Sub-Committee on Race & Ethnicity,
D.C. Circuit Task Force on Gender, Race and Ethnic Bias

Abbe Smith
Professor of Law
Georgetown University Law Center
Author of Understanding Lawyers' Ethics (with Monroe H. Freedman) (5th *Ed*., Carolina Press, 2016) and Editor of Lawyers' Ethics (with Freedman & Woolley) (Routledge, 2016)

Marna S. Tucker
Former President, D.C. Bar
Former Member, Board on Professional Responsibility
Former Chair, ABA Standing Committee on Professional Discipline
Senior Partner, Feldesman Tucker Leifer Fidell, LLP

Melvin White
Former DC Bar President
Member/Barrister - Edward Bennett Williams Inn of Court 1991-2018
Attorney in private practice

Bruce Wolff
Former Manatt Phelps & Phillips partner (retired)
Former Deputy Assistant Secretary for Legislation, HEW

* In addition to Mr. Ratner's signature, each person listed above has authorized his or her name on the complaint as a co-signer. Signers' affiliated organizations are listed only for identification, and do not connote organizations' endorsement of this complaint.