

Article

THE TRANSACTIONAL AND SITUATIONAL VIEW OF THE CONDUCT OF GOVERNMENT AND THE USE OF FEDERAL CRIMINAL INVESTIGATIONS AND PROSECUTIONS AS INSTRUMENTS TO INFLUENCE FOREIGN RELATIONS AND ADVANCE GEOPOLITICAL INTERESTS

Thomas M. DiBiagio*

INTRODUCTION.....	187
I. The Use of Criminal Investigations and Prosecutions As An Expedient Tool for Advancing Political Interests Unrelated to Pursuing Justice and Preventing Injustice.	190
A. Hong Kong.....	190
B. Ukraine.....	195
II. The Assertion that Federal Criminal Investigations Were Interfered With to Advance Political Interests.....	196
III. The Assertion that Federal Criminal Investigations and Prosecutions of Foreign Officials and State Controlled Entities Were Used As Instruments to Influence Foreign Relations and Advance Geopolitical Interests	211
A. ZTE: Sanctions Enforcement	216
B. Mexico: Public Corruption and Drug Trafficking Conspiracy	219
C. North Korea: International Money Laundering Conspiracy.	226

* Thomas M. DiBiagio, Adjunct Professor of Law, William & Mary School of Law, and former United States Attorney for the District of Maryland. The author genuinely appreciates the assistance of the editors and staff of the American Journal of Criminal Law in publishing this Article. © 2021, Thomas M. DiBiagio.

D. Turkey: Halkbank Bank Corruption and Evading Iran Sanctions Evasion.	228
E. China: Computer Fraud and Economic Espionage.	229
F. Venezuela: Corruption and Drug Trafficking	238
VII. Restraints that Check the Use of Federal Investigations and Prosecutions to Advance Political Interests Unrelated to Pursuing Justice and Preventing Injustice.	241
CONCLUSION.....	247

INTRODUCTION

The Department of Justice has a well-established strategy of targeting foreign commercial corruption. Using the Foreign Corrupt Practices Act,¹ this effort has targeted businesses and individuals involved in schemes to use corrupt payments to a foreign official for the purpose of obtaining or retaining business.² Because the statute does not typically apply to foreign government officials,³ federal prosecutors have used the federal fraud and money laundering statutes to charge foreign officials with participating in these commercial corruption schemes.⁴ In addition, over the last two years, the special counsel conducting investigations related to interference in the 2016 election has targeted foreign government officials beyond foreign commercial corruption schemes. The special counsel has brought charges against lower-level Russian foreign intelligence operatives and military intelligence officers, accusing them of committing identity theft, cybercrimes and participating in a scheme to interfere with the 2016 election.⁵

Over the last four years, the Department of Justice has intensified its targeting of foreign actors by recording several significant criminal indictments. These prosecutions reflect an inflection. A close examination of these indictments reveals that the strategy of the Department of Justice was expanded well beyond the reach of the Foreign Corrupt Practices Act and the work of the special counsel. First, the targets of these indictments were

¹ The Foreign Corrupt Practices Act prohibits American companies and American persons, as well as their agents, from using interstate commerce in connection with the payment of bribes. *See* 15 U.S.C. § 78dd-2. The FCPA also prohibits foreign persons or businesses from taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States. *See* 15 U.S.C. § 78dd-3.

² *See* Micah Maidenber, *Legg Mason to Pay SEC More Than \$34 Million to Settle Libya Bribery Case*, WALL ST. J. (Aug. 27, 2018), <https://www.wsj.com/articles/legg-mason-to-pay-sec-more-than-34-million-to-settle-libya-bribery-case-1535393458> (efforts to bribe government officials to secure investments from Libya's sovereign-wealth fund and related government owned financial firms); Aruna Viswanatha, *J.P. Morgan Settlement Lays Bare the Practice of Hiring 'Princelings'*, WALL ST. J. (Nov. 17, 2016), <https://www.wsj.com/articles/j-p-morgan-to-pay-264-million-to-end-criminal-civil-foreign-corruption-cases1479398628#:~:text=J.P.%20Morgan%20agreed%20to%20pay,hiring%20of%20so%2Dcalled%20princelings> (J.P. Morgan agreed to pay \$264 million and admitted it violated the Foreign Corrupt Practices Act through its practice of hiring relatives of Chinese government officials for the purpose of securing business); *United States v. Seng*, 934 F.3d 110, 146 (2d Cir. 2019) (affirming foreign bribery conviction).

³ The Foreign Corrupt Practice Act applies to American companies and citizens and their agents, employees, officers directors and shareholders. The statute also applies to foreign actors acting within the United States. *See* *United States v. Hoskins*, 902 F.3d 69, 73 (2d Cir. 2018) (holding that FCPA contains no provision assigning liability to nonresident foreign nationals acting outside United States territory, who lack an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies).

⁴ *See e.g.*, Indictment at 33–35 and 42–43, *United States v. Boustani*, No. 18-681, (E.D.N.Y. filed Dec. 19, 2018) (fraud and money laundering charges against corrupt minister of finance of Mozambique).

⁵ Indictment at 2–4, 16–19, and 34–35, *United States v. Internet Research Agency LLC*, No. 00032-DLF (D.D.C. filed Feb. 6, 2018) (conspiring to interfere with the 2016 presidential election); Indictment, at 6, 19–21, and 27, *United States v. Netyksho*, No. 00215 (D.D.C. filed July 13, 2018) (conspiring to interfere with the 2016 presidential election).

expanded to include government officials, foreign intelligence officers, and state-owned and state-controlled entities. Federal prosecutors brought charges against a former senior law enforcement official in Mexico,⁶ the former defense minister of Mexico,⁷ Turkey's second-largest state-owned bank,⁸ China's largest telecom equipment maker and its chief financial officer,⁹ members of the Chinese military intelligence,¹⁰ Chinese foreign intelligence operatives,¹¹ North Korean government officials and a North Korean foreign intelligence officer,¹² the president of Venezuela, the chief justice of Venezuela, other senior-level government officials and intelligence officers in the Venezuelan government,¹³ the Minister of Defense of Venezuela,¹⁴ and two former officials at Venezuela's state-owned and state-controlled oil monopoly.¹⁵ Second, the scope of the underlying conduct was expanded beyond foreign commercial bribery and kickback schemes, identify theft, and cybercrimes. In the shadow of all of these federal charges was an extraordinary incursion by the Department of Justice into foreign sovereignty by targeting foreign government corruption. Along with the expansion of the scope of these investigations and prosecutions, there has been legitimate concerns that these federal investigations and prosecutions

⁶ Indictment at 3–4, *United States v. Luna*, No. 19-576 (E.D.N.Y. filed July 30, 2020) (corruption and international drug trafficking charges).

⁷ Indictment at 1 and 3, *United States v. Cienfuegos Zepeda*, No. CR 19366 (E.D.N.Y. filed Aug. 14, 2019) (corruption and international drug trafficking and money laundering charges); *Read U.S. Prosecutors' Motion to Dismiss the Indictment of Former Mexican Defense Minister Salvador Cienfuegos Zepeda*, WASH. POST (Nov 18, 2020), https://www.washingtonpost.com/context/read-u-s-prosecutors-motion-to-dismiss-the-indictment-of-former-mexican-defense-minister-salvador-cienfuegos-zepeda/8531831e-733a-477f-a7d1-91e731d8a818/?itid=ik_interstitial_manual_6.

⁸ Indictment at 4, *United States v. Turkiye Halk Bankasi A.S.*, No. S6 15 Cr. 867 (S.D.N.Y. filed Oct. 15, 2009) (wire fraud and money laundering charges against state-owned and state-controlled bank in Turkey); Humeyra Pamuk, *Turkey's Halbank May Face Sanctions if it Fails to Appear in U.S. Court*, REUTERS (Oct. 23, 2019), <https://www.reuters.com/article/us-usa-turkey-halbank/turkeys-halbank-may-face-sanctions-if-it-fails-to-appear-in-u-s-court-idUSKBN1X222A>.

⁹ Superseding Indictment 1–3, *United States v. Huawei Technologies Co., LTD*, No. 18-457 (E.D.N.Y. filed Feb. 12, 2020); Superseding Indictment, *United States v. Huawei Technologies Co., LTD*, No. 18-457 (E.D.N.Y. filed Jan. 24, 2019); *Huawei Still Tops Global Telecom Equipment Makers in 2020*, GLOBAL TIMES (Mar. 9, 2021), <https://www.globaltimes.cn/page/202103/1217854.shtml>.

¹⁰ *See* Indictment at 2, *United States v. Zhiyong*, No. 1:20-cr-00046 (N.D. Ga. filed Jan. 28, 2020) (computer hacking into credit reporting agency).

¹¹ Indictment at 1–2, *United States v. Zhu Feng*, No. MJ-1025 (E.D.N.Y. filed Oct. 28, 2020); Indictment at 2, *United States v. Xiaoyu*, No. 6019 (E.D. Wash. filed July 7, 2020) (conspiracy to steal coronavirus vaccine data for Chinese government).

¹² Indictment at 3–6, *United States v. Ko Chol Man*, No. 1:20-cr-00032-RC (D.D.C. filed Feb. 5, 2020) (international money laundering conspiracy scheme to facilitate North's nuclear weapons program).

¹³ Indictment at 4–6, *United States v. Maduro Moros*, No. 1:11-CR-205 (S.D.N.Y. filed Mar. 26, 2020) (corruption and narco-terrorism conspiracy).

¹⁴ Indictment at 1–2, *United States v. Vladimir Padrino Lopez*, No. 1:19-cr-00176 (D.D.C. filed May 24, 2019) (corruption and narco-terrorism conspiracy); Reuters Staff, *Venezuela's Defense Minister Asked Maduro to Resign*, REUTERS (Jan. 9, 2019), <https://www.reuters.com/article/us-venezuela-politics-defense/venezuelas-defense-minister-asked-maduro-to-resign-washington-post-idUSKCN1P32LQ>.

¹⁵ Indictment at 2 and 4, *United States v. Carolas De Leon-Perez*, No. 17 CR 514 (S.D. Tex. filed Aug. 23, 2017) (corruption and money laundering conspiracy).

crossed a line and were used as instruments to influence foreign relations and advance geopolitical interests.

This article will examine the transactional and situational view of the conduct of government, the use of federal criminal investigations, and prosecutions as expedient instruments to advance political interest unrelated to pursuing justice and preventing injustice. Part I of the Article will discuss two dramatic examples of the transactional and situational use of the law. In particular, Part I will examine the implementation of a national security law by the Chinese government in Hong Kong to suppress domestic opposition and the campaign by Donald Trump to use military assistance to pressure the Ukraine government to pursue a corruption investigation of a political rival. Part II of the Article will then examine the assertion that the Department of Justice was not operating independently and that federal criminal investigations were interfered with to advance political interests unrelated to the pursuit of justice or preventing injustice. Part III of the Article will draw attention to the concern that federal prosecutions targeting foreign government officials and state-controlled entities were used as expedient tools to influence foreign relations and advance geopolitical interests. Finally, Part IV of the Article will examine the restraints that may apply to curtail the use of federal investigations and prosecutions to advance political interest unrelated to pursuing justice or preventing injustice.

Looking forward, it is important to understand the lessons learned from the transactional and situational view of the conduct of government. First, there is a real question about the efficacy of using criminal investigations and prosecutions as leverage to influence foreign relations and advance geopolitical interests. Federal criminal investigations and prosecutions are not designed to be a contingent set of arrangements to be used as leverage in a political deal. In addition, one of the unintended consequences of the willingness to deal with these federal charges away is that it undercuts any perception that these indictments are instruments of geopolitical power. If these investigations and prosecutions were intended to be used to persuade, intimidate or deter adversarial governments, the tactic was uniformly unsuccessful. As a practical matter, because these federal criminal indictments did not present any risk to the foreign targets or their governments, the indictments were not effective in altering behavior or driving a desired geopolitical outcome. Second, there is a cost to using federal criminal investigations and prosecutions as expedient instruments to influence foreign relations and advance geopolitical interests. The Department of Justice is the vehicle through which the nation honors its commitment to pursue justice and prevent injustice.¹⁶ The reputation of the

¹⁶ See, e.g., Katharine Q. Seelye, *Dzhokhar Tsarnaev Is Guilty on All 30 Counts in Boston Marathon Bombing*, N.Y. TIMES (Apr. 8, 2015), <https://www.nytimes.com/2015/04/09/us/dzhokhar-tsarnaev-verdict-boston-marathan-bombing-trial.html>; see also Jo Thomas, *McVEIGH GUILTY ON ALL COUNTS IN THE OKLAHOMA CITY BOMBING; JURY TO WEIGH DEATH PENALTY*, N.Y. TIMES (June 3, 1997), <https://www.nytimes.com/1997/06/03/us/mcveigh-guilty-all-counts-oklahoma-city-bombing->

Department of Justice for independence and integrity is founded on its straightforward commitment to an honest and unencumbered effort for justice. This commitment is binding and is not transactional or situational and should not be disregarded in favor of convenience.

I. THE USE OF CRIMINAL INVESTIGATIONS AND PROSECUTIONS AS AN EXPEDIENT TOOL FOR ADVANCING POLITICAL INTERESTS UNRELATED TO PURSUING JUSTICE AND PREVENTING INJUSTICE.

A. *Hong Kong*

To see the use of criminal laws as expedient tools to advance political interests unrelated to pursuing justice and preventing injustice, unfortunately, does not require a developed imagination. One of the most recent and oppressive examples is being carried out by the Chinese government to curtail the independence and freedoms in Hong Kong. In June of 2020, Chinese authorities imposed a vague and far-reaching national security law on Hong Kong to suppress political opposition and dissent. The law designates various protests related activities, including the disruption of public transportation infrastructure, a criminal offense. Beijing has made the enforcement of this national security law central to its effort to suppress political opposition in Hong Kong and has used the threat of criminal prosecution to target journalists, activists, opposition legislators, and protest organizers.

On June 29, 2020, the *New York Times* was unambiguous in its reporting that the national security law was intended to intimidate and suppress dissent in Hong Kong.¹⁷

China unveiled a contentious new law for Hong Kong late Tuesday that grants the authorities sweeping powers to crack down on opposition at home and abroad with heavy prison sentences for vaguely defined political crimes. The law's swift approval in Beijing signaled the urgency that the Communist Party leader, Xi Jinping, has given to expanding his control over Hong Kong to quash pro-democracy protests that evolved last year into

jury-weigh-death-penalty.html; Seth Mydans, *Verdict in Los Angeles; 2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES (Apr. 18, 1993), <https://www.nytimes.com/1993/04/18/us/verdict-in-los-angeles-2-of-4-officers-found-guilty-in-los-angeles-beating.html> ("A Federal jury today convicted a police sergeant and the officer who delivered the most blows to Rodney G. King in a beating two years ago and acquitted two other officers. Their civil rights case focused the nation's attention on police misconduct and urban problems."); Walter Rugaber, *7 Men Sentenced In Rights Killings; Receive Sentences in Slayings*, N.Y. TIMES (Dec. 30, 1967), <https://www.nytimes.com/1967/12/30/archives/7-men-sentenced-in-rights-killings-receive-sentences-in-slayings.html> (seven men convicted of federal civil rights charges for taking part in a Ku Klux Klan plot to kill three young civil rights workers in Neshoba County, Mississippi were sentenced to Federal prison terms ranging from 3 to 10 years).

¹⁷ Chris Buckley, Keith Bradsher & Tiffany May, *New Security Law Gives China Sweeping Powers Over Hong Kong*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/world/asia/china-hong-kong-security-law-rules.html>.

an increasingly confrontational challenge to Chinese rule. . . The text provided a far-reaching blueprint for the authorities and the courts to suppress the city's protest movement and for China's national security apparatus to pervade many layers of Hong Kong's society. Ambiguously worded offenses of separatism, subversion, terrorism and collusion with foreign countries carry maximum penalties of life imprisonment. Inducing residents to hate the government in Beijing or Hong Kong is defined as a serious crime.¹⁸

In a follow-up article a month later, the *New York Times* described how quickly and aggressively the national security law was being enforced by the Chinese authorities and their surrogates in Hong Kong and used as an instrument of domestic repression. The report also noted the intimidation of Hong Kong's director of prosecutions:¹⁹

[T]he Chinese government has used the letter and spirit of the law to crush Hong Kong's pro-democracy opposition with surprising ferocity. In the last week alone, the authorities have ousted a tenured law at the University of Hong Kong who has been a key figure in the city's democracy movement, and arrested four young activist on suspicion that they expressed support online for independence. They have also barred a dozen candidates from running for the legislature, using opposition to the security law as new ground for disqualification.

. . . .

The breadth and severity of the actions reflect Beijing's urgency to smother opposition to its encroaching authority over the territory after more than a year of political upheaval there.

. . . .

Years in the making, the national security law created a climate of fear and uncertainty in only a matter of hours after it was imposed. . . On Friday evening, Chinese state television reported that the Hong Kong police had issued warrants for the arrests of six democracy advocates who are now overseas. They are wanted on charges of promoting secession and colluding with foreign forces, according to the report—crimes that are punishable with life imprisonment under the security law.

. . . .

Also on Friday, Hong Kong's secretary for justice said that David Leung, the city's British-trained director of prosecutions, had submitted his

¹⁸ *Id.*

¹⁹ Keith Bradsher, Elaine Yu & Steven Lee Myers, *With Security Law as a Cudgel, Beijing Cracks Down on Hong Kong*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/world/asia/hong-kong-election-national-security-law.html>.

resignation. Pro-Beijing politicians and the police had accused Mr. Leung of being too cautious about bringing charges against protesters, though he had prosecuted some high-profile activists. Mr. Leung did not issue a statement.”²⁰

The national security law was viewed as part of the process where the Chinese government will exercise control over the prosecutorial power in Hong Kong. The *Wall Street Journal* reported that the law allows China’s top prosecutorial agency and supreme court to designate mainland Chinese prosecutors and courts to handle certain major national-security cases from Hong Kong, thus allowing suspects to be tried in mainland courts for alleged crimes committed in Hong Kong. Moreover, the law was intentionally structured to allow Beijing to exercise this prosecutorial power without legal restraints or oversight.²¹

On November 30, 2020, the *New York Times* expressed its concern that the Chinese government was undermining review and oversight by an independent judiciary.²²

²⁰ *Id.* It has also been reported that as part of the crackdown on political dissent, the Chinese authorities seized the personal assets of activist. See Austin Ramzy & Tiffany May, *U.S. Imposes Sanctions on Chinese Officials Over Hong Kong Crackdown*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/12/08/world/asia/hong-kong-china-us-sanctions.html>.

²¹ Chun Han Wong, *What’s in Hong Kong’s New National-Security Law*, WALL ST. J. (July 2, 2020), <https://www.wsj.com/articles/whats-in-hong-kongs-new-national-security-law-11593689730>.

²² Austin Ramzy, *Hong Kong’s Courts Are Still Independent. Some Want to Rein Them In*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/11/30/world/asia/hong-kong-china-courts.html>; See also Vivian Wang & Tiffany May, *Hong Kong Protesters Who Fled by Boat Are Sentenced to Prison in China*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2020/12/29/world/asia/hong-kong-protesters-china.html#:~:text=HONG%20KONG%20%E2%80%94%20A%20group%20of,offensive%20against%20pro%2Ddemocracy%20activists>:

A group of Hong Kong protesters who were arrested by the Chinese authorities while fleeing the city by speedboat were sentenced by a mainland court to between seven months and three years in prison on Wednesday, in the Chinese Communist Party’s latest offensive against pro-democracy activists. The case of the 12 protesters. . . who were detained in the mainland for months without charges, then tried out of public view—embodied the worst of their fears about Hong Kong’s future under tighter central government control. . .

. . . .

The 12 protesters, who prosecutors said were caught in mainland waters, were not extradited. But their detention and secretive sentencing in Yantian District People’s Court, in the mainland city of Shenzhen, laid bare the differences between Hong Kong’s independent legal system and the courts in the mainland, which are controlled by the Communist Party and often used to silence dissidents . . .

. . . .

Throughout their three-month detention, the protesters were denied access to lawyers. . . They were also not charged with any crimes until this month; in the mainland, defendants are routinely held for long stretches without being charged . . . Nor was the trial open to observers, despite requests from the family and some foreign diplomats.

See also Austin Ramzy, *China Moves to Punish Lawyers Hired to Help Hong Kong Activists*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/04/world/asia/china-hong-kong-lu-siwei-ren-quanniu.html>:

In addition to imposing the national security law, Communist Party officials and state newspapers in the city are pushing for still more control. In a continuing series, *Ta Kung Pao*, a newspaper owned by the Chinese government's liaison office in Hong Kong, has demanded that judges be patriotic. It has called for establishing a council to set the length of sentences, an external panel to handle complaints about judges and greater scrutiny over the judicial selection process.

....

The security law has further constricted the city's courts. It allows for some cases, such as those involving foreign forces or imminent threats, to be tried on the mainland. Under the law, Carrie Lam, Hong Kong's chief executive, will designate judges for trials on national security charges. . .

....

Hong Kong's Department of Justice recently pressed beyond the scope of the law, asking that a judge authorized to hear national security matters handle the trial of Tam Tak-chi, an activist charged with sedition and unauthorized assembly. Those charges do not fall under the security law.²³ On December 3, 2020, Austin Ramzy and Tiffany May writing in the *New York Times* reported on the imprisonment of three prodemocracy

The Chinese legal authorities have threatened to revoke the licenses of two lawyers hired to help a group of Hong Kong protesters who were arrested last year while trying to flee to Taiwan by speedboat. . .

....

For Hong Kong's pro-democracy opposition, the case has highlighted fears of the Communist Party-controlled legal system on the mainland and the risks it poses to the city's tradition of an independent. . .

....

The Chinese authorities have for years used annual licensing requirements to intimidate lawyers involved in sensitive cases, wielding the threat of disbarment to punish those who don't back down. . .

....

"For their daring to go against the powers that be, and persistence in upholding the rights of the twelve, the authorities have resorted to ending their professional career and cutting off their livelihoods," the families said in a statement.

²³ *Id.*; see Chris Buckley, Keith Bradsher & Elaine Yu, *Law Will Tighten Beijing's Grip on Hong Kong With Chinese Security Force*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/20/world/asia/china-hong-kong-security-law.html> ("Hong Kong's opposition politicians said the law would seriously erode the city's cherished judicial independence and rights to protest and free speech."); see also James T. Areddy & Chun Han Wong, *China's Security Law Tightens Vise on Hong Kong*, WALL ST. J. (June 30, 2020), <https://www.wsj.com/articles/as-china-national-security-law-looms-hong-kong-activists-disband-11593528117> ("The law imposes penalties of up to lifetime imprisonment and empowers Beijing to deploy state-security agencies in the city and, in some cases, directly tackle suspected national-security crimes. . . The further tilt in power to Beijing's favor especially undermines Hong Kong's well-regarded legal system, which is based on British Common Law.").

activists on unauthorized assembly charges and described how the law was being used to advance the Chinese government's political interests.²⁴

Their sentencing points to the wide-ranging nature of Beijing's increasingly aggressive crackdown on political opposition in Hong Kong, which was roiled by months of antigovernment demonstrations last year. The police have arrested activists, journalists and politicians, while pro-Beijing voices have sought to pressure the city's largely independent judiciary and freewheeling news media. China also moved to force the ouster of four lawmakers last month, prompting the mass resignation of the pro-democracy camp from the local legislature. This summer, China imposed a national security law on Hong Kong that grants the authorities sweeping powers to limit dissent.²⁵

The national security law gives the Chinese government the power to enforce crimes such as foreign collusion, session and sedition. These laws are being used by Beijing as an expedient instrument to intimidate and suppress dissent. Moreover, as part of the strategy for implementing the national security law, the Chinese government is deliberately intimidating prosecutors and undermining review and oversight by an independent judiciary. The use of the law to suppress political dissent in Hong Kong, is, therefore, a stunning example of the unquestioned use of criminal investigations and prosecutions to advance political interests unrelated to pursuing justice or preventing injustice.²⁶

²⁴ Austin Ramzy & Tiffany May, *Joshua Wong and Agnes Chow Are Sentenced to Prison Over Hong Kong Protest*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/02/world/asia/joshua-wong-agnes-chow-hong-kong.html>.

²⁵ *Id.*

²⁶ James T. Areddy & Chun Han Wong, *China's Security Law Tightens Vise on Hong Kong*, WALL ST. J. (June 30, 2020), <https://www.wsj.com/articles/as-china-national-security-law-looms-hong-kong-activists-disband-11593528117> (reporting on how the national-security law has provided Beijing an overarching legal basis for its suppression of dissent); *see also* Wenxin Fan, *China's Campaign to Crush Democracy in Hong Kong Is Working*, WALL ST. J. (Feb. 25, 2021), <https://www.wsj.com/articles/chinas-campaign-to-crush-democracy-in-hong-kong-is-working-11614268174>:

Just eight months after Beijing imposed a new national security law to quell a pro-democracy movement, this freewheeling former British colony has all but been brought to heel. Moving with a scope and speed few here anticipated, authorities have used the law to stamp out street protests, ban activists from lobbying foreign governments, gut the city's legislature and arrest most of the opposition. . .

. . . .

The national security law categorizes four crimes—secession, subversion, terrorism and colluding with foreign forces, punishable by up to life imprisonment. It also makes a point of requiring authorities to supervise and regulate schools, social organizations, media and the internet. It allows suspects to be sent to the mainland for trial, a prospect locals find most scary, and enables mainland state security agencies to operate from offices in Hong Kong. . .

. . . .

Chinese officials are now eyeing changes to Hong Kong's other institutional check on executive power: its judiciary. They complain that judges release activists on bail soon after police arrest them, impeding Beijing's goals. The grumbles underscore an uncomfortable truth:

B. Ukraine

The July 2019 campaign by Mr. Trump to use military assistance to pressure the Ukrainian government to announce a corruption investigation of his political rival, is another disturbing imprint of the transactional and situational view of the conduct of government. Kenneth P. Vogel of the *New York Times* provided a summary of the evidence presented during the impeachment process that described in detail an illicit campaign by President Trump to withhold nearly \$400 million in military aid as leverage to intimidate the Ukrainian government to pursue a corruption investigation that would benefit him politically.²⁷

[T]he impeachment process that dominated Washington for months produced a set of facts that is largely beyond dispute: The president of the United States pressured a foreign government to take actions aimed at his political opponents. . . Mr. Trump’s public statements, plus testimony and documents introduced during the impeachment process and revelations independent from the congressional revelations from the congressional inquiry, establish a narrative of the president’s involvement in the effort. . . to persuade Ukraine to publicly commit to investigating [a political rival]. . .

. . . .

Some of the clearest evidence comes from Mr. Trump’s own statements, both in his phone conversation with President Volodymyr Zelensky of Ukraine on July 25 and in public remarks he later made. A reconstructed transcript of the call, made public by the White House in October, makes clear that Mr. Trump asked the Ukrainian president to pursue investigations into the Bidens. . . “I would like you to do us a favor through,” Mr. Trump said, asking Mr. Zelensky’s government. . . to pursue the investigations.”²⁸

The *Wall Street Journal* was even more direct in its conclusion that Mr. Trump attempted to use military aid as an expedient instrument to advance a personal political interest.²⁹

The city’s British-style independent justice system is incompatible with that of the mainland, where judges are considered part of the political apparatus that implements the party’s ruling.

²⁷ Kenneth P. Vogel, *Beyond the Partisan Fight, a Wealth of Evidence About Trump and Ukraine*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-ukraine-evidence.html>.

²⁸ *Id.*

²⁹ Rebecca Ballhaus & Dustin Volz, *Testimonies, Place Trump at Center of Ukraine Pressure Campaign*, WALL ST. J. (Nov. 23, 2019), <https://www.wsj.com/articles/testimonies-place-trump-at-center-of-ukraine-pressure-campaign-11574517601>; see also Rebecca Ballhaus & Dustin Volz, *Impeachment Hearing: Sondland Says He Pursued Ukraine Probes at ‘Express Direction’ of Trump*, WALL ST. J. (Nov. 20, 2019), <https://www.wsj.com/articles/gordon-sondland-to-testify-in-impeachment-inquiry-11574245802>:

Gordon Sondland, the U.S. ambassador to the European Union, said Wednesday at a public hearing that “at the express direction” of President Trump he urged Ukraine to announce investigations that would benefit the president politically. Mr. Sondland testified there was a

More than 30 hours of public hearings laid out the case that President Trump sought to use the powers of his office to drive a newly elected Ukrainian president to pursue investigations that would benefit him politically.

....

Taken together, the hearings depicted a president whose interest in Ukraine centered on his push for investigations that could reap him political gain.³⁰ The Ukraine pressure campaign reflected Mr. Trump's transactional and situational view of the conduct of government. The record reflects that there was an effort to use military aid as leverage to intimidate a foreign government to pursue a corruption investigation to advance interests unrelated to pursuing justice or preventing injustice. Unfortunately, the records suggest that Mr. Trump's willingness to use the conduct of government as leverage to advance his political interests was not limited to the Ukraine pressure campaign and contributed to a narrative that the Department of Justice was not acting independently of his political interest.

II. THE ASSERTION THAT FEDERAL CRIMINAL INVESTIGATIONS WERE INTERFERED WITH TO ADVANCE POLITICAL INTERESTS

President Trump's view that the conduct of government was transactional and situational was not limited to the use of military assistance to pressure the Ukrainian government to announce a corruption investigation of a political rival. Mr. Trump clearly viewed criminal investigations and prosecutions as expedient instruments that could be used to advance his political interests. The *New York Times*³¹ and the *Wall Street Journal*³² were unsparing in their criticism of actions that they believe suggest that the Department of Justice was not operating independently of the political interests of the White House. Therefore, the discussion of the use of federal criminal law as an instrument to achieve geopolitical interest, should also take into account the concern that federal criminal investigations and

"quid pro quo" between a White House meeting for the new Ukrainian president and the investigations Mr. Trump sought, and explained in detail why he believed nearly \$400 million in aid to Ukraine had been linked to those probes. Democrats said his account backed up the central issue in the impeachment inquiry. Republicans questioned his memory and truthfulness and said he was overstating the evidence for his conclusion. "As a presidential appointee, I followed the directions of the president," Mr. Sondland said, adding that he worked with Rudy Giuliani, the president's personal attorney, to persuade Ukraine to launch investigations into Democrat Joe Biden and alleged 2016 election interference "because the president directed us to do so."

³⁰ *Id.*

³¹ Maggie Haberman & Michael Crowley, *Trump Calls on Barr to 'Act' Against Biden Before Election*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/us/politics/trump-barr-biden.html>.

³² Andrew Restuccia & Sadie Gurman, *Trump Urges Barr to Initiate Investigation Into Joe Biden and Son*, WALL ST. J. (Oct. 20, 2020), <https://www.wsj.com/articles/trump-urges-barr-to-initiate-investigation-into-joe-biden-and-son-11603220876>.

prosecutions were interfered with to advance political interests unrelated to pursuing justice and preventing injustice.

On October 20, 2020, the *New York Times* reported that President Trump, demonstrating his worse impulses, essentially tried to revive the risky, legally dubious and dangerous Ukrainian type pressure campaign by urging that federal prosecutors pursue a corruption investigation of his political rival:³³

President Trump on Tuesday called on William P. Barr, the attorney general, to take action before Election Day against his Democratic opponent. . . an extraordinary attempt to pressure the government's chief law enforcement to help him politically.

"We've got to get the attorney general to act," Mr. Trump said on Tuesday. . . Mr. Trump called on Mr. Barr to appoint a special prosecutor or similar official, saying: "He's got to act. And he's got to act fast." "This is major corruption, and this has to be known about before the election."

. . . .

Critics have accused Mr. Barr on a number of occasions of intervening on issues to help Mr. Trump politically. But for the president to publicly call on him to take action against a political opponent was remarkable, especially two weeks before a presidential election.³⁴

On the same day, the *Wall Street Journal* also reported on President Trump's urging that the Department of Justice pursue a corruption investigation of his political rival.³⁵ Moreover, Andrew Restuccia and Sadie Gurman included the identical comment asserting their belief that Mr. Barr had taken actions to benefit of Mr. Trump and those with personal or political connections to him, "including personal interventions in *several criminal cases* related to Mr. Mueller's Russia probe that Mr. Barr said had been poorly handled."³⁶

A federal criminal investigation was never pursued as desired by Mr. Trump. Moreover, it was later revealed that Mr. Barr did not publicly disclose the existence of an investigation of Hunter Biden into possible tax evasion prior to the election.³⁷ Nevertheless, over the last four years, Mr. Barr has

³³ See Haberman, *supra* note 31; see also Peter Baker and Maggie Haberman, *Trump Lashes Out at His Cabinet With Calls to Indict Political Rivals*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/politics/trump-calls-to-indict-political-rivals.html>:

Mr. Trump has often argued that his political antagonists should be prosecuted, but in this case, he went further by indicating that he had directly pressured Mr. Barr to indict without waiting for more evidence. "He's got all the information he needs," the president said. "They want to get more, more, more, they keep getting more. I said, 'You don't need any more.'"

³⁴ *Id.*

³⁵ See Restuccia, *supra* note 32.

³⁶ *Id.*

³⁷ Maggie Haberman & Michael S. Schmidt, *Trump Denounces Barr for Not Publicly Disclosing the Hunter Biden Inquiry*, N.Y. TIMES (Dec. 13, 2020), <https://www.nytimes.com/2020/12/12/us/politics>

been expressly portrayed as an instrument of Mr. Trump and the relentless criticism has been that, under Mr. Barr, the Department of Justice was not operating independently of the political interests of the White House. This critical narrative of Mr. Barr has relied on judgments he made to intervene in the prosecution of two former associates of Mr. Trump that were brought by the special counsel investigating interference in the 2016 election. In the prosecution of former national security advisor Michael Flynn, Mr. Barr intervened or interfered in this prosecution after the defendant pleaded guilty to lying during an interview by FBI agents. Mr. Barr directed that prosecutors seek dismissal of the charges. Aruna Viswanatha and Sadie Gurman reported on the request to dismiss the charges for the *Wall Street Journal*.³⁸

The Justice Department moved to drop its case against Michael Flynn in a major reversal more than two years after the former national security adviser pleaded guilty to lying to the FBI. . .

. . . .

“The Government has concluded that the interview of Mr. Flynn was untethered to, and unjustified by, the FBI’s counterintelligence investigation into Mr. Flynn,” said the filing, signed by interim Washington U.S. Attorney Timothy Shea, a former aide to Attorney General William Barr.

. . . .

Mr. Flynn, a former Army lieutenant general, admitted that he had misled FBI agents about whether he had spoken to Russia’s ambassador weeks before President Trump’s inauguration about U.S. sanctions on the country.

. . . .

At issue wasn’t whether or not Mr. Flynn lied to the FBI, which he admitted to, but rather whether that lie was material to the investigation—and whether the interview was justified as part of the counterintelligence probe into the national security adviser. It was slated to be closed just as evidence of his contacts with the Russian diplomat surfaced.³⁹

The prosecution became involved in a complicated legal process after the federal district judge overseeing the case explicitly questioned the request to

/trump-barr-biden-investigation.html; see also Katie Brenner, *William Barr is Out as Attorney General*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/us/politics/william-barr-attorney-general.html> (“Mr. Trump accused his attorney general of disloyalty for not publicly disclosing the department’s investigation into President-elect Joseph R. Biden Jr.’s son Hunter Biden during the campaign.”).

³⁸ Aruna Viswanatha & Sadie Gurman, *Justice Department to Drop Case Against Michael Flynn*, WALL ST. J. (May 7, 2020), <https://www.wsj.com/articles/justice-department-to-drop-case-against-mike-flynn-11588878267>.

³⁹ *Id.*

dismiss the charges. Before a final decision was made by the court, Mr. Flynn was pardoned by President Trump.⁴⁰

In the prosecution of Roger Stone, a longtime friend and informal political advisor, Mr. Barr intervened after the defendant was found guilty of lying to Congress and witness tampering.⁴¹ Prior to sentencing, Mr. Barr intervened in the case and directed that the initial sentencing recommendation of seven to nine years be reduced. Mr. Barr found this recommendation to be excessive and directed that those prosecutors handling the case seek only an unspecified term of incarceration for Mr. Stone.⁴² After he was sentenced to a term of three years,⁴³ President Trump commuted Mr. Stone's sentence.⁴⁴

In its reporting on Mr. Barr's intervention in the Flynn and Stone cases, the *New York Times* and the *Wall Street Journal*, explicitly questioned whether the moves by Mr. Barr were motivated by his intent to benefit Mr. Trump.⁴⁵ Mr. Barr was plainly frustrated with the judgments made by the

⁴⁰ Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html>.

⁴¹ Sharon LaFraniere & Zach Montague, *Roger Stone Is Convicted of Impeding Investigators in a Bid to Protect Trump*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2019/11/15/us/politics/roger-stone-trial-guilty.html>.

⁴² Katie Benner, Sharon LaFraniere & Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/02/11/us/politics/roger-stone-sentencing.html>.

⁴³ See Sharon LaFraniere, *Roger Stone Is Sentenced to Over 3 Years*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/02/20/us/roger-stone-40-months-sentencing-verdict.html>.

⁴⁴ Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>. On December 23, 2020, Stone was granted a full pardon. See Rebecca Ballhaus & Byron Tau, *Trump Pardons Manafort, Stone 24 Others*, WALL ST. J. (Dec. 23, 2020), <https://www.wsj.com/articles/trump-issues-26-more-pardons-including-to-paul-manafort-roger-stone-11608769926>.

⁴⁵ See Adam Goldman & Katie Benner, *U.S. Drops Michael Flynn Case, in Move Backed by Trump*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/05/07/us/politics/michael-flynn-case-dropped.html>. In its reporting on the intervention in the Flynn case, the *New York Times* suggested that the action was in response to political pressure from the White House and undermined the independence of the Justice Department:

After an extraordinary public campaign by President Trump and his allies, the Justice Department dropped its criminal case on Thursday against Michael Flynn Mr. Trump's first national security adviser. Mr. Flynn had previously pleaded guilty twice to lying to F.B.I. agents about his conversations with a Russian diplomat during the presidential transition in late 2016. The move was the latest example of Attorney General William P. Barr's efforts to chisel away at the results of the Russian investigation.

Id.; see also Restuccia, *supra* note 32; Katie Benner, Sharon LaFraniere & Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/02/11/us/politics/roger-stone-sentencing.html>:

Four prosecutors abruptly withdrew on Tuesday from the case of President Trump's longtime friend Roger J. Stone after senior Justice Department officials intervened to recommend a more lenient sentence for crimes he committed in a bid to protect the president. In an extraordinary decision overruling career lawyers, the Justice Department recommended an unspecified term of incarceration for Mr. Stone instead of the prosecutors' request of a punishment of seven to nine years. The move coincided with Mr. Trump's declaration on Twitter early Tuesday that the government was treating Mr. Stone too harshly. The development immediately prompted questions about whether the Justice Department was bending to White House. . . .

investigative agents in the Flynn case and the prosecutors in the Stone case. However, Mr. Barr's concern about whether investigators and prosecutors acted responsibly, seems to have been limited to just these two matters brought by the special counsel. Mr. Barr never connected these concerns to any broader issue or concern about the judgments, practices, or tactics of investigators and prosecutors in other white collar crime cases. As a consequence, it appeared that Mr. Barr was relying on only one sensor and that his intervention was specifically intended to benefit Mr. Trump and those close to him.

After the Flynn and Stone interventions, the narrative that the Justice Department under Mr. Barr was not acting independently of the political interest of the White House took on increasingly undeniable momentum. During the presidential campaign, Mr. Barr was relentlessly criticized for what was viewed as intentionally aligning the Department of Justice with issues that advanced the political interest of the White House. On September 21, 2020, the *New York Times* reported that the Justice Department had threatened to withhold federal funding from New York, Seattle and Portland, Oregon over their responses to protests against injustices that were carried out over the summer of 2020. Katie Benner, writing in the *New York Times*, linked this decision to Mr. Trump's inflammatory rhetoric about "anarchy" in cities led by Democratic mayors:⁴⁶

Attorney General William P. Barr on Monday escalated the Trump administration's attacks on Democratic-led cities by threatening to withhold federal funding from New York, Seattle and Portland, Ore., over their responses to protests against police brutality, portraying them as inadequate as President Trump seeks to make the unrest a cornerstone of his re-election campaign.

The cities "permitted violence and destruction of property to persist and have refused to undertake reasonable measures to counteract criminal activities," the Justice Department said in a statement announcing its response to a directive by the president this month to find ways to cut funding from such cities.

"We cannot allow federal tax dollars to be wasted when the safety of the citizenry hangs in the balance," Mr. Barr said in a statement. "It is my hope that the cities identified by the Department of Justice today will reverse

.....

To some, the surprising reversal in the politically sensitive Stone case underscored questions about Attorney General William P. Barr's willingness to protect the department's independence from any political influence by Mr. Trump. Critics have accused Mr. Barr of seeming to side with the president over law enforcement, including his criticism of the origins of the F.B.I.'s investigation into whether the Trump campaign conspired with Russia in 2016.

⁴⁶ Katie Benner, *Justice Dept. Threatens to Withhold Federal Funds From N.Y., Seattle and Portland*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/21/us/politics/trump-new-york-seattle-portland.html>.

course and become serious about performing the basic function of government and start protecting their own citizens. . .”

. . . .

In his directive, Mr. Trump accused cities of allowing “anarchy” to take hold and said that the local officials who had permitted crime to persist should face punitive financial measures. His memo threatened to withdraw billions of dollars from some of the country’s largest cities and cited New York, Seattle and Portland.⁴⁷

The *Wall Street Journal* shared the concern that the Department of Justice was not acting independently of the political interests of the White House. In an article published on September 21, 2020, Sadie Gurman also suggested that the threat from the Justice Department to withhold funds from targeted cities reflected an effort to coordinate with the political interests of the White House. The report also noted a memorandum sent by the White House to the Justice Department directing that federal prosecutors identify jurisdictions that were “‘permitting anarchy’ by failing to aggressively quell civil unrest” as evidence of the close coordination.⁴⁸

In addition to threatening to withhold federal funding, as part of the response to the protests that took place during the summer of 2020, Mr. Barr requested that federal prosecutors consider using a national security law against protestors. On September 16, 2020, the *New York Times* reported that Mr. Barr requested that prosecutors consider using the federal sedition statute to suppress the demonstrators.⁴⁹ Mr. Barr went further and also suggested

⁴⁷ *Id.*; see also Katie Benner, *William Barr Is Out as Attorney General*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/us/politics/william-barr-attorney-general.html>:

Mr. Barr brought the Justice Department closer to the White than any attorney general in a half-century. Defying the distance that federal law enforcement officials have typically maintained from campaign politics, Mr. Barr spent the months leading up to the election echoing Mr. Trump’s unsubstantiated claims of widespread voter fraud. He also told an interviewer that the country would be “irrevocably committed to the socialist path,” if the president were not re-elected.

⁴⁸ Sadie Gurman, *Justice Department Threatens to Cut Funds to New York, Seattle and Portland*, WALL ST. J. (Sept. 21, 2020), <https://www.wsj.com/articles/justice-department-threatens-to-cut-funds-to-new-york-seattle-and-portland-11600704061>.

⁴⁹ The federal seditious conspiracy statute provides:

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2384; See *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999) (confirming seditious conspiracy conviction based on evidence that the defendant advocated the attack on the United States military installations, the United Nations as well as of the murder of Egyptian President Hosni Mubarak); cf. Katherine Bishop, *U.S. Deuts Off An Old Law*, N.Y. TIMES (Mar. 27, 1988), <https://www.nytimes.com/1988/03/27/weekinreview/us-deuts-off-an-old-law.html>:

that federal prosecutors consider federal criminal charges against the mayor of Seattle for allowing a police-free protest zone.⁵⁰

On September 25, 2020, Katie Benner wrote in the *New York Times* that by pushing violent crime persecutions, Mr. Barr was intentionally aligning the Department of Justice with Mr. Trump's re-election campaign. As a consequence, according to "critics" cited by Ms. Benner, Mr. Barr had placed the political independence of the Justice Department at risk.⁵¹

Mr. Barr's approach to running the Justice Department . . . "is squarely in line" with not only the Trump White House but also with the Trump campaign's law-and-order political platform and assertions that Democrats have made the United States less safe. Critics argued that the department's norm of independence from politics, widely seen as an anticorruption measure that grew out of the post-Watergate era, was at risk. . . .

. . . .

As protests wore on, Mr. Trump accused Democratic leaders of allowing violence to spiral out of control, labeling New York, Seattle and Portland as "anarchistic cities" and announcing with fanfare that he had asked Mr. Barr to determine whether they should lose their federal funding. This week, the Justice Department announced that Mr. Barr concluded that they should. . . .

. . . .

While all presidents promote the accomplishments of their administrations, Mr. Barr's view defied the norm of the past several decades where

In what legal experts say is the most aggressive use of seditious conspiracy laws in recent years, the Reagan Administration has charged a number of radical organizations on the left and right of the political spectrum with plotting to overthrow the Government. Some of the defendants are Puerto Rican nationalists who the Government believes are associated with a group accused of being a terrorist organization. Others are white supremacists who spread a message of hate against blacks and Jews. Still others are Marxist-Leninists accused of bombing companies that do business with South Africa.

To convict a group of seditious conspiracy, the Government need not prove that the organization actually tried to carry out its insurrection but simply that its members conspired to do so. This power to prosecute people for their intentions has led to criticism that seditious conspiracy laws are simply a tool for political repression. In the current cases, however, groups are also charged with bombings, shootings and other offenses. By arguing that these are not isolated actions but elements of a pattern to overthrow the Government, the Justice Department can seek longer sentences and catch more people in its prosecutorial net.

⁵⁰ Katie Benner, *Barr Told Prosecutors to Consider Sedition Charges for Protest Violence*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/16/us/politics/william-barr-sedition.html>. As it turned out, there was not the aggressive response by federal prosecutors as anticipated. See Aruna Viswanatha and Sadie Gurman, *Almost Half of Federal Cases Against Portland Rioters Have Been Dismissed*, WALL ST. J. (Apr. 15, 2021), <https://www.wsj.com/articles/almost-half-of-federal-cases-against-portland-rioters-have-been-dismissed-11618501979> (reporting that federal prosecutors in Portland have moved to dismiss charges arising out of the violence demonstrations during the summer of 2020).

⁵¹ Katie Benner, *Barr's Approach Closes Gap Between Justice Dept. and White House*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/us/politics/william-barr-justice-department.html>.

presidents and attorneys general have typically sought a separation between the White House and the Justice Department to preserve the appearance that justice is meted out fairly, regardless of political affiliation.

“What used to be, by design, independent legal decisions by the department are now carefully staged to maximize their political impact,” said Stephen I. Vladeck, a law professor at the University of Texas. “It’s one thing to take advantage of some of the Justice Department’s work for political reasons, but to turn the department basically into a satellite office of the Trump campaign is incredibly damaging to any institutional independence that was left.”⁵²

The *Wall Street Journal* also expressed the belief that priorities of the Department of Justice were being too closely intertwined with the political interests of the White House. In particular, by promoting a “tough-on-crime” program at the Justice Department, it was suggested that Mr. Barr was directly furthering Mr. Trump’s campaign re-election message.⁵³ On October 14, 2020, Sadie Gurman and Aruna Viswanatha, writing in the *Wall Street Journal*, asserted that Mr. Barr had too closely aligned the Justice Department’s agenda with the president’s political interests.⁵⁴

Attorney General William Barr had a message for the dozens of U.S. attorneys gathered in a hotel conference room in Alexandria, Va., last month: With just weeks left before the November election and the end of President Trump’s first term, they should push hard on federal gun-crime cases and prosecutions of violent demonstrators.

Mr. Barr this week plans to travel to Albuquerque, N.M., and St. Louis to tout a Justice Department crime-fighting program that has netted thousands of nationwide and will speak to police chiefs in New Orleans, as he blames Democrats for policies he says have led to increases in violence. His appearances illustrate how Mr. Barr’s priorities have dovetailed with President Trump’s law-and-order campaign message, which critics, including some current and former department officials, say show a pattern of prioritizing the Justice Department’s work in a way that could boost Mr. Trump’s re-election chances. . . .

. . . .

Mr. Barr’s supporters say his sense of urgency on violent crime is part of a longstanding focus, in particular after rises in homicides and months of sporadic unrest in cities that resulted in deaths and property damage. Any benefit to Mr. Trump’s campaign is ancillary, they say. . . Yet a report

⁵² *Id.*

⁵³ Sadie Gurman & Aruna Viswanatha, *Barr’s Justice Department Touts Fighting Gun Violence as Election Approaches*, WALL ST. J. (Oct. 14, 2020), <https://www.wsj.com/articles/barrs-justice-department-touts-fighting-gun-violence-as-election-approaches-11602684001>.

⁵⁴ *Id.*

released this week by an ethics center at the University of Pennsylvania's law school, written by a group that included officials from Republican and Democratic administrations, concluded that Mr. Barr "appears to be willing to use the powers of his office to attempt to help with the president's bid for re-election."⁵⁵

The chosen narrative, that Mr. Barr turned the Justice Department into a crime scene, is overstated and deprived of balance.⁵⁶ First, contrary to repeated suggestions in published reports, Mr. Barr actually supported the underlying criminal prosecution of Mr. Stone.⁵⁷ Second, looking beyond the two prosecutions brought by the special counsel, the record does not suggest that Mr. Barr intervened or interfered in any additional federal criminal investigations or prosecutions that touched Mr. Trump or those close to him. Mr. Barr did not interfere in the financial fraud conviction and sentencing of Mr. Trump's 2016 campaign chairman, Paul Manafort, in the Eastern District of Virginia.⁵⁸ Nor did he interfere with Manafort's conspiracy conviction and

⁵⁵ *Id.*

⁵⁶ See Sadie Gurman, *William Barr to Resign as Attorney General*, WALL ST. J. (Dec. 14, 2020), <https://www.wsj.com/articles/attorney-general-william-barr-resigns-effective-dec-23-11607986828>:

Attorney General William Barr will resign just before Christmas, President Trump said Monday, ending a tenure during which Mr. Barr long marshaled the Justice Department to the president's personal and political agenda before falling afoul of him in recent months. . . .

. . . .

Mr. Barr's refusal to acquiesce to Mr. Trump's demands in recent months does little to repair what Democrats and some former and current Justice Department officials saw as his persistent undermining of the Justice Department's independence from White House influence. They cite in part Mr. Barr's sometimes open disparagement of career prosecutors and his decisions to reverse their work and give lenient treatment to Trump associates such as Roger Stone and Michael Flynn, who faced criminal prosecutions.

⁵⁷ See Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone and Charles Kushner*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html> ("But Mr. Barr supported the prosecution of Mr. Stone . . .").

⁵⁸ See Sharon LaFraniere, *Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>:

Paul Manafort, President Trump's former campaign chairman, was convicted on Tuesday in his financial fraud trial. . . prosecutors introduced extensive evidence that Mr. Manafort hid millions of dollars in foreign accounts to evade taxes and lied to banks repeatedly to obtain millions of dollars in loans. Mr. Manafort was convicted of five counts of tax fraud, two counts of bank fraud and one count of failure to disclose a foreign bank account. . . .

. . . .

Mr. Manafort concealed more than \$60 million in income in 31 foreign bank accounts opened in the names of shell companies. The money came from Ukrainian oligarchs who paid Mr. Manafort to boost the political career of Viktor F. Yanukovich, a pro-Russian politician who, with Mr. Manafort's help was elected president of Ukraine in 2010. Financial analysts for the F.B.I. and the Internal Revenue Service testified that Mr. Manafort transferred more than \$15 million from those accounts to pay for landscaping, clothing, rugs, home renovations and entertainment systems. In 2012 alone, he wired enough money from the hidden accounts to purchase a loft in SoHo, a brownstone in Brooklyn and a residence in Arlington, Va., they said. Mr. Manafort also disguised some of his income as loans to avoid taxes, witnesses testified. . .

sentencing in the District of Columbia.⁵⁹ There has been no allegation that Mr. Barr intervened in the false statement conviction and sentencing of Mr. Trump's former lawyer Michael Cohen in the Southern District of New York⁶⁰ or Cohen's campaign finance conviction and sentencing in the Southern District for New York.⁶¹ Mr. Barr did not interfere in the criminal

In order to persuade three banks to loan him a total of \$20 million, prosecutors said, Mr. Manafort added millions of dollars in fake income to his financial statements.

Id.; see also Sharon LaFraniere, *Paul Manafort Is Sentenced to Less Than 4 Years in 1 of 2 Cases Against Him*, N.Y. TIMES (Mar. 7, 2019), <https://www.nytimes.com/2019/03/07/us/politics/paul-manafort-sentencing.html> (does not mention Mr. Barr assisting Mr. Manafort in recounting the financial fraud case).

⁵⁹ See Sharon LaFraniere & Kenneth P. Vogel, *Paul Manafort Agrees to Cooperate With Special Counsel; Pleads Guilty to Reduced Charges*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/us/politics/manafort-plea-deal.html> (does not mention Mr. Barr assisting Mr. Manafort in recounting the conspiracy charges); see also Sharon LaFraniere, *Paul Manafort's Prison Sentence Is Nearly Doubled to 7½ Years*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/politics/paul-manafort-sentencing.html> (does not mention Mr. Barr assisting Mr. Manafort in recounting the conspiracy charges and sentencing).

⁶⁰ See Mark Mazzetti, Benjamin Weiser, Ben Protess, & Maggie Haberman, *Cohen Pleads Guilty and Details Trump's Involvement in Moscow Tower Project*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/nyregion/michael-cohen-trump-russia-mueller.html> (does not state that Mr. Barr interfered with Mr. Cohen's false statement conviction and sentencing).

⁶¹ See William K. Rashbaum, Maggie Haberman, Ben Protess & Jim Rutenberg, *Michael Cohen Says He Arranged Payments to Women at Trump's Direction*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-plea-deal-trump.html> (does not state that Mr. Barr interfered with Mr. Cohen's campaign finance conviction or sentencing); see also Benjamin Weiser & William K. Rashbaum, *Michael Cohen Sentenced to 3 Years After Implicating Trump in Hush-Money Scandal*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/michael-cohen-sentence-trump.html> (does not state that Mr. Barr interfered with Mr. Cohen's campaign finance conviction or sentencing).

Mr. Cohen had pleaded guilty in two separate cases, one brought by federal prosecutors in Manhattan, the other by the office of the special counsel, Robert S. Mueller III, who is investigating Russian interference in the 2016 election. . .

. . . .

In addition to the campaign-finance violations, Cohen pleaded guilty to tax evasion and making false statements to a bank and lying to Congress. . . Mr. Cohen admitted in court that he had arranged the payments "for the principal purpose of influencing the election" for president in 2016. The payments included \$130,000 to the adult-film actress Stormy Daniels, which the government considers an illegal donation to Mr. Trump's campaign since it was intended to improve Mr. Trump's election chances. . . .

. . . .

Mr. Cohen also admitted he had arranged for an illegal corporate donation to be made to Mr. Trump when he orchestrated a \$150,000 payment by American Media Inc. to a former Playboy playmate, Karen McDougal, in late summer 2016. Prosecutors in Manhattan wrote last Friday to Judge Pauley that Mr. Cohen, in arranging the payments, "acted in coordination with and at the direction" of Mr. Trump, whom they referred to as Individual 1.

Id. There was one published report that suggested that Barr questioned the underlining legal theory to support the campaign violations conviction but did not intervene or interfere in the prosecution. See also Benjamin Weiser, Ben Protess, Katie Benner & William K. Rashbaum, *Inside Barr's Effort to Undermine Prosecutors in N.Y.*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/06/25/nyregion/geoffrey-berman-william-barr-michael-cohen.html>:

By the time Mr. Barr was sworn into office in February, Mr. Cohen, who had paid hush money to an adult film star who said she had an affair with Mr. Trump, had already pleaded guilty and

investigation and conviction of Elliott Broidy, a former top fund-raiser for President Trump,⁶² or the criminal investigation and subsequent indictment of Steve Bannon, President Trump's former adviser and an architect of his 2016 general election campaign, on fraud charges.⁶³

Finally, Mr. Barr did not disclose the existence of an investigation of Hunter Biden into possible tax evasion prior to the election⁶⁴ and contradicted Mr. Trump by acknowledging that there was no evidence of widespread voter fraud that would change the outcome of the 2020 presidential election.⁶⁵ Mr. Barr intervened into two special counsel cases. However, expanding these two judgments into the broader narrative that Mr. Barr wielded the power of the Justice Department to benefit Mr. Trump and those close to him,⁶⁶

was set to begin a three-year prison sentence, all of which embarrassed and angered the president. But Mr. Barr spent weeks in the spring of 2019 questioning the prosecutors over their decision to charge Mr. Cohen with violating campaign finance laws, according to people briefed on the matter. At one point during the discussions, Mr. Barr instructed Justice Department officials in Washington to draft a memo outlining legal arguments that could have raised questions about Mr. Cohen's conviction and undercut similar prosecutions in the future, according to the people briefed on the matter. The prosecutors in New York resisted the effort, the people said, and a Justice Department official said Mr. Barr did not instruct them to withdraw the case.

Id.

⁶² See Kenneth P. Vogel, *Elliott Broidy Pleads Guilty in Foreign Lobbying Case*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/us/politics/elliott-broidy-foreign-lobbying.html> (does not say Mr. Barr interfered with Mr. Broidy's conviction or sentencing).

⁶³ See Alan Feuer, William K. Rashbaum & Maggie Haberman, *Steve Bannon Is Charged With Fraud in We Build the Wall Campaign*, N.Y. TIMES (Nov. 20, 2020), <https://www.nytimes.com/2020/08/20/nyregion/steve-bannon-arrested-indicted.html> (does not say that Mr. Barr interfered with Mr. Bannon's fraud charges).

⁶⁴ Maggie Haberman & Michael S. Schmidt, *Trump denounces Barr for not publicly disclosing the Hunter Biden inquiry.*, N.Y. TIMES (Dec. 13, 2020), <https://www.nytimes.com/2020/12/12/us/politics/trump-barr-biden-investigation.html>:

President Trump on Saturday excoriated Attorney General William P. Barr, castigating him on Twitter for not violating Justice Department policy to publicly reveal an investigation into President-Elect Joseph R. Biden Jr.'s son. . . His messages on Saturday echoed his attacks on his first attorney general, Jeff Sessions, whom he blamed for recusing himself from overseeing the investigation into whether the Trump campaign had colluded with Russian officials in the 2016 election. For months, Mr. Trump publicly berated Mr. Sessions before firing him in November 2018, a day after the midterm races. In his tweets, Mr. Trump called the attorney general a "big disappointment" and denounced him for not disclosing the existence of an investigation into Hunter Biden for possible tax evasion, which he said would have given Republicans an edge in the election. Doing so would have violated department guidelines about publicly discussing ongoing cases. Mr. Trump benefited from that policy himself in 2016, when officials kept quiet the inquiry into possible conspiracy between his campaign and Russian officials.

Id.

⁶⁵ Katie Benner & Michael S. Schmidt, *Barr Acknowledges Justice Dept. Has Found No Widespread Voter Fraud*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/william-barr-voter-fraud.html>; Sadie Gurman & Jacob Gershman, *Barr Says No Evidence of Voter Fraud in Election*, WALL ST. J. (Dec. 1, 2020), <https://www.wsj.com/articles/trump-campaign-files-more-election-challenges-in-wisconsin-michigan-11606849219>; see also Katie Benner & Adam Goldman, *Barr Dismisses Trump's Claim That Russia Inquiry Was an Obama Plot*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/barr-trump-obama.html>.

⁶⁶ Benner, *supra* note 42.

appears to have ignored the full record and suggests a narrow interpretation of Mr. Barr's judgement and intentions.

Mr. Barr also deserves credit for resisting pressure and making the consequential decision to hold two major corporations accountable. Under Mr. Barr, the Justice Department was able to secure a major corruption and corporate fraud conviction against Goldman Sachs⁶⁷ and hold Purdue Pharma accountable for the opioid addiction crisis.⁶⁸ There was significant pressure

⁶⁷ See Matthew Goldstein & Emily Flitter, *Goldman Sachs Malaysia Arm Pleads Guilty in IMDB Fraud*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/goldman-sachs-fraud-guilty-plea.html>:

Goldman Sachs played a starring role in the dubious financial engineering that helped spark a global financial crisis last decade, and its 151-year history is dotted with scandals that ended in fines or governmental scoldings. But never before had it had to go before a U.S. judge and admit it was guilty of a crime. The bank, one of Wall Street's most powerful firms, admitted criminal wrongdoing by its Malaysian subsidiary on Thursday in a Brooklyn federal courtroom, bringing to a close a globe-spanning foreign bribery case that is the worst black eye in Goldman's long history. Goldman employees, the bank said, took part in a scheme to pay \$1 billion in bribes to foreign officials. The bank, in turn, arranged the sale of bonds to raise \$6.5 billion that was intended to benefit the people of Malaysia but was instead looted by the country's leaders and their associates. In the end, the scandal, which netted the bank a relatively paltry \$600 million in fees, will cost Goldman and its current and former executives dearly. The bank itself will pay more than \$5 billion in penalties to regulators around the world, more than it had to pay for peddling bonds backed by risky mortgages a decade ago. And it has moved to recoup or withhold more than \$100 million in executive compensation, a rare move for a Wall Street bank.

Id.; see also Liz Hoffman & Dave Michaels, *Goldman Pays Billions—And Takes Million From Top Execs—To End IMDB Scandal*, WALL ST. J. (Oct. 23, 2020), <https://www.wsj.com/articles/goldman-sachs-to-recoup-top-executives-pay-after-costly-1mdb-fines-11603380050> (supports that the Goldman Sachs scandal was found during Mr. Barr's tenure at the Justice Department).

⁶⁸ Katie Benner, *Purdue Pharma Pleads Guilty to Role in Opioid Crisis as Part of Deal With Justice Dept.*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2020/11/24/us/politics/purdue-pharma-opioids-guilty-settlement.html>:

Purdue Pharma pleaded guilty on Tuesday to criminal charges that it misled the federal government about sales of its blockbuster painkiller OxyContin, the prescription opioid that helped fuel a national addiction crisis. The admission brought a formal end to an extensive federal investigation that led to a multibillion-dollar settlement between the company and the Justice Department. . . .

. . . .

Purdue's chairman, Steve Miller, acknowledged in a remotely conducted hearing in federal court in New Jersey that in order to meet sales goals, the company told the Drug Enforcement Administration that it had created a program to prevent OxyContin from being sold on the black market, even though it was marketing the drug to more than 100 doctors suspected of illegally prescribing OxyContin.

Purdue also pleaded guilty to paying illegal kickbacks to doctors who prescribed OxyContin and to an electronic health records company, Practice Fusion, for targeting physicians with alerts that were intended to increase opioid prescriptions. . . . Doctors overprescribing OxyContin, along with illicit distribution of the drug, have contributed to the deaths of more than 450,000.

In 2007 Federal prosecutors recommended that three top company executives be indicted on felony charges. However, senior political appointees in Bush Justice Department Criminal Division did not support the move. See Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html> (recounting opioid maker's knowledge of the crisis); see also Barry Meier,

campaign for leniency in each of these corporate cases.⁶⁹ Mr. Barr should also have been given more credit for making the consequential decision to place meaningful oversight over the way sensitive investigations and domestic surveillance are carried out by the FBI.⁷⁰

On the other hand, the appraisal that Mr. Barr was *in pari materia* with Mr. Trump and irrevocably associated with him politically, is well-founded. On December 27, 2020, Katie Benner, Michael Schmidt, and Peter Baker were harsh in their appraisal and expressed the belief that no prior attorney general had “wielded the power of the Justice Department more deeply in

Opinion, *Opioid Makers Are the Big Winners in Lawsuit Settlements*, N.Y. TIMES (Dec. 22, 2018), <https://www.nytimes.com/2018/12/26/opinion/opioids-lawsuits-purdue-pharma.html> (“The decision by Justice Department officials in 2007 to forgo felony charges against the executives of Purdue Pharma also resulted in the loss of a critical chance to slow the epidemic’s trajectory. Without a public trial doctors remained unaware of the extent of Purdue Pharma’s deceptions. . . .”) (“[T]he Justice Department could have changed the behavior of other opioid makers if it had charged executives of Purdue Pharma in 2007 with felonies, as federal prosecutors had recommended, in connection with OxyContin’s illegal marketing. Instead, department officials negotiated a deal under which the executives pleaded guilty to misdemeanor charges that did not include jail time. In the years that followed, executives of other opioid makers and distributors kept shipping millions of addictive pain pills into towns like this one apparently without fear of serious penalties.”); see also Barry Meier, *A Nun, a Doctor and a Lawyer — and Deep Regret Over the Nation’s Handling of Opioids*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/18/health/opioids-purdue-pennington-gap.html?searchResultPosition=9> (supporting the impact of the opioid crisis).

⁶⁹ See Goldstein, *supra* note 67 (“Three law firms worked on the matter for the bank, and this year Goldman lobbied top officials with the Justice Department for a degree of leniency.”); see also Matthew Goldstein, *Goldman Sachs Is Said to Try to Avoid Pleading Guilty in 1MDB Scandal*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/business/goldman-sachs-1mdb-malaysia.html> (“The bank has asked the U.S. to review demands that any settlement include a guilty plea to a felony charge, according to people briefed on the matter.”); see also Barry Meier, *Origins of an Epidemic: Purdue Pharam Knew Its Opiods Were Widely Abused*, N.Y. TIMES (May 28, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html> (describing the pressure campaign that resulted in senior level Department of Justice lawyers agreeing to less serious charges against company executives). Mr. Barr also made the consequential decision to hold Wells Fargo accountable for abusing of its customers in its community banks. See also Emily Flitter, *The Price of Wells Fargo’s Fake Account Scandal Grows by \$3 Billion*, N.Y. TIMES (Feb. 21, 2020), <https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html>:

Wells Fargo has agreed to pay \$3 billion to settle criminal charges and a civil action stemming from its widespread mistreatment of customers in its community bank over a 14-year period, the Justice Department announced on Friday. From 2002 to 2016, employees used fraud to meet impossible sales goals. They opened millions of accounts in customers’ names without their knowledge, signed unwitting account holders up for credit cards and bill payment programs, created fake personal identification numbers, forged signatures and even secretly transferred customers’ money.

Several days after Mr. Barr’s departure, the Justice Department announced a deferred prosecution agreement with Boeing. See also Niraj Chokshi & Michael S. Schmidt, *Boeing Reaches \$2.5 Billion Settlement With U.S. Over 737 Max*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/business/boeing-settlement-justice-department.html> (“Boeing agreed to pay more than \$2.5 billion in a legal settlement with the Justice Department stemming from the 737 Max debacle. The agreement resolves a criminal charge that Boeing conspired to defraud the Federal Aviation Administration, which regulates the company and evaluates its planes.”).

⁷⁰ See Katie Benner, *Barr Imposes Limits on F.B.I. Surveillance of Political Candidates*, N.Y. TIMES (Sept. 1, 2020), <https://www.nytimes.com/2020/09/01/us/politics/barr-elections-fbi-surveillance.html> (“Attorney General William P. Barr issued two memos on Tuesday restricting the F.B.I.’s ability to surveil political candidates and their aides. . . .”).

service of a president's political agenda than any attorney general in a half-century."⁷¹ Moreover, Mr. Barr failed to recognize that suggesting that an ambiguous national security law should be used against demonstrators, that prosecutors should consider bringing federal criminal charges against the mayor of Seattle, and that federal funds should be withheld (similar to the Ukrainian pressure campaign), would leave him vulnerable to indelible criticism that he was explicitly partisan and undermined the independence of the Department of Justice.

Mattathias Schwartz, writing in the *New York Times Magazine*,⁷² looked beyond many of the convenient assumptions about Mr. Barr's motivations and presented a much more straightforward explanation for Mr. Barr's appearance of unflinching loyalty. Mr. Schwartz linked William Barr's alignment with Mr. Trump to a transactional and situational calculation by Mr. Barr that he could use the arrangement with Mr. Trump to advance many of his long-held visions. According to Schwartz, Mr. Barr was compliant because the association with Mr. Trump allowed him an unusual opportunity to advance a conservative agenda that was important to him: promoting individual morality and the need for accountability, pursuing social order, and sustaining executive power.⁷³ While it is difficult to make any definitive statement about the shape of Mr. Barr's motivations, what is perhaps more relevant to the study of the use of federal criminal investigations and prosecutions targeting foreign actors to advance political interest, is not the narrative that Mr. Barr was acting to benefit Mr. Trump and those close to him, but rather Mr. Barr's long-held conviction that the executive has unquestionable authority on matters of criminal prosecutions. Mattathias Schwartz wrote that that Mr. Barr has consistently maintained an abiding commitment to the expansive vision of executive power:⁷⁴

[C]onservative thinkers of Barr's generation began to coalesce around an idea they called "the unitary executive." The president's right to his powers under Article II of the Constitution, they argued, was undivided and absolute. Post-Watergate reforms—independent prosecutors to investigate high-level wrongdoing, requirements to get warrants for national-security wiretaps, and more—were unconstitutional incursions into the president's rightful powers.

...

⁷¹ Katie Benner, Michael S. Schmidt & Peter Baker, *Barr Is Said to Be Weighing Whether to Leave Before Trump's Term Ends*, N.Y. TIMES (Dec. 6, 2020), <https://www.nytimes.com/2020/12/06/us/politics/barr-considering-resigning.html>.

⁷² Mattathias Schwartz, *Williams Barr's State of Emergency*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/01/magazine/william-barr-attorney-general.html>.

⁷³ *Id.*

⁷⁴ *Id.*

Last year, shortly after his Notre Dame speech, Barr gave a second major address at the annual convention of the Federalist Society, an organization of conservative lawyers founded during the Reagan administration. The subject was executive power. . . . Barr seemed to suggest that when it comes to foreign policy, the only legitimate check on presidential behavior is the next election.⁷⁵

In his remarks at Hillsdale College on September 16, 2020, Mr. Barr articulated his conviction that the executive has almost unquestionable authority on matters of criminal prosecution:

I want to focus today on the power that the Constitution allocates to the Executive, particularly in the area of criminal justice. The Supreme Court has correctly held that, under Article II of the Constitution, the Executive has virtually unchecked discretion to decide whether to prosecute individuals for suspected federal crimes.⁷⁶

There is a careful symmetry between Mr. Barr's expansive view of executive power and the Justice Department's more aggressive strategy of targeting foreign government officials, foreign intelligence officers and state-owned and state-controlled entities to advance political interests.

⁷⁵ *Id.*

⁷⁶ William P. Barr, Att'y Gen., U.S. DEPT. JUST., Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event, (Sept. 16, 2020) available at <https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event> [hereinafter Barr Hillsdale Remarks]; see also Katie Benner, *Barr Told Prosecutors to Consider Sedition Charges for Protest Violence*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/16/us/politics/210hinese-barr-sedition.html>:

“During a speech on Wednesday night, Mr. Barr noted that the Supreme Court had determined that the executive branch had “virtually unchecked discretion” in deciding whether to prosecute cases. . . .”The power to execute and enforce the law is an executive function altogether,” Mr. Barr said in remarks at an event in suburban Washington celebrating the Constitution. “That means discretion is invested in the executive to determine when to exercise the prosecutorial power.”

The aggressive view of the almost limitless authority of the executive is not unique to Mr. Barr. Senior Justice Department lawyers in the Obama administration held the view that the president had the unquestionable authority to order the killing of American citizens, without trial, and that Congress and the courts did not have any right to review such a decision. See also Charlie Savage & Scott Shane, *Memo Cites Legal Basis for Killing U.S. Citizens in Al Qaeda*, N.Y. TIMES (Feb. 5, 2013), <https://www.nytimes.com/2013/02/05/us/politics/us-memo-details-views-on-killing-citizens-in-al-qaeda.html>.

III. THE ASSERTION THAT FEDERAL CRIMINAL INVESTIGATIONS AND PROSECUTIONS OF FOREIGN OFFICIALS AND STATE CONTROLLED ENTITIES WERE USED AS INSTRUMENTS TO INFLUENCE FOREIGN RELATIONS AND ADVANCE GEOPOLITICAL INTERESTS

The Department of Justice has a well-established strategy of targeting foreign commercial corruption. Using the Foreign Corrupt Practices Act,⁷⁷ this effort has targeted businesses and individuals involved in schemes to use corrupt payments to a foreign official for the purpose of obtaining or retaining business.⁷⁸ Because the statute only applies to foreign government officials under limited circumstance,⁷⁹ federal prosecutors have used other federal criminal statutes, such as the federal fraud and money laundering statutes, to charge foreign officials with participating in foreign commercial corruption schemes.⁸⁰ For example, in March of 2019, the Department of Justice unsealed an indictment charging three former bankers, along with Mozambique's former finance minister and other government officials, and executives of a major Persian Gulf shipbuilding firm, with federal fraud and money laundering offenses.⁸¹ The defendants were accused of engaging in a corruption scheme involving the creation of government maritime projects as

⁷⁷ The Foreign Corrupt Practices Act makes it a crime to corruptly give a foreign official anything of value for purposes of: (1) "influencing any act or decision of such foreign official in his official capacity"; (2) "inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official," (3) "securing any improper advantage," or (4) "inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality" 15 U.S.C. §§ 78dd-2(a)(1), 78dd-3(a)(1). The FCPA further requires that the intent of these payments must serve to assist in "obtaining," "retaining," or "directing" business. *See United States v. Seng*, 934 F.3d 110 (2d Cir. 2019) (affirming foreign bribery conviction of Chinese national).

⁷⁸ *See* Dave Michaels & Dylan Tokar, *Energy Trader Vitol Paying \$163 Million to Settle Corruption, Manipulation Charges*, WALL ST. J. (Dec. 3, 2020), <https://www.wsj.com/articles/energy-trader-vitol-to-pay-90-million-to-settle-u-s-corruption-charges-11607023519> (global commodity trading company Vitol "agreed to pay \$163 million to settle criminal and civil charges that its employees paid bribes to gain an advantage when bidding for oil in Brazil, Mexico and Ecuador."); Micah Maidenberg, *Legg Mason to Pay SEC More Than \$34 Million to Settle Libya Bribery Case*, WALL ST. J. (Aug. 27, 2018), <https://www.wsj.com/articles/legg-mason-to-pay-sec-more-than-34-million-to-settle-libya-bribery-case-1535393458> (efforts to bribe government officials to secure investments from Libya's sovereign-wealth fund and related government owned financial firms); Aruna Viswanatha, *J.P. Morgan Settlement Lays Bare the Practice of Hiring 'Princelings'*, WALL ST. J. (Nov. 17, 2016), <https://www.wsj.com/articles/j-p-morgan-to-pay-264-million-to-end-criminal-civil-foreign-corruption-cases-1479398628> (J.P. Morgan agreed to pay \$264 million and admitted it violated the Foreign Corrupt Practices Act through its practice of hiring relatives of Chinese government officials for the purpose of securing business).

⁷⁹ The Foreign Corrupt Practice Act applies to American companies and citizens and their agents, employees, offices directors and shareholders. The statute also applies to foreign actors acting within the United States. *See United States v. Hoskins*, 902 F.3d 69, 73 (2d Cir. 2018).

⁸⁰ *See United States v. Napout*, 963 F.3d 163 (2d Cir. 2020) (confirming honest services wire fraud convictions of corrupt former officials of the global soccer organization for receiving bribes in exchange for broadcast and marketing rights); *see also United States v. Turkiye Halk Bankasi A.S.*, 426 F.Supp.3d (S.D.N.Y. 2019) (wire fraud and money laundering charges against state-owned and state-controlled bank in Turkey).

⁸¹ *See generally United States v. Boustani*, 356 F.Supp.3d 246 (E.D.N.Y. 2019).

fronts to borrow money, which was used to pay at least \$200 million in bribes and kickbacks. The country defaulted in 2017 on \$2 billion of debt meant to build coastal security, fishing and shipbuilding projects after much of the borrowed money went missing.⁸²

In addition, over the last two years, the special counsel, conducting investigations related to interference in the 2016 election, has brought charges against lower-level Russian foreign intelligence operatives and military intelligence officers and accused them of committing identity theft and cybercrimes in furtherance of a scheme to interfere with the 2016 election. On February 16, 2018, the special counsel indicted 13 Russians and three companies and charged them with conspiracy to defraud the United States,⁸³ conspiracy to commit wire fraud and bank fraud,⁸⁴ and aggravated identity theft.⁸⁵ The *New York Times* reported that:⁸⁶

The Justice Department charged 13 Russians and three companies on Friday in a sprawling indictment that unveiled a sophisticated network designed to subvert the 2016 election. “The Russians stole the identities of American citizens, posed as political activists and used the flash points of immigration, religion and race to manipulate a campaign in which those issues were already particularly divisive,” prosecutors said.

....

⁸² Matt Wirz and Gabriele Steinhauser, *U.S. Scores Guilty Plea in Mozambique Corruption Case*, WALL ST. J. (July 23, 2019), <https://www.wsj.com/articles/u-s-scores-guilty-plea-in-mozambique-corruption-case-11563894033>:

The U.S. Department of Justice has gained a key advantage in its prosecution of an alleged global corruption ring involving \$2 billion of Mozambican government-debt deals. Prosecutors working on the case got a guilty plea last week from the former banker at Credit Suisse AG who designed the loans. . . .

....

Federal prosecutors allege that executives at Prinvest recruited London-based Credit Suisse bankers to make loans guaranteed by the Mozambican government, which were then sold to investors around the world. Credit Suisse and other banks raised \$2 billion in loans and bonds in 2013 and 2014, some of which were kept secret from the public and investors. . . Prosecutors from the Brooklyn U.S. attorney’s office and the Justice Department allege that Prinvest executives negotiated at least \$200 million in bribes and kickbacks to Mozambican government officials, Credit Suisse bankers and themselves.

See also Matt Wirz, *Shipbuilding Executive Found Not Guilty in Mozambique Debt Fraud Trial*, WALL ST. J. (Dec. 2, 2019), <https://www.wsj.com/articles/shipbuilding-executive-found-not-guilty-in-mozambique-debt-fraud-trial-11575310415> (finding Lebanese shipbuilding executive not guilty of fraud and money-laundering charges related to \$2 billion of debt deals in Mozambique).

⁸³ See Indictment at 30, *United States v. Internet Research Agency LLC*, Cr. No. 00032-DLF (D.D.C. filed Feb. 16, 2018).

⁸⁴ *Id.* at 31.

⁸⁵ *Id.* at 34.

⁸⁶ Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/212hinese212-indicted-mueller-election-interference.html>.

None of the defendants were arrested—Russia does not generally extradite its citizens to the United States. But prosecutors use such indictments to name and shame operatives, making it harder for them to work undetected in the future. If they travel abroad, they risk capture and extradition.⁸⁷

On July 13, 2018, the special counsel obtained a second indictment accusing several Russian operatives conspiring to interfere with the 2016 presidential election. The indictment charged 12 Russian foreign intelligence officers with conspiracy to commit an offense against the United States,⁸⁸ aggravated identity theft⁸⁹ and money laundering.⁹⁰ The indictment accused the Russian government of being complicit in the criminal scheme:

In or around 2016, the Russian Federation (“Russia”) operated a military intelligence agency called the Main Intelligence Directorate of the General Staff (“GRU”). The GRU had multiple units, including Units 26165 and 74455, engaged in cyber operations that involved the staged releases of documents stolen through computer intrusions. These units conducted large-scale cyber operations to interfere with the 2016 U.S. presidential election.⁹¹

Mark Mazzetti and Katie Benner reporting in the *New York Times* wrote that the indictment detailed that the effort by the Russian foreign intelligence services to interfere with the 2016 presidential election was extensive.⁹²

The special counsel investigating Russian interference in the 2016 election issued an indictment of 12 Russian intelligence officers on Friday in the hacking of the Democratic National Committee and the Clinton presidential campaign. . . . The 29-page indictment is the most detailed accusation by the American government to date of the Russian government’s interference in the 2016 election, and it includes a litany of brazen Russian subterfuge operations meant to foment chaos in the months before Election Day. From phishing attacks to gain access to Democratic operatives, to money laundering, to attempts to break into state elections boards, the indictment details a vigorous and complex effort by Russia’s top military intelligence service to sabotage the campaign of Mr. Trump’s Democratic rival, Hillary Clinton.⁹³

⁸⁷ *Id.*

⁸⁸ See Indictment at 1, *United States v. Netkysko*, Cr. No. 00215 (D.D.C. filed July 13, 2018).

⁸⁹ *Id.* at 20.

⁹⁰ *Id.* at 21.

⁹¹ *Id.* at 1.

⁹² Mark Mazzetti & Katie Benner, *12 Russian Agents Indicted in Mueller Investigation*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html>.

⁹³ *Id.* On March 16, 2020, the New York Times reported that the Justice Department moved to dismiss the charges against two Russian shell companies accused of financing schemes to interfere in the 2016 election. See Katie Benner & Sharon LaFraniere, *Justice Dept. Moves to Drop Charges Against Russian Firms Filed by Mueller*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics>

In addition to the two indictments brought by the special counsel, on October 19, 2020, the Department of Justice obtained an indictment accusing six Russian military intelligence officers with engaging in a global computer hacking conspiracy.⁹⁴ The defendants were charged with conspiracy,⁹⁵ conspiracy to commit wire fraud,⁹⁶ wire fraud,⁹⁷ damage to computers⁹⁸ and aggravated identity theft.⁹⁹ Michael Schmidt and Nicole Perloth reported in the *New York Times* that global computer infiltration conspiracy carried out by the Russian military intelligence officers included infiltrating elections in France, the electricity grid in Ukraine and the 2018 Winter Olympics in Pyeongchang, South Korea:¹⁰⁰

The Justice Department on Monday unsealed charges accusing six Russian military intelligence officers of an aggressive worldwide hacking campaign that caused mass disruption and cost billions of dollars by attacking targets like a French presidential election, the electricity grid in Ukraine and the opening ceremony of the 2018 Winter Olympics. Prosecutors said the suspects were from the same unit that helped distribute stolen Democratic emails in the 2016 election. Though Justice Department officials played down the timing of the announcement two weeks before the presidential election, it nevertheless served as American officials' latest censure of Russia's hostile intrusions into other countries' affairs, even as President Trump has adopted a more accommodating stance toward Moscow.

....

The charges also showed the limits of the United States' power to deter Russia. Many of the breaches occurred after the United States imposed sanctions and publicly rebuked Russia over its 2016 election sabotage, and it is highly unlikely that the Kremlin will hand over the intelligence officers to stand trial in American courts.¹⁰¹

Over the last four years, the Department of Justice has intensified its targeting of foreign actors by recording several significant criminal indictments. A close examination of these indictments reveals that the strategy of the Department of Justice was expanded well beyond the reach of the Foreign Corrupt Practices Act and the work of the special counsel. First,

/concord-case-russian-interference.html (prosecutors recommended that the case be dismissed to preserve national security interests and prevent Russia from weaponizing delicate American law enforcement information).

⁹⁴ See Indictment at 6–7, *United States v. Andrienko*, Cr. No. 20-316 (W.D. Pa. filed Oct. 15, 2020).

⁹⁵ *Id.*

⁹⁶ *Id.* at 44.

⁹⁷ *Id.* at 46.

⁹⁸ *Id.* at 47.

⁹⁹ *Id.* at 48.

¹⁰⁰ Michael S. Schmidt & Nicole Perloth, *U.S. Charges Russian Intelligence Officers in Major Cyberattacks*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/politics/213hinese-intelligence-cyberattacks.html>.

¹⁰¹ *Id.*

the targets of these indictments were expanded to include government officials, foreign intelligence officers, and state-owned and state-controlled entities. Federal prosecutors brought charges against a former senior law enforcement official in Mexico,¹⁰² the former defense minister of Mexico,¹⁰³ Turkey's second-largest state owned bank,¹⁰⁴ China's largest telecom equipment maker and its chief financial officer,¹⁰⁵ members of the Chinese military intelligence,¹⁰⁶ Chinese foreign intelligence operatives,¹⁰⁷ North Korean government officials and a North Korean foreign intelligence officer,¹⁰⁸ the president of Venezuela, the chief justice of Venezuela, other senior level government officials and intelligence officers in the Venezuelan government,¹⁰⁹ the Minister of Defense of Venezuela¹¹⁰ and two former officials at Venezuela's state-owned and state-controlled oil monopoly.¹¹¹ Second, the scope of the underlying conduct was expanded beyond schemes to use corrupt payments to obtain and retain business and identify theft and cybercrimes. In the shadow of all of these federal charges was an extraordinary incursion by federal prosecutors into foreign sovereignty by targeting foreign government corruption. Along with the expansion of the scope of these investigations and prosecutions, there has been legitimate concerns that these investigations and prosecutions crossed a line and were used as expedient instruments to influence foreign relations and advance geopolitical interests unrelated to pursuing justice and preventing injustice.

Mr. Trump's view that the conduct of government is transactional and situational carried over to several federal criminal investigations and prosecutions. On June 17, 2020, Peter Baker writing in the *New York Times* reported on former national security advisor John Bolton's allegation that

¹⁰² See Indictment at 3, *United States v. Luna*, Cr. No. 19-576 (E.D.N.Y. filed July 30, 2020).

¹⁰³ See Indictment at 1, *United States v. Cienfuegos Zepeda*, Cr. No. 19-366 (E.D.N.Y. filed Aug. 14, 2019).

¹⁰⁴ *United States v. Turkiye Halk Bankasi A.S.*, 426 F.Supp.3d 23 (S.D.N.Y. 2019) (wire fraud and money laundering charges against state-owned and state-controlled bank in Turkey).

¹⁰⁵ Superseding Indictment at 2, *United States v. Huawei Technologies Co., LTD*, No. 18-CR-457 (S-2) (AMD), 2020 WL 903007 (E.D.N.Y. 2020); Superseding Indictment, *United States v. Huawei Technologies Co., LTD*, (E.D.N.Y. 2019).

¹⁰⁶ Indictment at 2, *United States v. Zhiyong* (N.D. Ga. Filed Jan. 28, 2020) (computer hacking into credit reporting agency).

¹⁰⁷ Complaint at 1–2, *United States v. Zhu Feng*, No. 20-MJ_1025 (E.D.N.Y. 2020); Indictment, *United States v. Xiaoyu*, No. 4:20-CR-6019-SMJ (E.D. Wash. Filed July 7, 2020) (conspiracy to steal coronavirus vaccine data for Chinese government).

¹⁰⁸ Indictment at 3–4, *United States v. Ko Chol Man*, No.1:20-cr-00032-RC (D.D.C. filed Feb. 5, 2020) (international money laundering conspiracy scheme to facilitate North's nuclear weapons program).

¹⁰⁹ Superseding Indictment at 4–6, *United States v. Maduro Moros*, No. 1:11-CR-205 (S.D.N.Y. filed Mar. 5, 2020) (corruption and narco-terrorism conspiracy).

¹¹⁰ Indictment at 1, *United States v. Vladimir Padrino Lopez*, No. 1:19-CR-176 (D.D.C. filed May 24, 2019) (corruption and narco-terrorism conspiracy).

¹¹¹ Indictment at 1–3, *United States v. Carlos De Leon-Perez*, No.17-cr-514 (S.D. Tex. Filed Aug. 23, 2017) (corruption and money laundering conspiracy).

President Trump was willing to intervene in federal investigations and prosecutions to advance political interests:¹¹²

Bolton asserts that the president was willing to intervene in criminal investigations to curry favor with foreign dictators. . . The other episodes that Mr. Bolton says the House should have investigated include Mr. Trump's willingness to intervene in Justice Department investigations against foreign companies to "give personal favors to dictators he liked." Mr. Bolton said it appeared to be "obstruction of justice as a way of life."

. . . .

He singles out Halkbank of Turkey, a state-owned financial institution investigated for a multibillion-dollar scheme to evade American sanctions on Iran. At a side encounter during a Buenos Aires summit meeting in late 2018, President Recep Tayyip Erdogan of Turkey handed Mr. Trump a memo by the law firm representing Halkbank, "which Trump did nothing more than flip through before declaring he believed Halkbank was totally innocent." He then told Mr. Erdogan "he would take care of things. . ."

. . . .

Mr. Bolton also mentions ZTE, the Chinese telecommunications giant that was convicted of evading sanctions on Iran and North Korea and then faced new penalties for further violations during its follow-up consent decree. During a conversation on trade with President Xi Jinping of China, Mr. Trump offered to lighten the penalties. "Xi replied that if that were done, he would owe Trump a favor and Trump immediately responded he was doing this because of Xi."¹¹³

A study of the indictments brought by the Justice Department over the last four years that have targeted foreign actors, confirm the assertion by Mr. Bolton that there was a willingness to intervene in federal criminal prosecutions to advance political interests.

A. ZTE: Sanctions Enforcement

During the period of 2016 the Commerce Department began an enforcement action against ZTE, China's second-largest maker of telecom equipment, and accused ZTE of violating American sanctions related to doing business with Iran and North Korea.¹¹⁴ A year later, the Commerce Department found that ZTE was continuing to violate the law.¹¹⁵ In addition,

¹¹² Peter Baker, *Five Takeaways From John Bolton's Memoir*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/18/us/politics/john-bolton-memoir-takeaways.html>.

¹¹³ *Id.*

¹¹⁴ Paul Mozur & Cecilia Kang, *U.S. Fines ZTE of China \$1.19 Billion for Breaching Sanctions*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/technology/zte-china-fine.html>.

¹¹⁵ *Id.*

the regulators found that ZTE had intentionally provided incomplete and misleading information to regulators about its compliance with the law. As an additional punishment, ZTE agreed to plead guilty and pay \$1.19 billion fine.¹¹⁶ In addition, ZTE was barred from purchasing critical electronic components from suppliers in the United States.¹¹⁷ The *New York Times* reported that:

China's second-largest maker of telecommunications equipment will not be able to use components made in the United States after the Commerce Department said it failed to punish employees who violated American sanctions against Iran and North Korea. . . .

. . . .

"ZTE misled the Department of Commerce," Wilbur Ross, the commerce secretary, said in a statement. "Instead of reprimanding ZTE staff and senior management, ZTE rewarded them. This egregious behavior cannot be ignored."¹¹⁸

Two months later, Mr. Trump swept aside the "egregious" failure of ZTE to comply with the law and ignored the finding that ZTE had intentionally mislead regulators. On June 7, 2018, Mr. Trump intervened in the enforcement action and lifted sanctions on ZTE. The *New York Times* came out with two published reports that were undisguised in suggesting that the intervention in this law enforcement action was transactional and situational and part of a calculated effort to influence relations with the Chinese government:¹¹⁹

President Trump handed the Chinese telecommunications firm ZTE a lifeline on Thursday, agreeing to lift tough American sanctions over the objections of Republican lawmakers, his defense advisers and some of his own economic officials. The deal will help defuse tensions with the Chinese president, Xi Jinping, who personally asked Mr. Trump to intervene to save ZTE and whom the president has relied on to help pave the way for next week's summit meeting with the North Korean leader. . . .

. . . .

In 2016, the United States found the Chinese company guilty of violating American sanctions on Iran and North Korea. In April, the government said ZTE had failed to take the necessary actions to rectify the issue, and had

¹¹⁶ *Id.*

¹¹⁷ Paul Mozur & Ana Swanson, *Chinese Tech Company Blocked From Buying American Components*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/technology/216hinese-tech-company-blocked-from-buying-american-components.html>.

¹¹⁸ *Id.*

¹¹⁹ Ana Swanson, *Trump Strikes Deal to Save China's ZTE as North Korea Meeting Looms*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/business/us-china-zte-deal.html>.

lied about its efforts, prompting the Commerce Department to implement the ban.

....

Mr. Ross and other administration officials have repeatedly insisted that ZTE is being handled as a law enforcement matter that is independent of trade negotiations. But those statements have been undercut by the president himself, who has suggested that the company is a bargaining chip in negotiations between the countries. In mid-May, the president said he was working with Mr. Xi to give ZTE a way to get back in business. Two days later, Mr. Trump described the ZTE move as part of “the larger trade deal we are negotiating with China and my personal relationship with President Xi.”¹²⁰

In the second article on the intervention in the ZTE sanctions case, Paul Mozur and Kevin Granville, writing in the *New York Times*, were more direct in their suggestion that Mr. Trump’s intervention in this law enforcement matter was transactional and situational and asserted that the ZTE enforcement action was being used as leverage to influence the negotiations with China on a trade deal:¹²¹

In normal times, the company’s fate would be a legal matter for the Commerce Department. But the Trump administration is pressuring China to make trade concessions. It may also need Beijing’s help to strike a deal with North Korea as Washington and Pyongyang plan a high-profile meeting on June 12 in Singapore. Mr. Trump appears to be using ZTE’s punishment as a bargaining chip in negotiations with China, rather than a matter of law enforcement.¹²²

Critics of intervention in the ZTE enforcement action pointed out that the abrupt reversal reflected the “arbitrary and transactional nature “of Mr. Trump’s trade policy and his willingness to use enforcement actions as expedient tools to influence foreign relations and advance geopolitical interests unrelated to pursuing justice or preventing injustice.”¹²³

¹²⁰ *Id.*

¹²¹ Paul Mozur & Kevin Granville, *What Is ZTE? A Chinese Geopolitical Pawn That Trump Wants to Rescue.*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/business/what-is-zte.html>.

¹²² *Id.* The *Wall Street Journal* also was unequivocal in suggesting that the intervention in the ZTE enforcement action was transactional and situational and part of a calculated effort to advance geopolitical interests. See Bob Davis, Dan Strumpf & Lingling Wei, *China’s ZTE to Pay \$1 Billion Fine in Settlement With U.S.*, WALL ST. J. (June 7, 2018), <https://www.wsj.com/articles/zte-pays-1-billion-fine-after-allegedly-violating-u-s-sanctions-1528374558>.

¹²³ The Editorial Board, Opinion, *Trump Lets ZTE Off the Hook*, WALL ST. J. (May 14, 2018), <https://www.wsj.com/articles/trump-lets-zte-off-the-hook-1526338721> (“Donald Trump vows to challenge China’s trade abuses, but then how to explain his extraordinary intervention Sunday to rescue the Chinese telecom firm ZTE? The answer lies in the arbitrary and transactional nature of Mr. Trump’s trade policy, which has economic and political costs.”).

B. Mexico: Public Corruption and Drug Trafficking Conspiracy

In 2019, federal prosecutors obtained two significant indictments charging a former senior level government officials in Mexico with corruption and drug trafficking offences. The first indictment was obtained on December 10, 2019 when the Department of Justice announced that a former senior law enforcement official in Mexico, Genaro García Luna, was charged with participating in a corruption and drug trafficking conspiracy.¹²⁴ The defendant was accused of engaging in a continuing criminal enterprise,¹²⁵ participating in an international cocaine distribution conspiracy,¹²⁶ conspiracy to distribute cocaine,¹²⁷ conspiracy to import cocaine¹²⁸ and false statement.¹²⁹ Alan Feuer report in the *New York Times*, revealed that that the defendant received millions of dollars in bribes from a drug cartel while he held several senior high-level law enforcement positions in the Mexican government:¹³⁰

A retired Mexican police official who once led his country's equivalent of the F.B.I. was indicted in New York on Tuesday on charges of taking bribes while in office to protect the Sinaloa drug cartel, one of Mexico's most powerful criminal mafias. The official, Genaro García Luna, served as the head of Mexico's Federal Investigation Agency from 2001 to 2005, and for the next six years was Mexico's secretary of public security, a cabinet-level position. In that role he was tasked with helping the president at the time, Felipe Calderón, craft his strategy to battle their country's drug cartels. But according to prosecutors in Brooklyn, even while Mr. García Luna presented himself as the public face of the war against the drug trade in Mexico, he was quietly receiving millions of dollars from the Sinaloa cartel, which was run at the time by the drug lord Joaquín Guzmán Loera, better known as El Chapo.¹³¹

The second indictment was obtained on October 16, 2002, when federal prosecutors announced that the former defense minister of Mexico, Salvador Cienfuegos, was arrested as he arrived in Los Angeles for a family vacation. In connection with the arrest, the Department of Justice unsealed an indictment charging Salvador Cienfuegos with drug-related corruption charges.¹³² The defendant was charged with participating in an international

¹²⁴ See Superseding Indictment at 2–3, *United States v. Luna*, No. 19-576 (S1) (BMC) (E.D.N.Y. filed July 30, 2020).

¹²⁵ *Id.* at 3–4.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 7–8.

¹²⁸ *Id.* at 8.

¹²⁹ *Id.* at 9.

¹³⁰ Alan Feuer, *Architect of Mexico's War on Cartels Is Accused of Taking Bribes From One*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2019/12/10/world/americas/genaro-garcia-luna-mexico-arrest.html>.

¹³¹ *Id.*

¹³² Indictment at 1, *United States v. Cienfuegos Zepeda*, No. CR 19-366 (E.D.N.Y. filed Aug. 14, 2019).

drug trafficking¹³³ and money launder conspiracy.¹³⁴ The *Wall Street Journal* reported that Cienfuegos was accused of using his position as defense minister to pass along information about investigations to drug cartels and to facilitate the shipment of substantial amounts of cocaine and other drugs to the United States.¹³⁵ David Luhnnow and José de Córdoba wrote that:

Mexico's former defense minister received bribes from a drug cartel in exchange for allowing it to ship tons of cocaine and other drugs to the U.S., and used his position to pass along information on investigations to crime bosses, U.S. prosecutors alleged. The allegations were part of an indictment unsealed Friday against Gen. Salvador Cienfuegos, who served as defense minister from 2012 to 2018 in then-President Enrique Peña Nieto's administration and led the army's war on drug cartels. U.S. agents arrested the retired at Los Angeles International Airport on Thursday as he arrived with his family.

...

The arrest is expected to damage bilateral cooperation and trust in the campaign against narcotics trafficking. The indictment alleges deeply rooted corruption in Mexico's armed forces. Gen. Cienfuegos, whose nickname is "El Padrino," or "The Godfather," according to the indictment, used his position as defense minister to help the H-2 Cartel, a gang more commonly known in Mexico as the Beltrán Leyva organization, to ship drugs.

As defense minister, the indictment alleges, Gen. Cienfuegos warned the cartel about a U.S. law-enforcement investigation that was using an informant in the cartel. Cartel leaders then ordered the killing of a member whom they mistakenly identified as the informant, the indictment alleges.

The indictment alleges that the general also used his position to initiate operations against rival drug gangs, locate maritime transportation for drug shipments, help the cartel expand its territory and introduce cartel leaders to other senior officials willing to be bribed in exchange for helping the gang.

The gang, according to the indictment, used bribes of other top unnamed Mexican government officials to ensure the arrest and torture of rival drug traffickers by Mexican law enforcement; the release of members of the H-2 Cartel from prison; and the ability to engage in wholesale drug trafficking, firearms trafficking and violence, including dozens of murders, without interference by Mexican law-enforcement officials.

¹³³ *Id.* at 2.

¹³⁴ *Id.* at 5.

¹³⁵ David Luhnnow & José de Córdoba, *Mexican Ex-Defense Minister Charged With Helping Cartel Ship Drugs*, WALL ST. J. (Oct. 16, 2020), <https://www.wsj.com/articles/mexican-ex-defense-minister-faces-drug-traf-icking-money-laundering-charges-11602869775>.

The arrest raises serious concerns about drug-related corruption throughout the armed forces, which Mexico has long relied on to tackle organized crime and soaring rates of violence. . . .

. . . .

Gen. Cienfuegos's arrest follows last year's arrest of Genaro García Luna, a former head of Mexico's federal police who led the country's war on drug cartels during the 2006-12. . . Taken together, the arrests suggest drug-related corruption has infiltrated the most senior levels of Mexican law enforcement and military, analysts said. That leaves U.S. antidrug officials with few counterparts in Mexico they can trust.¹³⁶

At the initial hearing before a Federal Magistrate Judge, federal prosecutors in Los Angeles claimed that Cienfuegos had "no respect for public authority or the rule of law," and argued that that if Cienfuegos was released he would escape to Mexico where he would be protected by powerful former public officials in Mexico and one of Mexico's most violent drug trafficking organizations.¹³⁷

One month later, the Justice Department abruptly abandoned the prosecution of Cienfuegos to "preserve its relationship with Mexico," an interest unrelated to the pursuit of justice or preventing injustice. Rather than challenging the forces of corruption that touch the highest levels of the Mexican government, it appears that it was the Mexican government who was ultimately able to "touch" the Department of Justice.¹³⁸ On November 16, 2020, federal prosecutors suddenly aborted the prosecution of the former defense minister and moved to dismiss all charges against the defendant. The abrupt move suggested that senior administration officials viewed this federal criminal investigation and prosecution as transactional and situational.

¹³⁶ *Id.*; see also Azam Ahmed, *Mexico's Former Defense Minister Is Arrested in Los Angeles*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/world/americas/mexico-salvador-cienfuegos-arrested.html> (noting that the arrest of the high ranking military officer underscored "the forces of corruption that touch the highest levels" of the Mexican government); Azam Ahmed & Alan Feuer, *Who Was 'El Padrino,' Godfather to Drug Cartel? Mexico's Defense Chief, U.S. Says*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/16/world/americas/mexico-salvador-cienfuegos-arrested.html>:

[T]he authorities say, they finally confirmed that the mystery patron of one of the nation's most violent drug cartels was actually the leader in charge of waging Mexico's war against organized crime. It was a stunning display of how deep the tendrils of organized crime run in Mexico. . . Officials say that General Cienfuegos helped the H-2 cartel, a criminal group that committed horrific acts of violence as part of its drug smuggling business, with its maritime shipments. In exchange for lucrative payouts, officials say, General Cienfuegos also directed military operations away from the cartel and toward its rivals. . . The news not only casts a pall over Mexico's fight against organized crime, but also underscores the extent of corruption at the highest levels of government.

¹³⁷ Patricia Hurtado, *Mexico Ex-Military Chief Charged in U.S. With Aiding Cartel*, BLOOMBERG (Oct. 16, 2020), <https://www.bloomberg.com/news/articles/2020-10-16/mexico-s-ex-defense-minister-charged-by-u-s-in-narcotics-plot>.

¹³⁸ See Juan Montes & José de Córdoba, *Mexico's President Pushed Hard for Release of General Arrested in U.S.*, WALL ST. J. (Dec. 5, 2020), <https://www.wsj.com/articles/mexicos-president-pushed-hard-for-release-of-general-arrested-in-u-s-11607187601>.

Sadie Gurman and José de Córdoba writing in the *Wall Street Journal*, reported that the Department of Justice's motion to dismiss the charges was the result of "foreign-policy concerns" and was in response to threats from the Mexican government to severely curtail United States law enforcement operations in Mexico:¹³⁹

Mexico's former defense minister arrived back in the country Wednesday night after a U.S. judge dismissed drug-trafficking and corruption charges against him at the request of U.S. prosecutors, who said the unusual move was motivated by foreign-policy concerns and driven by Attorney General William Barr. The decision to drop charges against Gen. Salvador Cienfuegos, who had been accused of taking bribes in exchange for protecting cartel leaders, came after Mexico threatened to cut off cooperation with U.S. authorities unless the general were returned home, top Mexican officials said. . . .

. . . .

Acting U.S. Attorney Seth DuCharme offered few new glimpses into the unusual decision, saying only that the case was strong but the U.S. interest in maintaining its relationship and law-enforcement partnerships with Mexico outweighed the Justice Department's interest in pursuing it. He said Mr. Barr made the decision himself in consultation with Mexican officials.¹⁴⁰

The *New York Times* also cited to Justice Department statements about how the need to preserve the relationship with Mexico "prevailed over pursuing the case."¹⁴¹

In a court filing, prosecutors acknowledged that the Trump administration had determined that preserving its relationship with Mexico prevailed over pursuing the case. "The United States has determined that sensitive and important foreign policy considerations outweigh the government's interest in pursuing the prosecution of the defendant, under the totality of the circumstances, and therefore require dismissal of the case," they wrote in asking a judge to dismiss the charges. . . .

¹³⁹ Sadie Gurman & José de Córdoba, *Mexico's Ex-Defense Minister Back Home After U.S. Drops Corruption Charges*, WALL ST. J. (Nov. 18, 2020), <https://www.wsj.com/articles/u-s-judge-agrees-to-dismiss-case-against-mexico-ex-defense-minister-11605716673>.

¹⁴⁰ *Id.* The depth of the deception by the defendant was stunning. Cienfuegos played a leading role in Mexico's counter-narcotics strategy when he headed the nation's armed forces. He was one of the significant sponsors of a national security law that was intended to address drug trafficking and organized crime in Mexico. See Paulina Villegas, *Missing Mexicans' Case Shines Light on Military's Role in Drug War*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/world/americas/mexico-missing-military-drugs.html>.

¹⁴¹ Michael S. Schmidt & Natalie Kitroeff, *U.S. to Drop Case Against Mexican Ex-Official to Allow Inquiry in Mexico*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/world/americas/mexico-general-cienfuegos-case.html>.

....

[T]he decision by American officials to arrest a former defense minister had rattled relations between the countries. It was the first time a high-ranking military leader had been detained on American soil on charges of drug-related corruption. The quick reversal may be an attempt to preserve relations between the countries or a testament to the close relationship between President Trump and President Andrés Manuel López Obrador of Mexico. . . .

....

Mr. Barr said Tuesday that as part of an agreement with the Mexican authorities, the Justice Department had provided the evidence it had collected against General Cienfuegos to investigators there. But the status of that investigation remains unclear.

The arrest made a huge splash in Mexico, dominating the headlines for days as word spread of the extent of the accusations that investigators made against General Cienfuegos. Among them: Thousands of BlackBerry messages coordinating with cartel leaders, orchestrating meetings between military officials and organized crime figures, starting operations against rival traffickers. The American authorities said General Cienfuegos had helped transport narcotics and tipped a drug cartel off to American investigations into their operations.

The Justice Department charges against General Cienfuegos underscored the corruption that has touched the highest levels of the government in Mexico. General Cienfuegos served as defense minister to President Enrique Peña Nieto, who left office two years ago. And his arrest came 10 months after another top official—who once led the Mexican equivalent of the F.B.I.—was inducted in New York on charges of taking bribes while in office to protect the powerful Sinaloa drug cartel.¹⁴²

¹⁴² *Id.* A statement issued by Attorney General Barr, in connection with the dismissal of the charges, indicated that the Justice Department had provided “all the evidence in the case” to Mexican officials and gave the impression that there would be an investigation and, perhaps, a criminal prosecution in Mexico. Contrary to the statement or intention of Barr, the likelihood that the Cienfuegos will actually be held accountable in Mexico is illusory. On January 14, 2021, just two months after the charges were dismissed, the Mexican attorney general’s office had cleared the general of all charges. See José de Córdoba & Anthony Harrup, *Mexican Former Defense Minister Cleared of Drug Allegations*, WALL ST. J. (Jan. 15, 2021), <https://www.wsj.com/articles/mexican-former-defense-minister-cleared-of-drug-allegations-11610685428>; Natalie Kitroeff, Alan Feuer & Oscar Lopez, *In Blow to U.S. Alliance, Mexico Clears General Accused of Drug Trafficking*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/world/americas/mexico-general-drug-charges.html>.

The *New York Times* came out with a second published report suggesting that political pressure from the Mexican government played a direct role in prompting the dismissal of the charges:¹⁴³

From the moment U.S. federal agents arrested a former Mexican defense minister last month on drug trafficking charges, the highest levels of the Mexican government were outraged at being kept in the dark about the case, seeing it as an egregious breach of trust between allies.

Those emotions reached a peak in recent days, as Mexico City issued an unheard-of warning to its counterparts in Washington: If the United States did not rethink its pursuit of Salvador Cienfuegos Zepeda, Mexico would consider expelling American federal drug agents from the country, jeopardizing a decades-long partnership that has helped bring several top drug lords to justice, according to three people in the United States who are familiar with the case.

That threat appeared to work. On Wednesday, at the request of Attorney General William P. Barr himself, a federal judge in Brooklyn said she would formally dismiss the charges against Mr. Cienfuegos, a former army general.

The Justice Department's reversal stunned officials in the State Department and in Congress, who said Mr. Cienfuegos's release would be an abrupt departure from the Trump administration's aggressive pursuit of organized crime and drugs from Mexico. . . .

. . . .

Seth DuCharme, a former top aide to Mr. Barr who now serves as the acting U.S. attorney in Brooklyn, sought to explain the move, saying that by releasing Mr. Cienfuegos he was seeking to protect "the United States' relationship with Mexico," particularly where joint law enforcement matters were concerned. . . .

. . . .

The release of Mr. Cienfuegos—who arrived back in Mexico on Wednesday, with no guarantee that he would ever face charges—illustrates how foreign policy can interfere with the day-to-day prosecution of the drug war. Prosecutors acknowledged the challenges in a letter to the Judge Carol B. Amon, of Federal District Court in Brooklyn, saying they had dropped the charges because of "sensitive and important foreign policy considerations . . ."

¹⁴³ Alan Feuer & Natalie Kitroeff, *Mexico, Outraged at Arrest of Ex-Official, Threatened to Toss U.S. Agents*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/18/world/americas/mexico-cienfuegos-barr.html>.

The investigation, which began in late 2013, was bolstered, court papers say, by a sprawling wiretap that covertly captured thousands of BlackBerry messages, some of which are said to implicate Mr. Cienfuegos in chatting and orchestrating meetings with cartel leaders.

Officials say that Mr. Cienfuegos helped the H-2 cartel, which has committed horrific acts of violence as part of its smuggling business, with its maritime shipments. In exchange for lucrative payouts, the officials say, Mr. Cienfuegos also directed military operations away from the cartel and toward its rivals . . .”¹⁴⁴

These were very serious federal criminal charges. The defendant was a high-level government official who was alleged to have breached the public trust by taking bribes in exchange for protecting drug cartel leaders. Both the *Wall Street Journal*¹⁴⁵ and the *New York Times*¹⁴⁶ reported that the decision to dismiss the charges was made by Mr. Barr and linked to vague “foreign-policy concerns.” There were no statements made public by the Department of Justice that would explain why the Cienfuegos indictment implicated foreign-policy concerns whereas the Zepeda prosecution (the former director of the equivalent of Mexico’s FBI) did not. Moreover, these foreign policy concerns were clearly obvious prior to when the target was arrested and there were no published reports that identified what unexpected events intervened in the thirty-days between the time Cienfuegos was arrested and when the charges were dismissed against him that would explain this abrupt change in position by the Justice Department. There are many reasons to be skeptical. In just thirty days, the commitment by the Department of Justice to address the extensive corruption at the highest levels within the Mexican government and holding “a patron of Mexico’s most violent drug cartel accountable”¹⁴⁷ became negotiable.¹⁴⁸ Clearly, the willingness to deal these federal charges

¹⁴⁴ *Id.*

¹⁴⁵ Sadie Gurman & José de Córdoba, *Mexico’s Ex-Defense Minister Back Home After U.S. Drops Corruption Charges*, WALL ST. J. (Nov. 18, 2020), <https://www.wsj.com/articles/u-s-judge-agrees-to-dismiss-case-against-mexico-ex-defense-minister-11605716673>.

¹⁴⁶ See Schmidt, *supra* note 141.

¹⁴⁷ See Ahmed, *supra* note 136.

¹⁴⁸ The sudden reversal is difficult to understand because senior level lawyers at the Department of Justice were obviously involved in every phase of the investigation, charging decision and decision to apprehend the target at the airport in Los Angeles. The indictment and arrest of Cienfuegos was clearly the product of close consultation and coordination with and review by senior-level attorneys in the Justice Department. Reporting on the Equifax indictment *The New York Times* made it clear that charging decisions involving foreign military officers that implicate significant foreign-policy interests are made by the Attorney General: “The Justice Department rarely secures indictments against members of foreign militaries or intelligence services, in part to avoid retaliation against American troops and spies, but Mr. Barr said it has made exceptions for state-sponsored actors who hacked into American networks to steal intellectual property or interfere in United States elections.” Katie Benner, *Charges Chinese Military Officers in 2017 Equifax Hacking*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/02/10/us/politics/equifax-hack-china.html>. The decision not to advise law enforcement counterparts in Mexico of the indictment of Cienfuegos in 2019 or the intention to arrest the target was obviously made by senior level lawyers at the Department of Justice. See Feuer, *supra* note 143. The indictment had been pending for

away undermines any perception that federal criminal indictments are instruments of geopolitical power.

C. North Korea: International Money Laundering Conspiracy.

In February 2019, a second summit meeting between the United States and North Korea ended abruptly without any agreement on nuclear disarmament or easing tensions on the Korean Peninsula.¹⁴⁹ The use of federal prosecutions to influence foreign relations surfaced again to advance geopolitical interest in North Korea. In May of 2020, the Department of Justice unsealed an indictment charging several North Korean and Chinese citizens with participating in an international money laundering conspiracy that was intended to facilitate the North's nuclear weapons program.¹⁵⁰ The indictment charged the North Korean and Chinese targets with conspiracy,¹⁵¹ violating the International Emergency Economic Powers Act,¹⁵² violating the Weapons of Mass Destruction Proliferators Sanctions Regulations,¹⁵³ violating the North Korea Sanctions Regulations,¹⁵⁴ bank fraud,¹⁵⁵ conspiracy to launder monetary instruments,¹⁵⁶ international money laundering¹⁵⁷ and participating in a continuing financial crimes enterprise.¹⁵⁸ The report in the *Wall Street Journal* suggested that the timing of the indictment signaled that the federal charges were being used as leverage in the campaign against the North Korean government. The *Wall Street Journal* noted that it was the first Justice Department indictment targeting senior North Korean government officials. Among the defendants charged in the indictment were the chairman of the Foreign Trade Bank and a member of North Korea's foreign intelligence service, the Reconnaissance General Bureau.¹⁵⁹

almost a year. How could it be that these senior level lawyers at the Department of Justice failed to anticipate the reaction from the Mexican government to having one of their former defense ministers charged with federal criminal offenses and apprehended in Los Angeles.

¹⁴⁹ Edward Wong, *Trump's Talks With Kim Jong-un Collapse, and Both Sides Point Fingers*, N.Y. TIMES (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/world/asia/trump-kim-vietnam-summit.html>.

¹⁵⁰ Indictment at 1, *United States v. Ko Chol Man*, No. 1:20-cr-00032-RC (D.D.C. filed Feb. 5, 2020).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Aruna Viswanatha & Ian Talley, *U.S. Charges North Korea Officials With Illegally Transferring \$2.5 Billion*, WALL ST. J. (May 28, 2020), <https://www.wsj.com/articles/u-s-charges-north-korea-of-icials-with-illegally-transferring-2-5-billion-11590681073>.

Katie Benner writing in the *New York Times*, also suggested that there was a link between the charges and the Trump administration's diplomatic effort to disrupt North Korea's nuclear weapons program:¹⁶⁰

North Korean and Chinese citizens are operating a multibillion-dollar money laundering scheme to help fund the North's nuclear weapons program, the Justice Department said in an indictment unsealed on Thursday. The case underscores the Trump administration's inability to halt Pyongyang's nuclear weapons program through diplomacy. The department charged 28 North Koreans and five Chinese citizens of using a web of more than 250 shell companies to launder over \$2.5 billion in assets through the international banking system, according to court documents filed in February by the U.S. attorney's office in Washington. The government claimed that the money flowed back to North Korea's primary, state-operated foreign exchange bank, the Foreign Trade Bank of the Democratic People's Republic of Korea. The North used the funds to support its weapons of mass destruction program. . . .

. . . .

While the United States has little chance of apprehending the defendants, the Justice Department sometimes brings charges against foreigners in an effort to deter adversarial governments. . . . The charges are also a tacit acknowledgment that the United States has been unable to stop North Korea from building nuclear weapons by imposing economic sanctions or through President Trump's attempt to broker an agreement.¹⁶¹

The indictment was largely performative. The likelihood that the North Korean or Chinese targets will be apprehended and extradited is extremely remote. The reason for this is that the targets are located in jurisdictions that preclude extradition and once the charges are publicly announced, it is highly unlikely that these targets will risk travel to a jurisdiction where apprehension and extradition is possible. The news report acknowledged that that the United States has little chance of apprehending the defendants, however, it suggested that "the Justice Department sometimes brings charges against foreigners in an effort to deter adversarial governments." It is unlikely that the risk of a federal criminal indictment would have any deterrent effect on the efforts by the North Koreans to fund or pursue their nuclear weapons program.

¹⁶⁰ Katie Benner, *North Koreans Accused of Laundering \$2.5 Billion for Nuclear Program*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/05/28/us/politics/north-korea-money-laundering-nuclear-weapons.html>.

¹⁶¹ *Id.*

D. *Turkey: Halkbank Bank Corruption and Evading Iran Sanctions Evasion.*

On October 15, 2019, the Department of Justice obtained a superseding indictment charging Turkey's largest state-owned and state-controlled bank with corruption and evading Iranian sanctions.¹⁶² The indictment alleged that billions of dollars' worth of gold and cash were illegally transferred to Iran in exchange for oil and gas. The bank was accused of conspiracy to defraud the United States,¹⁶³ conspiracy to violate the International Emergency Economic Powers Act,¹⁶⁴ bank fraud,¹⁶⁵ money laundering,¹⁶⁶ and conspiracy to commit money launder.¹⁶⁷ The superseding indictment claimed that the wrongdoing had reached senior levels of the Turkish government, that government officials had received bribes worth millions of dollars, and that government officials facilitated the corruption scheme and concealed the scheme from the scrutiny of U.S. regulators.¹⁶⁸

A report published in the *New York Times* pointed out that Paragraph 62 of the Superseding Indictment implicated that President Erdogan of Turkey and his son in law, Turkey's Treasury and Finance Minister Berat Albayrak in the corruption scheme.¹⁶⁹ The article also suggested that the particular timing of the criminal indictment coincided with Turkey falling out of favor and an effort by the Trump Administration to punish Turkey for its military incursion into northern Syria.¹⁷⁰

The Justice Department on Tuesday sharply escalated economic pressure on Turkey by filing fraud and money-laundering charges against the country's second-largest state-owned bank, accusing it of helping Iran evade United States sanctions. The charges against the institution, Halkbank, came as the administration sought ways to project that it was taking a tough line with Turkey after President Trump effectively signaled this month that the United States would not stand in the way of Turkey's desire to send forces into northern Syria. . . .

. . . .

President Recep Tayyip Erdogan of Turkey had repeatedly raised the Halkbank case with Mr. Trump over the past year, urging the United States

¹⁶² Superseding Indictment at 1–2, *United States v. Turkiye Halk Bankasi A.S.*, No. S6-15-cr-867 (RMB) (S.D.N.Y. filed Oct. 15, 2019).

¹⁶³ *Id.* at 35–36.

¹⁶⁴ *Id.* at 36–37.

¹⁶⁵ *Id.* at 37–38.

¹⁶⁶ *Id.* at 39–40.

¹⁶⁷ *Id.* at 40–41.

¹⁶⁸ *Id.* at 2.

¹⁶⁹ Eric Lipton, *U.S. Indicts Turkish Bank on Charges of Evading Iran Sanctions*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/us/politics/halkbank-turkey-iran-indictment.html>.

¹⁷⁰ *Id.*

not to take further action, saying that to do so would unfairly expose Turkey to severe financial risks. One of the bank's top executives was convicted on related charges last year, and the Justice Department has been reviewing since then whether to pursue the case further as Turkish officials and lawyers pressed the government not to indict the bank. . . .

. . . .

Justice Department officials said high-ranking government officials in Turkey "participated in and protected this scheme," with some receiving bribes worth tens of millions of dollars and helping to hide the conspiracy from the scrutiny of regulators in the United States.

After Mr. Trump came under intense criticism for choosing to stand aside as Turkey pursued its plan to assert control over a section of northern Syria, he began striking a tougher tone toward Mr. Erdogan, focusing in particular on the threat of harming Turkey's economy if it put United States military personnel at risk or engaged in atrocities against Kurds in the region. . . The Justice Department and the White House did not respond to questions about whether the decision was influenced by Turkey's decision to send troops in Syria.¹⁷¹

On October 29, 2020, the *New York Times* reported on an extraordinary pressure campaign from the Turkish government to interfere with a federal criminal investigation. The interference cascaded down on to the United States Attorney's Office for the Southern District of New York. The article more than suggested that the senior level officials in the Trump administration viewed the criminal prosecution as transactional and situational and intervened to facilitate its relationship with the Turkish government. In particular, the article stated that senior level Justice Department political appointees were pressing for a settlement on terms favorable to the Turkish government. However, to demonstrate how arbitrary the administration viewed the criminal investigation, after Turkey invaded northern Syria, the interest in preserving its relationship with Turkey no longer prevailed and the effort to intervene in the investigation was quickly halted and the indictment was allowed to go forward.¹⁷²

E. China: Computer Fraud and Economic Espionage.

On November 16, 2020, the *New York Times* described the relationship between the United States and China as adversarial and at the same time transactional and situational:

¹⁷¹ *Id.*

¹⁷² Eric Lipton & Benjamin Weiser, *Turkish Bank Case Showed Erdogan's Influence With Trump*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/us/politics/trump-erdogan-halkbank.html>.

While Democrats and Republicans have credited Mr. Trump with drawing attention to China's security threats, and its unfair economic practices like intellectual property theft, his dealings with China have also been transactional and inconsistent. In an attempt to secure a trade deal, Mr. Trump lavished praise on Mr. Xi, delayed sanctions against China's human rights violations for months and pardoned the Chinese company ZTE for running afoul of U.S. law.¹⁷³

In addition to the suggestion that William Barr was inextricably intertwined with Mr. Trump on domestic political issues, it has also been suggested that Mr. Barr was aligned with Mr. Trump's foreign policy message. On July 16, 2020, the *New York Times* reported that Mr. Barr had aligned himself with the White House's confrontational stance on China by accusing several United States based companies of ignoring China's economic aggression in order to obtain and retain access to China's consumer market:¹⁷⁴

Accusing American firms of engaging in "corporate appeasement" of the Chinese Communist Party, Attorney General William P. Barr called on the private sector on Thursday to get tougher in resisting what he portrayed as corrupting efforts by China to cheat and bully its way into taking over the global economy. "The C.C.P. has launched an orchestrated campaign across all of its many tentacles in Chinese government and society to exploit the openness of our institutions in order to destroy them.

Mr. Barr's was the third of four speeches on China by senior Trump administration officials, and it came as the White House was weighing imposing a sweeping ban on travel to the United States by members of the Chinese Communist Party as part of a broader confrontation with Beijing.

. . . .

Mr. Barr denounced China as an authoritarian state that found willing "pawns" as it sought to infiltrate, censor and co-opt American private-sector institutions and steal technological know-how. He focused in particular on entertainment and high-tech businesses, both industries that Republicans sometimes view as too liberal politically. For example, the attorney general criticized actors and directors for lecturing the United States at the Academy Awards each year about "how this country falls short of Hollywood's values" even as their industry censored movies to avoid losing access to the Chinese market. . . .

. . . .

¹⁷³ Ana Swanson, *Biden's China Policy? A Balancing Act for a Toxic Relationship*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2020/11/16/business/economy/biden-china-trade-policy.html>.

¹⁷⁴ Charlie Savage, *Barr Urges U.S. Companies to Resist Serving as 'Pawns' for China*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/us/politics/barr-china.html>.

He also lambasted Silicon Valley companies, saying that Cisco had helped China build its massive system for censoring and surveilling the internet, and that “Google, Microsoft, Yahoo and Apple have shown themselves to be all too willing to collaborate” with China. He focused on Apple, slamming it for removing Chinese users’ ability to access pro-democracy songs and apps that provide news and can evade internet censorship; for agreeing to put iCloud data of Chinese users on servers in China; and for securing iPhones in a way that inhibits the F.B.I.’s ability to scrutinize data on devices even with warrants—while, he insinuated, treating the Chinese government differently. . . .

. . . .

Mr. Barr praised the recent decision by several tech giants to suspend providing user data to Chinese law enforcement in response to its crackdown on protesters in Hong Kong. Noting that China has threatened criminal sanctions in response, Mr. Barr urged the companies to hold firm.¹⁷⁵

The Department of Justice clearly played a role in confronting China that went beyond harsh rhetoric. In a series of federal indictments targeting Chinese foreign intelligence officers and state-controlled entities, the Department of Justice signaled an undisguised intention to use investigations and prosecutions against a geopolitical adversary. On January 28, 2020, federal prosecutors obtained an indictment accusing Chinese foreign intelligence officers and intelligence operatives with engaging in an organized data thefts conspiracy. The indictment charged the defendants with computer fraud,¹⁷⁶ economic espionage¹⁷⁷ and fraud.¹⁷⁸ The indictment was extraordinary for several reasons. For only the second time, federal prosecutors brought charges against Chinese military intelligence officers and foreign intelligence operatives. Second, the targets were accused of committing a federal offense for conducting foreign intelligence activity on behalf of the Chinese government.¹⁷⁹ Third, the indictment was performative. By publicly announcing the charges, federal prosecutors were acknowledging that the targets were unlikely to be apprehended and brought to trial because China does not have an extradition treaty with the United

¹⁷⁵ *Id.*; see also U.S. DEP’T OF JUST., Attorney General William P. Barr Delivers the Keynote Address at the Department of Justice’s China Initiative Conference (Feb. 6, 2020) available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-keynote-address-department-justices-china> (“In the past, prior administrations and many in the private sector have too often been willing to countenance China’s hardball tactics. It has been this administration that has finally moved to confront and counteract China’s playbook.”).

¹⁷⁶ Indictment at 4, *United States v. Zhiyong*, No. 2:20-CR-00046-UNA (N.D. Ga. filed Jan. 28, 2020). Two defendants were identified in Paragraph 2 the indictment as “members of the People’s Liberation Army (‘PLA’), the armed forces of the People’s Republic of China (‘China’)”

¹⁷⁷ *Id.* at 13–14.

¹⁷⁸ *Id.* at 15–18.

¹⁷⁹ Katie Benner, *Charges Chinese Military Officers in 2017 Equifax Hacking*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/02/10/us/politics/equifax-hack-china.html>.

States. In addition, because the indictments were publicly disclosed, it is highly unlikely that these military intelligence officers and foreign intelligence operatives would travel to a jurisdiction where there was a risk of apprehension and extradition to the United States.

On July 7, 2020, federal prosecutors, for the second time in less than seven months, obtained indictments against Chinese foreign intelligence operatives. The intelligence operatives were charged with unauthorized computer access,¹⁸⁰ theft of trade secrets,¹⁸¹ conspiracy to commit wire fraud¹⁸² and aggravated identify theft.¹⁸³ The targets were accused of committing federal criminal acts while engaging in covert foreign intelligence activity as intelligence officers and operatives. The *New York Times* described the object of the conspiracy charged in the indictment as trying to steal coronavirus vaccine data for Chinese government.¹⁸⁴

The Justice Department accused a pair of Chinese hackers on Tuesday of targeting vaccine development on behalf of the country's intelligence service as part of a broader years long campaign of global cybertheft aimed at industries such as defense contractors, high-end manufacturing and solar energy companies. . . The indictment comes as the Trump administration has stepped up its criticism of Beijing, both for its theft of secrets and its failure to contain the spread of the coronavirus, and is a significant escalation of that campaign to denounce Beijing. The Justice Department said that China's covert activity could potentially set back vaccine research efforts. . . .

. . . .

The indictment also suggests that China did far less to curb its spying than it had vowed to as part of a nonaggression pact signed with the United States in late 2015 that was aimed at curbing China's efforts to steal American technological know-how.¹⁸⁵

It is unlikely that the Chinese government will hand over the targets. Therefore, the prosecution will most likely never proceed beyond the initial charging phase.

On January 24, 2019, the Justice Department unsealed indictments charging Huawei, China's largest telecom equipment maker and its chief financial officer.¹⁸⁶ The defendants were accused of conspiracy to commit

¹⁸⁰ Indictment at 6, *United States v. Xiaoyu*, No. 4:20-CR-6019-SMJ (E.D. Wash. filed July 7, 2020).

¹⁸¹ *Id.* at 6.

¹⁸² *Id.* at 24–25.

¹⁸³ *Id.* at 25–26.

¹⁸⁴ Julian E. Barnes, *U.S. Accuses Hackers of Trying to Steal Coronavirus Vaccine Data for China*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/politics/china-hacking-coronavirus-vaccine.html>.

¹⁸⁵ *Id.*

¹⁸⁶ Superseding Indictment at 1, *United States v. Huawei Technologies Co., LTD*, No. 18-457 (S-2) (AMD) (E.D.N.Y. filed Jan. 24, 2019).

bank fraud,¹⁸⁷ conspiracy to commit wire fraud,¹⁸⁸ conspiracy to defraud the United States,¹⁸⁹ conspiracy to evade economic sanctions¹⁹⁰ and obstructing an active criminal investigation.¹⁹¹ David Sanger, writing in the *New York Times* suggested that the indictments were being used to advance a political interest by blocking China from building the next generation of wireless networks.¹⁹²

The Justice Department unveiled sweeping charges on Monday against the Chinese telecom firm Huawei and its chief financial officer, Meng Wanzhou, outlining a decade-long attempt by the company to steal trade secrets, obstruct a criminal investigation and evade economic sanctions on Iran. The pair of indictments, which were partly unsealed on Monday, come amid a broad and aggressive campaign by the United States to try to thwart China's biggest telecom equipment maker. Officials have long suspected Huawei of working to advance Beijing's global ambitions and undermine America's interests and have begun taking steps to curb its international presence.

The charges underscore Washington's determination to prove that Huawei poses a national security threat and to convince other nations that it cannot be trusted to build their next generation of wireless networks, known as 5G. The indictments, based in part on the company's internal emails, describe a plot to steal testing equipment from T-Mobile laboratories in Bellevue, Wash. They also cite internal memos, obtained from Ms. Meng, that prosecutors said link her to an elaborate bank fraud that helped Huawei profit by evading Iran sanctions. . . .

. . . .

The indictment unsealed against Ms. Meng is similar to the charges leveled against the Huawei executive in filings made by federal prosecutors in connection with the bail hearing in Canada. It claimed that Huawei defrauded four large banks into clearing transactions with Iran in violation of international sanctions through a subsidiary called Skycom. . . .

. . . .

The most serious new allegation in the indictment, which could have bearing on the extradition proceeding in Canada, is the contention by federal prosecutors that Huawei sought to impede the investigation into the telecom

¹⁸⁷ *Id.* at 10–11.

¹⁸⁸ *Id.* at 11.

¹⁸⁹ *Id.* at 14.

¹⁹⁰ *See id.* at 16.

¹⁹¹ *Id.* at 20.

¹⁹² David E. Sanger, Katie Benner & Matthew Goldstein, *Huawei and Top Executive Face Criminal Charges in the U.S.*, N.Y. TIMES (Jan. 28, 2019), <https://www.nytimes.com/2019/01/28/us/politics/meng-wanzhou-huawei-iran.html>.

company's attempt to evade economic sanctions on Iran by destroying or concealing evidence.¹⁹³

On December 12, 2018, the *New York Times* reported that President Trump indicated his willingness to undercut federal prosecutors and use the Huawei indictment as leverage in the negotiations for a trade agreement with China. In particular, the article reported that Mr. Trump suggested that he would be willing to intervene in the effort by the Department of Justice to extradite and prosecute Meng Wanzhou, the senior executive of Huawei, if it would leverage trade concessions from China. Administration. The article also noted the criticism that such a move would undermine the rule of law:

194

When President Trump said in an interview this week that he was willing to intercede in the case of a Chinese telecom executive facing extradition to the United States if it helped achieve “the largest trade deal ever made,” it was a clear signal that his White House saw no problem intervening in the justice system to achieve what it considered economic gain. A range of experts agreed on Wednesday that the president had the legal authority to order the government to rescind the extradition request for the executive, Meng Wanzhou, or even drop the charges against her. But they could not

¹⁹³ *Id.*; see also David McCabe & Raymond Zhong, *Trump Administration Widens Huawei Dragnet*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/technology/trump-huawei-commerce-chips.html> (“The Trump administration announced on Monday that it was restricting Huawei’s ability to buy a wider array of chips made or designed with American equipment and software, tightening the limits it has placed on the Chinese telecom giant as it looks to cripple its ability to sell smartphones and telecom gear around the world.”).

¹⁹⁴ Michael Tackett & Charlie Savage, *Trump’s Intervention in Huawei Case Would Be Legal, but Bad Precedent, Experts Say*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/us/politics/trump-meng-wanzhou-huawei-extradition.html>; see also Barr, *supra* note 175:

Now let me turn to a very concrete problem that confronts us today. It is the pivotal nature of 5G technology and the threat arising from the Chinese drive to dominate this field. 5G technology lies at the center of the technological and industrial world that is taking shape. In essence, communications networks are not just for communications anymore. They are evolving into the central nervous system of the next generation of internet, called the “Industrial Internet,” and the next generation of industrial systems that will depend on that infrastructure. China has built up a lead in 5G, capturing 40 percent of the global 5G infrastructure market. For the first time in history, the United States is not leading the next technology era. Much of the discussion on the dangers of allowing China to establish dominance in 5G has been focused on the immediate security concern of using communications networks that China can monitor and surveil. That is, in fact, a monumental danger. For that reason alone, we should mobilize to surmount China’s drive to dominate 5G. But the stakes are far higher than this. It has been estimated that the Industrial Internet powered by 5G could generate new economic opportunities of \$23 trillion by 2025. If China establishes sole dominance over 5G, it will be able to dominate the opportunities arising from a stunning range of emerging technologies that will be dependent on, and interwoven with the 5G platform. From a national security standpoint, if the Industrial Internet becomes dependent on Chinese technology, China would have the ability to shut countries off from technology and equipment upon which their consumers and industry depend. The power the United States has today to use economic sanctions would pale by comparison to the unprecedented economic leverage we would be surrendering into the hands of China.

point to another instance of a president injecting himself into a criminal proceeding in a similar way.

“It sets a very bad precedent,” said Nicholas Burns, a former undersecretary of state and ambassador to NATO, “By mixing justice with trade and the rule of law with trade, it devalues both.” Ms. Meng, the chief financial officer of the telecommunications giant Huawei, was arrested last week by Canadian authorities at the request of the American government on suspicion of fraud related to Iranian sanctions. Mr. Trump said in an interview with that “I would certainly intervene if I thought it was necessary” for a trade deal. . . . But John Demers, the assistant attorney general for the Justice Department’s National Security Division, bristled at the notion that the motivation behind the charges might have anything to do with leverage in trade talks. “We are not a tool of trade when we bring the cases,” Mr. Demers said. . . .

. . . .

In the extradition case involving Ms. Meng, the president seemed willing to treat it as just another element in a deal. “It takes the term ‘transactional’ to a new level because he is basically suggesting everything is for sale,” said Wendy Cutler, a trade negotiator in President Barack Obama’s administration. “There’s a reason why these issues are in traditional lanes. And once you signal you are going to trade one off for the other, then you are in a whole new world. This undermines the rule of law. . . .”¹⁹⁵

Two days later, the *New York Times* published a second article that again noted Mr. Trump’s willingness to use the federal criminal prosecution of the Huawei business executive as leverage to advance the trade negotiations with China. The article cited criticism that claimed that such a move would send the message about the willingness to use trade enforcement as an expedient instrument for advancing unrelated goals.¹⁹⁶

When President Trump suggested that he may intervene in the arrest of a Chinese tech executive, he was seeking to leverage her case into a win on

¹⁹⁵ *Id.*; see also Julian E. Barnes & Adam Satariano, *U.S. Campaign to Ban Huawei Oversea Stumbles as Allies Resist*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/us/politics/huawei-ban.html>; Raymond Zhong & Paul Mozur, *Huawei Said to Be Preparing to Sue the U.S. Government*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/technology/235enezu-lawsuit-us-government.html>:

The criminal case against Ms. Meng in the United States could be complicated by comments from President Trump as the White House has engaged in trade negotiations with China. While criminal cases have traditionally been independent matters, Mr. Trump indicated that Huawei’s fate could be a bargaining chip. During a meeting in the Oval Office with a delegation of Chinese officials last month, Mr. Trump said, “We’ll be making that decision,” when asked if he would drop the criminal charges against Huawei as part of the trade deal. He added, “We’ll be talking to the attorney general.”

¹⁹⁶ See Charlie Savage, Katie Benner & Edward Wong, *Trump’s Push for Trade Win Could Undermine Sanctions Enforcement*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/politics/235enezu-trump-china.html>.

trade. But law enforcement officials say the president's comments could ultimately undermine America's ability to enforce tough sanctions on Iran and other rogue nations. Mr. Trump threw himself into the middle of a diplomatic crisis on Tuesday by indicating that he may stop an effort to extradite and prosecute Meng Wanzhou, a top executive at the telecommunications giant Huawei who was arrested in Canada on Saturday on suspicion of fraud related to Iran sanctions, if it would help secure trade concessions from China.

The comment has provoked deep concern among current and former Justice Department officials, who say Mr. Trump's willingness to interfere with law enforcement actions to accomplish unrelated trade policy goals could put at risk the United States' ability to go after foreign wrongdoers.

"President Trump's intervention in this case to use the criminal prosecution of Ms. Meng as a political bargaining chip in the United States' trade dispute with China not only would complicate vital law enforcement cooperation by the Canadian government in future sensitive matters, but also could undermine the perceived legitimacy, and therefore the success, of the U.S. extradition requests to other countries in national security cases," said David Laufman, who until February led the Justice Department section that enforces export control and sanctions laws. . . .

. . . .

Law enforcement officials say they worry that Mr. Trump is inflaming the perception among foreign critics that the United States' sanctions-related or extradition cases are expedient tools for achieving unrelated goals, not an exercise in the rule of law.¹⁹⁷

On February 13, 2020, the Justice Department brought additional charges against Huawei.¹⁹⁸ Huawei was now accused of participating in a racketeering conspiracy,¹⁹⁹ conspiracy to steal trade secrets,²⁰⁰ conspiracy to commit wire fraud,²⁰¹ conspiracy to commit bank fraud,²⁰² conspiracy to defraud the United States,²⁰³ conspiracy to evade the trade embargo on Iran,²⁰⁴ money laundering conspiracy,²⁰⁵ and conspiracy to obstruct justice.²⁰⁶ David Sanger, writing in the *New York Times*, suggested that the

¹⁹⁷ *Id.*

¹⁹⁸ Superseding Indictment at 1, *United States v. Huawei Technologies Co., LTD*, No. 18-457 (S-3) (AMD) (E.D.N.Y. filed Feb. 13, 2019).

¹⁹⁹ *Id.* at 33–35.

²⁰⁰ *Id.* at 35–38.

²⁰¹ *Id.* at 38.

²⁰² *Id.* at 38–40.

²⁰³ *Id.* at 42–44.

²⁰⁴ *Id.* at 44–48.

²⁰⁵ *Id.* at 48–49.

²⁰⁶ *Id.* at 49.

federal charges against Huawei were being used to advance an economic interest and were part of a pressure campaign to prevent Huawei from playing any role in the next generation of wireless networks:

The U.S. government has charged Huawei and two of its subsidiaries with federal racketeering and conspiracy to steal trade secrets from American companies, a significant escalation in the Trump administration’s legal fight with the Chinese telecommunications company.

In a federal indictment unsealed on Thursday in the Eastern District of New York, the Department of Justice accused Huawei and its affiliates of a “pattern of racketeering activity” and said the companies had worked to steal trade secrets from six American firms. The stolen information included source code, as well as the manuals for wireless technology. . . .

. . . .

The charges add more weight to Washington’s pressure campaign against Huawei, which is already barred from buying many American products and is viewed by the Trump administration as a threat to national security. The escalation is also part of the administration’s attempt to crack down on what it says is a pattern of Chinese espionage and theft aimed at giving Beijing a technological edge. . . .

. . . .

The White House has looked to ratchet up the pressure on Huawei for years, with members of Congress from both parties backing its efforts. The new charges may give more fodder to the company’s critics on Capitol Hill, who have been pushing to make sure Huawei has no role in the next generation of wireless networks, known as 5G. . . .

. . . .

Under the Trump administration, the Justice Department has focused on combating an array of threats that China poses to the United States and its allies in the West, including theft of trade secrets and espionage, as the country seeks to expand its sphere of economic and military power.²⁰⁷

Mr. Trump’s willingness to use a federal indictment as leverage to influence relations with China surfaced again in connection with the charges against Huawei. An article in the *New York Times* on March 17, 2019, suggested that Mr. Trump viewed the criminal charges against Huawei as

²⁰⁷ David McCabe, Nicole Hong & Katie Benner, *U.S. Charges Huawei With Racketeering, Adding Pressure on China*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/02/13/technology/237enezu-racketeering-wire-fraud.html>.

transactional and situational.²⁰⁸ The article described how Mr. Trump signaled his willingness to brush aside the Justice Department's focus on combating national security threats from China and use federal charges against Huawei as leverage to secure a trade deal with China:

Mr. Trump has repeatedly undercut his own Justice Department, which unveiled sweeping criminal indictments against Huawei and its chief financial officer with accusations of fraud, sanctions evasion and obstruction of justice. Mr. Trump has suggested that the charges could be dropped as part of a trade deal with China. The president previously eased penalties on another Chinese telecom firm accused of violating American sanctions, ZTE, after a personal appeal by President Xi Jinping of China.
²⁰⁹

At the end of the Trump administration, the Huawei prosecution and Meng extradition proceeding in Canada remained unresolved. However, the Department of Justice clearly played a role in confronting China with a series of federal indictments targeting Chinese foreign intelligence officers and state-controlled entities. Moreover, these indictments were mostly performative because China does not have an extradition treaty with the United States and because Mr. Trump was willing to use the prosecution as leverage to advance trade talks with China rather than to pursue justice.

F. *Venezuela: Corruption and Drug Trafficking*

The use of federal prosecutions to influence foreign affairs surfaced again to advance geopolitical interest in Venezuela. On March 26, 2020, federal prosecutors unsealed a superseding indictment charging President Nicolás Maduro of Venezuela of participating in a narco-terrorism conspiracy²¹⁰ and conspiring to import cocaine.²¹¹ The *Wall Street Journal* acknowledged that it was unlikely that Mr. Maduro would ever be apprehended and extradited to the United States and suggested that the indictment was being used by the Trump Administration as an expedient instrument to cause a regime change in Venezuela.²¹² The article included comments by Mr. Barr indicating that the indictment was intended to target foreign public corruption: “‘The Maduro regime is awash in corruption and criminality,’ Attorney General William Barr said. ‘While the Venezuelan

²⁰⁸ See Julian E. Barnes & Adam Satariano, *U.S. Campaign to Ban Huawei Oversea Stumbles as Allies Resist*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/us/politics/238enezu-ban.html>.

²⁰⁹ *Id.*

²¹⁰ 21 U.S.C. § 960a (2012); Superseding Indictment at 18, United States v. Maduro Moros, No. S2 11 Cr. 205 (S.D.N.Y. filed Mar. 26, 2020).

²¹¹ 21 U.S.C. § 963 (2012); Superseding Indictment at 21–22, United States v. Maduro Moros, No. S2 11 Cr. 205 (S.D.N.Y. filed Mar. 26, 2020).

²¹² See Aruna Viswanatha, José de Córdoba & Ian Talley, *U.S. Charges Venezuelan President Nicolás Maduro With Drug Trafficking*, WALL ST. J. (Mar. 26, 2020), <https://www.wsj.com/articles/u-s-indicts-venezuelan-president-nicolas-maduro-on-allegations-of-drug-trafficking-11585236443>.

people suffer, this cabal lines their pockets with drug money and the proceeds of their corruption.”²¹³

A report in the *New York Times* also connected this indictment to the Trump administration’s complex pressure campaign to cause a regime change in Venezuela and, according to Mr. Barr, address “the extensive corruption within the Venezuelan government — a system constructed and controlled to enrich those at the highest levels of the government,” Mr. Barr added.”²¹⁴

Five days later, the *Wall Street Journal* reported that the Trump Administration was seeking a regime change in Venezuela:

The Trump administration proposed that Venezuelan President Nicolás Maduro hand power to a transitional government in return for sanctions relief and other measures.

Under the terms of a proposal announced Tuesday, a council made up of representatives from both Mr. Maduro’s government and the opposition led by U.S.-backed Juan Guaidó would form a transitional government until an election is held later in the year.

....

The proposal comes more than a year into a global U.S. campaign to topple Mr. Maduro that has run up against a concerted effort by Russia, Cuba and others to thwart Washington’s aims for recasting the region’s geopolitics.²¹⁵

The day before the indictment against Maduro and other government officials in Venezuela was announced, federal prosecutors also unsealed an indictment targeting corruption in Venezuela’s petroleum and currency markets. The indictment, which had been pending for over three years,

²¹³ *Id.*; see also Dube et al., stating:

President Nicolás Maduro’s government reacted with defiance, [to the imposition of economic sanctions] vowing to remain in power despite the pressure from Washington to remove the authoritarian leader and replace him with an interim government led by the country’s opposition leader. . . .

....

President Trump issued an executive order on Monday that freezes all Venezuelan government assets in the U.S. and threatens to impose sanctions on virtually any company or individual, foreign or American, that engages in business with Mr. Maduro’s government or anyone affiliated with the regime.

Ryan Dube, Vivian Salama & Juan Forero, *Venezuelans Brace for Pain from U.S. Sanctions Against Maduro*, WALL ST. J. (Aug. 6, 2019), <https://www.wsj.com/articles/venezuelans-brace-for-pain-from-u-s-sanctions-against-maduro-11565131653>.

²¹⁴ William K. Rashbaum, Benjamin Weiser & Katie Benner, *U.S. Charges Venezuela’s With Trafficking and Narco-Terrorism*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/26/nyregion/239enezuela-president-drug-trafficking-nicolas-maduro.html>.

²¹⁵ Jessica Donati & Kejal Vyas, *U.S. Offers Venezuela Sanctions Relief in Return for Transitional Rule*, WALL ST. J. (Mar. 31, 2020), <https://www.wsj.com/articles/u-s-offers-venezuela-sanctions-relief-in-return-for-transitional-rule-11585661451>.

charged two former officials at Venezuela's state-owned and state-controlled oil company Petroleos de Venezuela ("PDVSA").²¹⁶ The defendants were charged with conspiracy to commit money laundering²¹⁷ and conspiracy to violate the Foreign Corrupt Practices Act²¹⁸ Again, the *New York Times* found a clear link between the federal charges and the collective action by the Trump administration to influence foreign relations and advance a geopolitical interest in the region: "[S]enior U.S. officials say they are part of a Trump administration effort to double down on its pressure campaign against President Nicolás Maduro's administration after failing to deliver on its primary goal of ousting the regime."²¹⁹ The article went on to cited statements by Trump administration officials indicating that the indictment was part of the collective actions intended "to publicly shame the Maduro government as a strategy to undermine its political support" and bolster "U.S.-backed opposition movement by recovering billions in stolen state assets, and disrupt the revenue that keeps the regime afloat and its allies financed."²²⁰

In addition to being used as part of the collective action to influence foreign relations and advance a geopolitical interest, it is important to note that a part of the overt subject of these federal charges against Mr. Maduro was an intent to target foreign government corruption. In announcing the Maduro indictment, Mr. Barr characterized the Venezuelan government as being "plagued by criminality and corruption."²²¹ Trump administration officials added that federal prosecutors were moving to "publicly shame the Maduro government" and hold foreign officials accountable for their conduct by "root[ing] out 'the extensive corruption within the Venezuelan government—a system constructed and controlled to enrich those at the highest levels of the government.'"²²² However, considering the strong conservative views of the Trump Justice Department and the Supreme Court's warning against federal prosecutors overreaching beyond boundaries, targeting corruption by foreign government officials seems to lack symmetry and reflect an extraordinary incursion by federal prosecutors into foreign sovereignty.²²³

²¹⁶ 18 U.S.C. § 1956(h) (2012); Indictment at 3–4, *United States v. Carlos De Leon-Perez*, No. 17-CR-514 (S.D. Tex., Aug. 29, 2017) (The two defendants were described in the indictment as having "previously been employed by instrumentalities of the Venezuelan government.").

²¹⁷ 18 U.S.C. § 1956(h) (2012).

²¹⁸ 15 U.S.C. § 78dd-2(a) (2012).

²¹⁹ Christopher M. Matthews, Ian Talley & Aruna Viswanatha, *U.S. Targets Venezuela's Maduro Regime with Fresh Charges, Sanctions*, N.Y. TIMES (Mar. 22, 2020), <https://www.wsj.com/articles/u-s-targets-venezuelas-maduro-regime-with-fresh-charges-sanctions-11584905226>.

²²⁰ *Id.*

²²¹ Rashbaum, *supra* note 214.

²²² Rashbaum, *supra* note 214.

²²³ See *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (limiting federal corruption prosecutions of state and local officials to official acts and declining to "construe the statute in a manner

Finally, there are instances, however, where federal prosecutors should disregard the need for carefully structured symmetry and make the difficult and sensitive decision to take extraordinary action. The criminal prosecution of a foreign government official for acts committed in his official capacity could be warranted and necessary to pursue justice and prevent injustice. For example, on December 10, 2020, Italian prosecutors charged four officers of the Egyptian security services with abducting and murdering an Italian student in Cairo in 2016.²²⁴ However, the record does not support the conclusion that pursuing justice and preventing injustice was the primary intent of the Maduro indictment, and the surrounding circumstances indicate these federal charges were bent to accommodate and advance political interests.

VII. RESTRAINTS THAT CHECK THE USE OF FEDERAL INVESTIGATIONS
AND PROSECUTIONS TO ADVANCE POLITICAL INTERESTS
UNRELATED TO PURSUING JUSTICE AND PREVENTING INJUSTICE.

In his book, former national security advisor John Bolton claimed that President Trump's intervention in active federal criminal investigations and prosecutions of foreign actors was obstruction of justice.²²⁵ The *New York Times* repeatedly characterized as obstruction of justice the willingness to use criminal investigations and prosecutions as political instruments.²²⁶ Although

that leaves its outer boundaries ambiguous and involves federal prosecutors setting standards' of 'good government for local and state officials.'").

²²⁴ According to Pianigiani & Yee:

The indictment, which accused the four officials of the "aggravated kidnapping" of the student, Giulio Regeni, with one also charged with "conspiracy to commit aggravated murder," was a major turn in a case that has gripped public attention in Italy. . . .

. . . .

The Rome prosecutor's office said in a statement on Thursday that it would seek to try four officials of the Egyptian National Security Agency: Maj. Madgi Ibrahim Abdelal Sharif, Maj. Gen. Tariq Sabir, Col. Athar Kamel Mohamed Ibrahim and Col. Uhsam Helmi. All four would be prosecuted on the abduction charge, with Major Sharif also indicted on the murder charge.

Gaia Pianigiani & Vivian Yee, *Italy Charges Egyptian Security Agents in Student's Killing*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/world/europe/italy-egypt-giulio-regeni.html>.

²²⁵ According to Peter Baker:

[T]he former national security adviser, says in his new book that the House in its impeachment inquiry should have investigated President Trump, not just for pressuring Ukraine, but for a variety of instances when he sought to use trade negotiations and criminal investigations to further his political interests.

Mr. Bolton describes several episodes where the president expressed a willingness to halt an active criminal investigation "to, in effect, give personal favors to dictators he liked," citing cases involving major firms in China and Turkey. "The pattern looked like obstruction of justice as a way of life, which we couldn't accept," Mr. Bolton writes, saying that he reported his concerns to Attorney General William P. Barr.

Peter Baker, *Bolton Says Trump Impeachment Inquiry Missed Other Troubling Episodes*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/us/politics/bolton-book-trump-impeached.html>.

²²⁶ *Id.*

there are aspects of the federal obstruction statutes that apply to the conduct of federal investigations and prosecutions, there is a real question as to whether these statutes would apply to the use of a federal criminal prosecution as an expedient tool to advance a political interest. Lawyers at the Department of Justice do not operate without legal or professional guard rails. Once initiated, a federal district court ensures that federal prosecutors follow the rules. For example, a federal judge in New York recently vacated a conviction because of the failure of prosecutors to fulfill their discovery obligations.²²⁷ However, legal restraints over the exercise of discretion to interfere and intervene in a federal criminal prosecution are much more limited. In contrast to a prosecutor's failure to follow legally binding rules of criminal procedure, there is a real question as to whether the exercise of prosecutorial discretion to advance a political interest falls within any legal preclusions.

There are two federal statutes that prohibit persons from corruptly influencing or interfering with a criminal proceeding. To sustain a conviction under 18 U.S.C. § 1503 and 18 U.S.C. § 1512(c)(2), the government must prove that the defendant acted corruptly to influence the administration of justice.²²⁸ To act "corruptly" means acting with an improper purpose and engaging "in conduct knowingly and dishonestly."²²⁹ Therefore, to apply the federal obstruction of justice statutes as a limit the intervention or interference with an active federal criminal investigation or prosecution, the target must have acted with a corrupt intent.

It is unlikely that these federal obstruction of justice statutes would apply to the use of a federal investigation or prosecution as an expedient instrument to advance a political interest. The reason for this is that interfering or intervening with a federal criminal investigation or prosecution to advance a political interest would not amount to acting "corruptly"—meaning acting with an improper purpose or engaging in conduct that was dishonest. Moreover, considering the view that the executive has unquestionable authority on matters of criminal prosecutions, it would be extremely difficult to prove that senior administration officials were acting with corrupt intent when intervening or interfering in the federal criminal prosecution of foreign

²²⁷ Benjamin Weiser, *U.S. Prosecutors' Bid to 'Bury' Evidence Draws Judge's Wrath*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/16/nyregion/manhattan-us-attorney-evidence-bury.html>; Jessica Anderson, *Federal Judge Dismisses Fraud Case, Blasts Prosecutors' Actions*, BALTIMORE SUN (Sept. 6, 2018), <https://www.baltimoresun.com/maryland/bs-md-fraud-case-dismissed-20160906-story.html> (dismissing fraud charges based on failure of prosecutors to disclose material evidence and presenting "significant" false testimony at trial).

²²⁸ See *United States v. Aguilar*, 515 U.S. 593, 598 (1995) (citing 18 U.S.C. § 1505); *United States v. Young*, 916 F.3d 368, 384 (4th Cir. 2019) (citing 18 U.S.C. § 1512(2)).

²²⁹ See *Arthur Anderson LLP v. United States*, 544 U.S. 696, 706 (2005); see also *United States v. Kumar*, 617 F.3d 612, 621 (2d Cir. 2010) (To establish that an act was done corruptly, the government must prove wrongful intent).

actors and state-interest entities to advance a political interest.²³⁰ Moreover, the prosecution would also be restrained by a reluctance to criminalize policy differences by looking back and questioning whether the particular policy goals that were being advanced were in the public's interest.²³¹

In contrast, initiating or interfering in an active federal investigation or prosecution in response to a bribe²³² or with the intent to advance a personal political interest would be "acting corruptly" under the federal obstruction of justice statutes. The distinction can be explained by comparing the July 2019 Ukrainian pressure campaign with the Maduro indictment or the decision to dismiss the Cienfuegos indictment. All three actions reflect a transactional and situational view of the conduct of government and the use of a criminal investigation to advance an interest unrelated to pursuing justice or preventing injustice. However, the Ukrainian pressure campaign reflected an intent to use military aid to advance a personal interest. In contrast, facilitating a geopolitical interest was the stated reason for the corruption and drug trafficking indictment against Maduro and the dismissal of corruption and drug trafficking charges against Cienfuegos.

Federal criminal investigations and prosecutions are not designed to be a contingent set of arrangements to be used as leverage in a political deal or instruments of geopolitical power, but that is just what the record suggests. Federal investigations and prosecutions targeting foreign actors were used as leverage to advance political interests that were unrelated to pursuing justice or preventing injustice. The fundamental question then becomes how did this happen? How did it come about that the Department of Justice, the vehicle through which the nation honors its commitment to justice, could be used as an expedient tool to advance goals unrelated to pursuing justice and preventing injustice. The answer to this question has two related parts. First,

²³⁰ See Charlie Savage, *Trump Says He Alone Can Do It, His Attorney General Nominee Usually Agrees*, N.Y. TIMES (Jan. 14, 2019) ("Mr. Barr's argument derived from his broad view of executive power: The Constitution, he claimed, does not permit Congress to make it a crime for the president to exercise his executive powers corruptly.").

²³¹ Attorney General Eric H. Holder Jr. was reluctant to "criminalize policy differences;" he declined to prosecute government officials for post-September 11, 2001 acts they believed were legal. See Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES (Aug. 30, 2012), <https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html>; see also Siobhan Gorman & Evan Perez, *CIA Memos Released; Immunity for Harsh Tactics*, WALL ST. J. (Apr. 17, 2009), <https://www.wsj.com/articles/SB123990682923525977>:

The Obama administration granted legal immunity to Central Intelligence Agency officials who followed Justice Department guidelines in carrying out harsh interrogations of terror suspects following the 9/11 attacks. . . .

. . . .

Mr. Holder said the Justice Department 'on't prosecute CIA officers "who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful. . . ."

²³² See *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (explaining that to sustain a bribery conviction the government must prove that payment was made with corrupt intent—the intent to receive a specific benefit in return for the payment).

senior lawyers may have simply calculated that supporting the transactional and situational view of the conduct of government or looking the other way enhances their personal fortune. Typically, these senior-level political appointees have engineered their own ascent by viewing the conduct of government as a contingent set of arrangements to be used for their own advancement.

William Barr has stated that he believes that the political process is in place to restrain the inevitable lapses of judgment by federal prosecutors at the Department of Justice. In his remarks at Hillsdale College on September 16, 2020, Mr. Barr warned against Justice Department lawyers who had become “headhunters, consumed with taking down . . . prominent political figures” and explained that he believed that supervision by detached senior-level lawyer political appointees is necessary and proper to prevent abuse and misuse of prosecutorial discretion.²³³ However, the irony is that it is often these “detached” senior political appointees at the Justice Department who are complicit or indifferent or fail to exercise independent and principled judgment. Their careers are built keeping silent when it pleases their political sponsors.²³⁴ For example, the day after Mr. Barr suggested that the sedition conspiracy statute should be used against the demonstrators, rather than expressing doubts about whether the protestors engaged in seditious behavior under the statute, Deputy Attorney General Jeffrey A. Rosen went even further. In an email to federal prosecutors, Mr. Rosen suggested that the national security law should be used to charge activists with federal crimes in jurisdictions where they viewed local prosecutors as unwilling or unable to control the demonstrations.²³⁵ There are many reasons to be skeptical. Considering the strong conservative views of the Trump Justice Department and the Supreme Court’s warning against federal prosecutors overreaching beyond boundaries,²³⁶ the direction that federal prosecutors should exercise this intense oversight over local and state prosecutors suggests a lack of

²³³ Barr Hillsdale Remarks, *supra* note 76. There are many reasons to be skeptical. Considering that the prosecution priorities at the Department of Justice have been consumed with low level gun cases, it is highly unlikely that there is a meaningful concern about federal prosecutors acting as “headhunters” consumed with trying to “amass glory.” See, e.g., Ali Watkins, *In Fight Against Violent Crime, Justice Dept. Targets Low-Level Gun Offenders*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/politics/jeff-sessions-gun-charges.html>. The concern that federal prosecutors will act too aggressively seems unconvincing considering that no top officer from any major bank went to prison after the biggest financial crisis since the Great Depression. See Jesse Eisinger, *Why Manafort and Cohen Thought They’d Get Away With It*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/sunday-review/manafort-cohen-mueller-white-collar-crime.html>.

²³⁴ For example, there were at least seven senior national security advisors and foreign policy officials on the July 25, 2019, call between Mr. Trump and President Volodymyr Zelensky of Ukraine. Not one moved to put an end to the idea of shaking down the Ukrainian government immediately after that call.

²³⁵ Katie Benner, *Top Justice Dept. Official Embraces Use of Sedition Charges for Protest Violence*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/us/politics/justice-department-sedition.html>.

²³⁶ See McDonnell, *supra* note 223.

symmetry and represents an extraordinary incursion into state and local sovereignty by federal prosecutors.

Mr. Barr's suggestion that the political process is a meaningful check on the inevitable lapses in judgment by federal prosecutors at the Department of Justice is not persuasive. Drawing the line, setting standards, and making consequential decisions have a way of disappointing and annoying people and often cause fissures with political sponsors who have promoted careers. The record suggests that senior level Justice Department political appointees rarely have the predisposition to disappoint and annoy people, alienate political sponsors or otherwise endanger their careers. They understand that their time at the Department of Justice is not tenured and appreciate that they will need a place to land within a relatively short period of time. As a consequence, rather than mitigating lapses in judgment, this need to maintain relationships that may provide the path to a federal judge nominations or lateral partner positions at major law firms, causes political appointees to become attached to their own self-interest and reluctant to make consequential decisions.²³⁷ For example, it was "detached" senior level political appointees at the Justice Department who not only prepared the legal cover for the use of torture on terrorism suspects but stood by passively and allowed it to happen.²³⁸ Therefore the record suggests, that rather than "acting political in a good and necessary sense,"²³⁹ when push came to shove, senior

²³⁷ See William D. Cohan, *A Clue to the Scarcity of Financial Crisis Prosecutions*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/business/dealbook/a-clue-to-the-scarcity-of-financial-crisis-prosecutions.html> ("One of the enduring mysteries of the 2008 financial crisis has been why the Justice Department made so few attempts to prosecute the individuals responsible for it, given the abundance of tangible evidence of wrongdoing by Wall Street bankers, traders and executives in the years leading up to the great unwinding."); see also Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for N.Y.P.D Officer*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-daniel-pantaleo.html> ("The last time the federal government brought a deadly force case against a New York police officer was in 1998 . . . Civil rights division prosecutors recommended to the deputy attorney general . . . that charges be brought, but he declined to move forward for almost two years."); Marc Fisher, Devlin Barrett & Kimberly Kindy, *The Pressure on a Prosecutor: How Epstein's Wealth and Power Steered Acosta Toward Lenient Deal*, WASH. POST (July 12, 2019), https://www.washingtonpost.com/investigations/the-pressure-on-a-prosecutor-how-epsteins-wealth-and-power-steered-acosta-toward-lenient-deal/2019/07/12/2a7bdd08-a421-11e9-bd56-eac6bb02d01d_story.html (describing pressure and intimidation tactics that combined to result in non-prosecution agreement to resolve sex trafficking charges against financier Jeffrey Epstein).

²³⁸ The harsh interrogation tactics employed by the CIA were authorized by "detached" senior level political appointees at the Justice Department. See Mark Mazzetti and Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES (Apr. 16, 2009), <https://www.nytimes.com/2009/04/17/us/politics/17detain.html>:

The Justice Department on Thursday made public detailed memos describing brutal interrogation techniques used by the Central Intelligence Agency, as President Obama sought to reassure the agency that the C.I.A. operatives involved would not be prosecuted.

In dozens of pages of dispassionate legal prose, the methods approved by the Bush administration for extracting information from senior operatives of Al Qaeda are spelled out in careful detail—like keeping detainees awake for up to 11 straight days, placing them in a dark, cramped box or putting insects into the box to exploit their fears.

²³⁹ See Barr Hillsdale Remarks, *supra* note 76.

political appointees at the Department of Justice were not particularly detached from their self-interest and calculated what was necessary to further their ambitions.²⁴⁰

A second reason that may explain the reticence to oppose the transactional and situational use of the conduct of government is the fear that voicing legitimate concerns about decisions made by senior government officials will derail your career. For example, on July 8, 2020, the *New York Times* reported that an army officer who called into question the Ukraine pressure campaign and testified in the House impeachment hearings was subject to a smear campaign and denied promotion and retired from the Army.²⁴¹

The exercise of prosecutorial discretion is ultimately an act of conscience. Therefore, perhaps the only meaningful guardrail against the transactional and situational view of the conduct of government is an individual's conscience and character. Perhaps, the most compelling guidance for striking the balance between ambition and conscience, was provided by former Attorney General Robert Kennedy when he said:

Every time we turn our heads the other way when we see the law flouted, when we tolerate what we know to be wrong, when we close our eyes and ears to the corrupt because we are too busy or too frightened, when we fail to speak up and speak out, we strike a blow against freedom and decency and justice.²⁴²

²⁴⁰ See Jennifer Senior, Opinion, *Rod Rosenstein Was Just Doing His Job*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/10/15/opinion/rod-rosenstein-family-separation.html>.

²⁴¹ Eric Schmitt & Helene Cooper, *Army Officer Who Clashed With Trump Over Impeachment Is Set to Retire*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/politics/vindman-trump-ukraine-impeachment.html>:

. . . Mr. Trump did not want to see Colonel Vindman promoted, officials said.

Mr. Trump's allies at the White House asked Pentagon officials to find instances of misconduct by Colonel Vindman that would justify blocking his promotion. . . .

. . . .

But Defense Secretary Mark T. Esper and Army Secretary Ryan McCarthy have been unable to produce such evidence, largely because it does not exist . . .

. . . .

Colonel Vindman testified in the House impeachment hearings that it was "improper for the president" to coerce a foreign country to investigate a political opponent.

See also Peter Baker & Michael D. Shear, *Key Moments from the Impeachment Inquiry Hearing: Vindman, Williams, Morrison and Volker Testify*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/19/us/politics/impeachment-hearings.html>.

²⁴² Remarks before the Joint Defense Appeal of the American Jewish Committee and the Anti-Defamation League of the B'nai B'rith (June 21, 1961). In contrast, Beijing has correctly calculated that corporations will value commerce and market access over fostering pro-democracy movement. Jing Yang, Quentin Webb & Frances Yoon, *China Fortifies Hong Kong's Role as Financial Powerhouse*, WALL ST. J. (July 23, 2020), <https://www.wsj.com/articles/china-fortifies-hong-kongs-role-as-financial-powerhouse-11595514386> ("Western banks already appear to be bending to the new reality. They have been careful not to say anything critical of Chinese policy or the national-security law, which is designed

CONCLUSION

Over the last four years, the Department of Justice indicted several significant foreign actors and state-controlled entities. A close examination of these indictments reveals a decisive shift; the Department of Justice expanded its strategy well beyond the reach of the Foreign Corrupt Practices Act and the work of the special counsel. First, the targets of these indictments were expanded to include government officials, foreign intelligence officers, and state-owned and state-controlled entities. Second, the scope of the underlying conduct extended beyond schemes to use corrupt payments to obtain and retain business, cybercrimes, and identity theft. In the shadow of all these federal charges is an extraordinary incursion by federal prosecutors into foreign sovereignty by targeting foreign government corruption. In addition, there has been legitimate concern that the expansion of the scope of these investigations and prosecutions crossed a line in order to advance political goals unrelated to pursuing justice and preventing injustice.

It is within the permissible scope of president's executive power to direct prosecution priorities and to dedicate resources to pursue these priorities.²⁴³ Often the exercise of this executive authority advances unrelated political interests.²⁴⁴ It is impossible to avoid the grim assessment that the Trump

to curb dissent and rolls back the autonomy of Hong Kong's governance . . ."); *see also* Alexandra Stevenson, *Business Embraces Hong Kong's Security Law. The Money Helps*, N.Y. TIMES (Aug. 21, 2020), <https://www.nytimes.com/2020/06/30/business/china-hong-kong-security-law-business.html>; *see also* Steven Lee Myers, *With Concessions and Deals, China's Leader Tries to Box Out Biden*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2021/01/03/world/asia/china-eu-investment-biden.html>; *see also* Alexandra Stevenson, *Hong Kong Courts the Rich as China Tightens Its Grip*, N.Y. TIMES (Apr. 8, 2021) (describing Beijing's effort to offer incentives to influence financial institutions and investment firms to increase their presence in Hong Kong).

²⁴³ *See* Rebecca R. Ruiz, *Justice Dept. to Work With 12 Cities to Fight Violent Crime*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/us/politics/justice-department-violent-crime.html>:

The Justice Department will form partnerships with a dozen cities across the country to help them fight gun crime, drug trafficking and gang violence, Attorney General Jeff Sessions said Tuesday. . . .

. . . .

The Trump administration's proposed budget includes \$26 million for 300 new federal prosecutors, 230 of which the Justice Department said would be dedicated to prosecuting violent crime and 70 to focus on violations of immigration law. . . .

. . . .

. . . Mr. Sessions last month announced a new policy on charging and sentencing, directing federal prosecutors to be maximally tough and pursue the most serious possible charges, even when they may carry mandatory minimum prison sentences.

See also Michael Balsamo and Corey Williams, *Justice Dept. Plans Crackdown on Violent Crime in 7 Cities*, ASSOCIATED PRESS (Dec. 18, 2019), <https://apnews.com/article/90727160adfd0417372951b939847cdf> ("Attorney General William Barr released details of the initiative known as Operation Relentless Pursuit. . . 'Fighting violent crime is one of the priorities of this administration,' Barr said.").

²⁴⁴ *See* Ron Nixon, Liz Robbins & Katie Benner, *Trump Targets MS-13, a Violent Menace, if Not the One He Portrays*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/us/politics/ms13-gang-threat-trump-policy.html> ("Early in his term, Attorney General Jeff Sessions instructed his top

administration viewed the conduct of government as transactional and situational and was willing to extend this view to investigations and prosecutions conducted by the Department of Justice.²⁴⁵ It is also impossible to avoid the recognition that Mr. Barr's expansive vision of executive power was taken too far and that criminal investigations and prosecutions were seen as expedient instruments to be used to advance political goals unrelated to pursuing justice and preventing injustice. In some instances, this intent was overt. For example, in the case of the indictment of Maduro, senior administration officials explicitly admitted that the criminal charges were being used as part of the pressure campaign to force a regime change in Venezuela.²⁴⁶ In addition, senior administration officials intervened and dismissed the corruption and drug trafficking charges against the former defense of Minister of Mexico to advance "sensitive and important foreign policy considerations"²⁴⁷—an interest unrelated to pursuing justice and preventing injustice. Also, repeated statements indicated a willingness to interfere with the Huawei prosecution to promote a trade deal with China.²⁴⁸

There is a real question as to whether using federal criminal investigations and prosecutions as expedient instruments to influence foreign relations and advance geopolitical interests is necessary. There is a range of established tools available that foreign policy executives in the United States government can use to advance the intended political interests.²⁴⁹ For example, in response to the implementation of the harsh national security laws in Hong Kong, the Trump administration punished China by revoking the territory's special economic and trading status, adding Chinese companies and other entities to a blacklist that restricted their access to American technology, and imposing sanctions on mainland Chinese government officials and entities implementing the security law.²⁵⁰ The

investigative deputies to target the transnational gang MS-13 as a priority. . . President Trump has seized on the gang's brutality and violence to symbolize the risks of illegal immigration.").

²⁴⁵ See Peter Baker, *Investigation of His Son Is Likely to Hang Over Biden as He Takes Office*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/politics/hunter-biden-investigation.html> ("Mr. Trump . . . believed the Justice Department and the F.B.I. should initiate or call off investigations according to his own wishes. He repeatedly pressured them to investigate Mr. Biden, former President Barack Obama, former Secretary of State Hillary Clinton and other perceived adversaries. . .").

²⁴⁶ Matthews, *supra* note 219.

²⁴⁷ See Feuer, *supra* note 143.

²⁴⁸ See Tackett, *supra* note 194.

²⁴⁹ See Jon Hilsenrath & Laurence Norman, *Trump Wields U.S. Economic Might in Struggles With Allies and Adversaries Alike*, WALL ST. J. (Jan. 17, 2020), <https://www.wsj.com/articles/trump-wields-u-s-economic-might-in-struggles-with-allies-and-adversaries-alike-11579280987> (describing how sanctions and tariffs were deployed by the Trump administration to advance geopolitical objectives).

²⁵⁰ Steven Lee Myers, *China Vows to Retaliate After Trump Signs Hong Kong Sanctions Bill*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/07/15/world/asia/china-trump-hong-kong.html> (reporting on the executive order); see also Ian Talley, *U.S. Adds Senior Chinese Lawmakers to Hong Kong Sanctions Blacklist*, WALL ST. J. (Dec. 7, 2020), <https://www.wsj.com/articles/u-s-adds-senior-chinese-lawmakers-to-hong-kong-sanctions-blacklist-11607370603> ("The sanctions [on Chinese Communist Party officials] prohibit the targets' travel to the U.S., freeze any assets they may own within

Trump administration also imposed sweeping sanctions against Venezuela that froze all its government assets in the United States and threatened to impose sanctions on virtually any company or individual, foreign or American, that engaged in business with Maduro's government or anyone affiliated with the regime.²⁵¹

There is a real question about the efficacy of using criminal prosecutions as a means of punishment or persuasion to influence foreign relations and advance geopolitical interests. These federal criminal indictments may be politically compelling, but whether they further the interest of justice is doubtful. If the prosecutions were intended as leverage or intimidation to change, disrupt or deter adversarial governments, the tactic was deeply flawed. The indictments did not impose serious personal, political or economic risks and were mostly performative. Once publicly announced, the likelihood that targets would be apprehended and extradited was extremely remote. The reason for this is that the targets were located in jurisdictions that precluded extradition; it is unlikely that the foreign government would willingly hand over the targets, and once the charges were publicly announced, it was highly unlikely that these targets would travel to jurisdictions where there was a risk of apprehension or extradition.²⁵² Because the foreign nationals who were named in the indictments were unlikely to ever face trial in the United States, the message actually sent was that there were no consequences for their actions. Moreover, it is unlikely that operatives working for the Russian, Chinese or North Korean equivalents of the Central Intelligence Agency or a South American dictator really cared about being "publicly shamed" with a federal criminal offense. For example, in 2014 the Justice Department indicted five members of the Chinese military and accused them of engaging in an elaborate corporate intelligence operation by infiltrating the computer network at Westinghouse. The charges were mostly performative, the case never proceeded past the initial charging phase, and the indictment did not deter or shame the Chinese government or

U.S. territories and complicate their travel and financing abroad, since banks with U.S. ties and other countries often enforce U.S. sanctions for fear of penalties.").

²⁵¹ Ryan Dube, Vivian Salama & Juan Forero, *Venezuelans Brace for Pain from U.S. Sanctions Against Maduro*, WALL ST. J. (Aug. 6, 2019), <https://www.wsj.com/articles/venezuelans-brace-for-pain-from-u-s-sanctions-against-maduro-11565131653>.

²⁵² See Gabriele Steinhäuser & Thandi Ntobela, *Mozambique Ex-Minister to Be Extradited Home Rather than to U.S.*, WALL ST. J. (May 21, 2019), <https://www.wsj.com/articles/mozambique-ex-minister-to-be-extradited-home-rather-than-to-u-s-11558468598> ("Mozambique's former finance minister, who has been indicted in the U.S. in connection with an alleged \$2 billion corruption scheme, will be extradited to his home country rather than to the U.S."); see also Apuzzo, *supra* note 86 ("None of the defendants were arrested—Russia does not generally extradite its citizens to the United States. . . . If they travel abroad, they risk capture and extradition."); Benner, *supra* note 160 ("While the United States has little chance of apprehending the defendants [from North Korea and China], the Justice Department sometimes brings charges against foreigners in an effort to deter adversarial governments.").

disrupt it from engaging in cyberattacks on United States corporate interests.²⁵³

The message these federal indictments actually send is that the United States is underestimating the power and ambitions of its adversaries. As a consequence, nuclear diplomacy with North Korea remains stalled. Russia's aggressive cyber-offensive continues unabated.²⁵⁴ The deadly narco-terrorism and violence continues in Mexico.²⁵⁵ Despite the dismissal of charges against Cienfuegos, the Mexican government nevertheless reacted by clamping down on the ability of U.S. law enforcement to operate in Mexico.²⁵⁶ In Venezuela, Maduro remains in place and his administration's corruption and cronyism continues unabated.²⁵⁷ Maduro most likely calculated that he can wait patiently until a new administration determines that preserving its relationship with Venezuela should prevail over pursuing the case against him. Beijing's predatory behavior continues unabated, and China remains one of the most domestically repressive and internationally

²⁵³ See Michael S. Schmidt, *5 in China Army Face U.S. Charges of Cyberattacks*, N.Y. TIMES (May 19, 2014), <https://www.nytimes.com/2014/05/20/us/us-to-charge-chinese-workers-with-cyberspying.html> (describing indictments of Chinese People's Liberation Army members for hacking U.S. companies and asserting that there was virtually no chance they would be turned over); see also Katie Benner, *U.S. Charges 3 North Koreans With Hacking and Stealing Millions of Dollars*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/02/17/us/politics/north-korea-hacking-charges.html> (reporting on federal charges against three North Korean intelligence officials accusing them of engaging in cybercrimes).

²⁵⁴ See Dustin Volz, U.S., *Agencies Hacked in Foreign Cyber Espionage Campaign Linked to Russia*, WALL ST. J. (Dec. 13, 2020), <https://www.wsj.com/articles/agencies-hacked-in-foreign-cyber-espionage-campaign-11607897866> ("Multiple federal government agencies, including the U.S. Treasury and Commerce departments, have had some of their computer systems breached as part of a widespread global cyber espionage campaign believed to be the work of the Russian government."); David E. Sanger, *Russian Hackers Broke Into Federal Agencies, U.S. Officials Suspect*, N.Y. TIMES (Dec. 13, 2020), <https://www.nytimes.com/2020/12/13/us/politics/russian-hackers-us-government-treasury-commerce.html>.

²⁵⁵ Oscar Lopez, *In Mexico, Ex-Governor Assassinated in Resort City*, N.Y. TIMES (Dec. 19, 2020), <https://www.nytimes.com/2020/12/18/world/americas/mexico-governor-killed.html>.

²⁵⁶ See José de Córdoba & Santiago Pérez, *Mexico Passes Law Curbing Operations of Foreign Security Agents*, WALL ST. J. (Dec. 15, 2020), <https://www.wsj.com/articles/mexico-passes-law-curbing-operations-of-foreign-security-agents-11608059949> ("President Andrés Manuel López Obrador's ruling party pushed through a new law Tuesday curbing the role of foreign law-enforcement officers in Mexico, a move the U.S. believes will cripple bilateral efforts to battle powerful drug cartels.").

²⁵⁷ See Juan Forero & Ginette Gonzales, *Maduro Tightens Grip in Venezuela*, WALL ST. J. (Dec. 7, 2020), <https://www.wsj.com/articles/venezuelas-maduro-tightens-grip-as-opposition-boycotts-elections-11607296455>; Isayen Herrera, Anatoly Kurmanaev, Tibisay Romero & Sheyla Urdaneta, *Maduro Crack Down on the Leftists Who Once Revered Him*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/world/americas/venezuela-maduro-critics-repression.html>; see also reporting that stated:

Mr. Trump's . . . harsh sanctions have failed to oust Mr. Maduro, while leaving Chinese, Russian and Iranian interests more firmly entrenched in Venezuela. Mr. Maduro has effectively vanquished Mr. Guaidó, whose popular support has collapsed.

Mr. Maduro's survival is, in part, a parable of foreign policy in Mr. Trump's Washington—where ideologues, donors and lobbyists compete to seize the attention of an inexperienced and highly transactional president, warping and reshaping American diplomacy along the way.

Nicholas Confessore, Anatoly Kurmanaev & Kenneth P. Vogel, *Trump, Venezuela and the Tug-of-War Over a Strongman*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/01/us/trump-venezuela-maduro.html>.

aggressive regimes.²⁵⁸ On December 11, 2020, Vivian Wang and Chris Buckley reported in the *New York Times* that, despite the pressure from the United States government, Chinese government officials in Hong Kong intended continue using the new national security law as an instrument of fear and intimidation intended to suppress political opposition and dissent. This intention included the conviction and sentencing of Jimmy Lai, the publisher of a pro-democracy newspaper in Hong Kong, under the national security law.²⁵⁹ Therefore, it does not appear that the use of federal criminal investigations and prosecutions as leverage dictated any outcomes, changed behavior, or achieved any favorable foreign policy goal.²⁶⁰

Finally, there are substantial reputational risks to viewing the conduct of government as transactional and situational. The capricious use of federal prosecutions of foreign actors and state-controlled entities as expedient tools for influencing foreign relations and advancing geopolitical goals, no matter how well intended, undermines the public reputation of the Department of Justice. It calls into question the fairness, integrity, and public reputation of the institution. If the public believed federal investigations and prosecutions were transactional and situational instruments for advancing political interests, unrelated to pursuing justice and preventing injustice, the public would justifiably fear being mistreated for political gain instead of criminal justice.

The Department of Justice is the vehicle through which the nation honors its commitment to justice. The reputation of this institution for independence and integrity is founded on the straightforward commitment to an honest and unencumbered effort to pursue justice and prevent injustice. This commitment is binding and is not transactional or situational, meaning reduced to cynical and self-serving deal making. Federal criminal

²⁵⁸ Austin Ramzy, *How the Dream of Hong Kong Democracy Was Dimmed*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/11/world/asia/hong-kong-china-timeline.html> (describing far-reaching national security bill for Hong Kong and removal of pro-democracy lawmakers from the Hong Kong government).

²⁵⁹ See Austin Ramzy, *Hong Kong Court Convicts Democracy Leaders Over Protest March*, N.Y. TIMES (Apr. 7, 2021), <https://www.nytimes.com/2021/03/31/world/asia/hong-kong-democracy-protest.html>; see also Austin Ramzy, *Hong Kong Court Sentences Jimmy Lai and Other Pro-Democracy Leaders to Prison*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/12/13/world/asia/hongkong-jimmy-lai-tiananmen.html> (asserting that that the conviction and sentencing of Lai was intended to send “an unmistakable message that activism carries severe risks for even the most internationally prominent opposition figures.”). As a further punitive measure, prosecutors then froze Mr. Lai assets. See also Natasha Khan, *Hong Kong’s National-Security Police Freeze Media Tycoon’s Assets*, WALL ST. J. (May 14, 2021), <https://www.wsj.com/articles/hong-kongs-national-security-police-freeze-media-tycoons-assets-11621009204> (security officials moved to freeze assets of about \$64.3 million including majority stake in an opposition newspaper along with property held in bank accounts under national-security legislation).

²⁶⁰ Cf. Michael R. Gordon, Vivian Salam & Anna Hirtenstein, *U.S. Puts Fresh Sanctions on Russia Over Hacking, Election Interference*, WALL ST. J. (Apr. 15, 2021), <https://www.wsj.com/articles/biden-signs-executive-order-targeting-harmful-foreign-activities-by-russian-government-11618490399> (reporting on sanctions against Russia that included the prohibitions on U.S. financial institutions from buying new bonds directly from Russia’s central bank, finance ministry and the country’s sovereign-wealth fund.).

investigations and prosecutions are not designed to be used as leverage in a political deal. The lesson going forward is that using federal criminal investigations and prosecutions as instruments to advance political interests and viewing the conduct of government as transactional and situational risks the arbitrary use of the law and will lead to a deep mistrust of the criminal process.²⁶¹

²⁶¹ “Of all the officers of the Government, those of the Department of Justice should be kept most free from any suspicion of improper action on partisan or fractional grounds, so that there shall be gradually a growth, even though a slow growth, in the knowledge that the Federal courts and the representatives of the Federal Department of Justice insist on meting out even-handed justice to all.” Letter from President Theodore Roosevelt to Att’y Gen. Moody (Aug. 9, 1904) (quoted in HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE* 17–18 (1937)).