



June 11, 2020

Michael Horowitz
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Re: Democracy 21 complaint requesting investigation of Attorney General Barr's appointment of U.S. Attorney John F. Bash to lead criminal investigation into "unmasking" of Michael Flynn

Dear Inspector General Horowitz and Counsel Ashton:

Democracy 21 requests that you conduct an investigation of Attorney General William Barr's appointment of U.S. Attorney John F. Bash to lead a criminal investigation into the "unmasking" of Michael Flynn by Obama Administration officials, and Bash's failure to recuse himself from the appointment in light of his apparent conflict of interest in doing so.

The appointment of Bash to lead the investigation fails to comply with the conflict of interest rules of the Justice Department and the Department's norms, standards and core mission to [provide](#) "fair and impartial justice for all Americans."

John Bash is the U.S. Attorney for the Western District of Texas. He was nominated by President Trump and sworn into that position on December 11, 2017. Prior to his appointment, Bash served in the White House as Special Assistant to President Trump and Associate White House Counsel.

An individual who has worked as a Trump Special Assistant and White House Counsel has no public credibility to head a criminal investigation about the "unmasking" of Michael Flynn by Obama Administration officials. President Trump has been attacking

the “unmasking” as part of his undefined and unexplained assertions about “Obamagate,” which appears to be nothing more than a label created for the purpose of damaging his presidential opponent, Joe Biden, who served as Vice President in the Obama Administration.

It is plainly inappropriate to name a former Special Assistant and Associate White House Counsel to Trump to conduct this politicized investigation, all the more so just months before a presidential election in which Trump is a candidate.

Attorney General Barr’s appointment of Bash was announced on May 28, 2020 by DOJ spokesperson Kerri Kupec as part of an appearance on Sean Hannity’s television show on Fox News. This is not the way such appointments are normally announced.

According to a [report](#) in *The Washington Post*, Kupec said, “The attorney general determined that certain aspects of unmasking needed to be reviewed.” According to [Politico](#), she added, “Obviously, we know that unmasking inherently isn’t wrong but certainly the frequency, the motivation and the reasoning behind unmasking can be problematic.”

“Unmasking” is the process by which a national security official can request that the identity of a person mentioned in an intelligence report be revealed to the official. According to [Politico](#), the practice is “common. For example, last year alone, U.S. spy agencies were asked 7,724 times to reveal the identities of Americans mentioned in those intercepts.”

Kupec, the Department’s spokesperson, characterized the new “unmasking” investigation initiated by Attorney General Barr as an offshoot of the Department’s ongoing investigation, also initiated by Barr, into the origins of the Justice Department’s Russia investigation. The ongoing investigation is being led by U.S. Attorney John Durham. According to [Kupec](#), “The attorney general determined that certain aspects of unmasking needed to be reviewed separately as a support to John Durham’s investigation.”

The Durham investigation into how the Obama Administration initiated the Russia investigation, and the new Bash investigation into the admittedly lawful and common practice of unmasking, are highly politicized and driven by President Trump. The first grew directly out of President Trump’s repeated, though discredited, claims that the Russia investigation was a “hoax” and that the Department engaged in a “witch hunt” of himself, his campaign and his associates. The second grew out of recent claims that Trump’s former national security adviser, Michael Flynn, was improperly investigated, prosecuted, and convicted by the Department. As [Politico notes](#),

Bash’s new investigative role with the Justice Department comes as the president and congressional Republicans have escalated their attacks on former senior officials within President Barack Obama’s administration who might have been involved in efforts that unmasked Michael Flynn, Trump’s first national security adviser.

The “unmasking” matter has gained further attention in the wake of the Department’s recent controversial [change of position](#) on the Flynn guilty plea, a decision that has [led](#) to “intense criticism from congressional Democrats and former Justice Department officials who charge that the attorney general is abusing the powers of his office to settle the president’s partisan vendettas.”

In order to defend the Department’s highly unusual action to seek dismissal of the Flynn charges post-conviction, President Trump and his supporters have challenged the origin of the Flynn prosecution. They have claimed that Flynn was unfairly targeted by officials in the Obama Administration who may have improperly unmasked his identity and then leaked his involvement in the conversations with a Russian diplomat, Sergey Kislyak, that eventually led to his indictment and conviction.

But according to press reports, the whole premise of this claim – that Flynn’s name was masked in the first place – may well be wrong. According to [The Washington Post](#),

It was the FBI, not the NSA, that wiretapped Kislyak’s calls and created the summary and transcript, the former officials said.

“When the FBI circulated [the report], they included Flynn’s name from the beginning” because it was essential to understanding its significance, said a former senior U.S. official, who spoke on the condition of anonymity to describe sensitive intelligence. “There were therefore no requests for the unmasking of that information.”

This set of allegations relating to Flynn, along with other unsubstantiated claims, has been packaged by President Trump under the specious and unexplained label of “Obamagate.” In this context, the Bash investigation into unmasking by Obama officials, initiated by Attorney General Barr, has an undeniably political and partisan cast.

The fact that Attorney General Barr has opened this investigation at all plays into Trump’s use of the pejorative “Obamagate” label and furthers Trump’s efforts to discredit the Flynn investigation by Obama Administration officials, despite the fact that Flynn pleaded guilty and admitted his guilt under oath on multiple occasions.

Any Department investigation of such a politically charged matter should not be opened at all just months before the presidential election, but if it is, the investigation must be undertaken in a manner that leaves no room for questioning the fairness, impartiality and credibility of the investigation or the investigators.

In this light, Attorney General Barr’s appointment of U.S. Attorney Bash to lead the investigation and Bash’s acceptance of the assignment is self-evidently improper, and in direct conflict with the Department’s core [mission](#) “to ensure fair and impartial administration of justice for all Americans.”

There is no way that an individual who worked in this Administration as Special Assistant and Associate White House Counsel for President Trump can have any public credibility in conducting part of a criminal investigation demanded by President Trump and being used by Trump for partisan political purposes to damage his opponent in the 2020 presidential election.

In selecting U.S. Attorney Bash, the Attorney General has chosen a prosecutor who creates the appearance that he has been chosen to serve the partisan re-election objectives of his former boss.

This selection is not only contrary to the core mission of the Department but also apparently fails to comply with DOJ conflict of interest rules.

The DOJ recusal regulations at 26 C.F.R. § 45.2 state:

(a) . . . no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:

(1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

(2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

28 CFR § 45.2(a). The regulation further defines the term “political relationship” to mean “a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof.” *Id.* § 45.2(c). A Special Assistant to the President and Associate White House Counsel is a principal adviser to the President.

Further, under 28 CFR § 42.5(b) any prosecutor falling within the scope of subsection 45.2(a) must have his participation in an investigation reviewed, and may participate in the investigation only if a supervisor determines in writing:

. . . after full consideration of all facts and circumstances, that:

(1) The relationship will not have the effect of rendering the employee’s service less than fully impartial and professional; and

(2) The employee’s participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

As explained above, the allegation that Obama Administration officials engaged in improper unmasking of Flynn is part of President Trump's use of the pejorative and unexplained label "Obamagate," which Trump repeatedly wields in an attempt to damage the presidential campaign of his opponent, Vice President Biden.

This unmasking allegation is publicly associated with President Trump and his allies, and with Trump's efforts to damage and defeat Vice President Biden. Trump thus has a "specific and substantial" political interest in how the investigation of that allegation is undertaken and resolved, within the scope of the Justice Department's conflict of interest and recusal rules.

Thus, under DOJ conflict of interest rules, Bash has a "political relationship" with President Trump, and Trump has a "direct and substantial" interest in the conduct and outcome of the unmasking investigation. Therefore, Bash's participation in the unmasking investigation is precluded by subsection (a) of the Department's conflict of interest rules. Bash's participation is also precluded by subsection (b) of the same rules.

Bash's role as Special Assistant and Associate White House Counsel to President Trump means his service to lead the unmasking investigation is "less than fully impartial" within the scope of subsection (b)(1), particularly given the highly politicized context in which any investigation of the unmasking allegation would occur. For the same reason, Bash's involvement in the investigation would create "an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution," within the scope of subsection (b)(2).

Under DOJ conflict of interest rules, Barr should not have appointed Bash to lead this investigation and Bash should never have accepted the position. Bash is prohibited from conducting the "unmasking" investigation and must withdraw immediately from doing so.

The decision to appoint Bash, with his close ties to President Trump, to lead an investigation initiated just months before a presidential election – an investigation that serves Trump's partisan political aim of damaging his opponent in the coming presidential election – could not be more improper and in apparent violation of the Justice Department rules.

Democracy 21 strongly urges you to open an immediate investigation of this matter and to take appropriate action to have U.S. Attorney Bash comply with the Justice Department's recusal rules and to hold Attorney General Barr and Bash accountable for their apparent violation of the Department's conflict of interest rules.

Sincerely,



Fred Wertheimer
President