

Center for American Progress



Restoring Integrity and Independence at the U.S. Justice Department

By the Criminal Justice team August 2020

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Introduction and summary

The U.S. Department of Justice (DOJ), like other institutions under the current administration, is unsettled and adrift. Like heads of other executive branch agencies, DOJ leaders have repeatedly violated long-standing norms, abandoned traditional priorities, and demoralized the DOJ's superb career workforce over the past few years. But the DOJ is also fundamentally unlike other institutions of government.

As U.S. Attorney General Griffin B. Bell said in 1978, the DOJ is “the acknowledged guardian and keeper of the law.”¹ The DOJ enforces the law by investigating and prosecuting those who violate it; defends the law by bringing and opposing lawsuits that challenge it; and promotes the law by advising and counseling the federal government on what is permissible. And it does so guided by an unwavering dedication to the rule of law and the fair and impartial administration of justice. In these and many other ways, the DOJ protects not only the safety, freedom, and equality of Americans, but also the promise of America itself.

All too often, however, the current administration has acted at odds with the DOJ's critical mission. It has compromised the independence of the agency to help political friends and harm political foes. It has improperly overruled the decisions of career prosecutors in pending cases. It has refused to defend federal laws and policies it simply dislikes. It has declined to meaningfully enforce civil rights and environmental laws.² And it has openly questioned the integrity of the career men and women of the DOJ in the process. These actions have undermined public confidence in the DOJ, demoralized the career workforce, and caused thousands of former DOJ officials—those who have served in Republican and Democratic administrations alike—to speak out, sound the alarm, and call for change.

This report attempts to answer that call by focusing not on specific actions of the current DOJ but on restoring and improving the institution itself. The Center for American Progress consulted a number of former DOJ officials—political appointees and career attorneys alike, many of whom served for decades in administrations of both parties—to identify key recommendations about what the next

attorney general should do on day one, without the need for congressional action, to strengthen the norms that have long informed the DOJ's work, improve public confidence, and rebuild morale in the workforce. While there will be considerable focus on the substantive policy agenda that the next administration and attorney general should pursue, this report examines the internal processes, procedures, and administrative responsibilities that are crucial to preserving the DOJ's integrity and independence.

No matter who is president, the next administration, Congress, and inspectors general must examine the depths of the damage done over the past 3 1/2 years. To be sure, more needs to be done than what this report recommends. These 11 recommendations, however, serve as a starting point for the next attorney general to restore the norms and improve the institution of the DOJ:

- 1. Codify stronger limits on contacts and communications with the White House.** The DOJ should clearly articulate what kinds of communications are appropriate and prohibited, especially those that deal with prosecutions and criminal investigations.
- 2. Adopt a clear, consolidated policy regarding election-year activity.** While the DOJ has an obligation to prosecute election-related crimes, it must do so in a fair, impartial, nonpartisan manner and never for the purpose of affecting an election or of giving an advantage or disadvantage to any candidate or political party.
- 3. Establish smarter charging and sentencing policies free from politicization.** The DOJ should encourage individualized assessments of the appropriate charges in a given case, but in no circumstance should the defendant's relationship with the president or other elected official have any impact on any criminal matter. Furthermore, the DOJ must review its current recusal policies to determine whether they sufficiently protect against even the appearance of impropriety.
- 4. Adopt a written policy regarding the DOJ's obligation to defend the federal government in litigation.** While administrations have policy prerogatives, a clear, written policy that explains when decisions to defend the federal government are appropriate and who ultimately is responsible for making them would provide needed transparency.

5. **Prioritize restoring trust in the justice system by coordinating at the departmental level.** The efficacy and impartiality of the country’s systems of justice are integral to a well-functioning democracy. Thus, an office at the departmental level should coordinate all the DOJ’s activities to reform the criminal justice system.
6. **Take a whole-of-government approach to civil rights.** Protecting and promoting civil rights is the responsibility of every component of the federal government, and the DOJ’s Civil Rights Division should be empowered to lead that effort.
7. **Restore integrity and fairness in immigration proceedings.** The next attorney general should make sure that the DOJ is providing immigrants with the full set of rights that they are entitled to under law and that immigration judges have the independence and autonomy they need to effectively manage their dockets and deliver justice.
8. **Improve the FISA process.** The DOJ must ensure that the inspector general’s recommendations for Foreign Intelligence Surveillance Act (FISA) reform have been appropriately implemented; that the FBI’s corrective measures have been effectively adopted; and that additional changes are made to make certain that information submitted to the FISA court is truthful, accurate, reliable, and complete.
9. **Restore productive congressional oversight.** The next attorney general must restore respectful, collaborative relationships with the committees that oversee the DOJ’s work.
10. **Adopt better goals and metrics.** The DOJ should employ a more useful and informative suite of performance metrics for attorneys and agents alike that focus not on raw outputs—numbers of arrests, for example—but on outcomes such as reducing crime or mitigating threats.
11. **Respect the professionalism of career staff and ensure a diverse workforce.** The next attorney general should launch an initiative to support career staff; vigorously defend career employees against unfair attacks whether from the president or anyone else; and help the public understand the critical and essential work that career employees are doing on the country’s behalf.

The norms that have long guided the DOJ

To better understand the bases for these recommendations, it is helpful to briefly review what DOJ does and what norms have historically undergirded its work. In recent decades, the DOJ has stated its mission: “To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.”³

In furtherance of this mission, the DOJ serves many roles. It acts as a prosecutor, investigating and bringing criminal cases and civil actions to enforce the law and promote public safety in a fair and just manner. At Main Justice, the DOJ’s headquarters in Washington, D.C., and in each of the 94 U.S. attorneys’ offices, DOJ trial attorneys and assistant U.S. attorneys investigate and prosecute a range of crimes—from terrorism to securities fraud to civil rights violations. These attorneys also investigate and bring civil lawsuits under statutes such as the False Claims Act and the Financial Institutions Reform, Recovery, and Enforcement Act. And they do so working in partnership with law enforcement officers within the DOJ and across the federal government whose job it is to keep the American people safe.

DOJ acts as a litigator, defending the United States and representing its interests in the nation’s courts. When third parties sue to challenge a statute enacted by Congress, a rule enacted by a federal agency, or a decision made by the federal government, the DOJ acts as the federal government’s lawyer. DOJ lawyers represent the government from federal district courts to the U.S. Supreme Court, where lawyers with DOJ’s Office of the Solicitor General appear on behalf of the government.

The DOJ acts as a counselor, providing legal advice to the president, other federal officials, and executive branch agencies. The DOJ’s Office of Legal Counsel, for example, reviews every presidential executive order to ensure it is legally sound and provides legal advice to settle disputes among different parts of the federal government. And the attorney general provides legal advice on a range of matters considered by the president and the National Security Council.

The DOJ acts as a policymaker and administrator, promoting justice and protecting the public through the enforcement priorities it sets, the billions of dollars in federal grants it administers, and the rules and guidance it issues.⁴ The DOJ has a budget of tens of billions of dollars and a workforce of roughly 115,000 people stationed in offices throughout the country and around the world.⁵ They are attorneys; agents with the FBI, Drug Enforcement Administration, and Bureau of Alcohol, Tobacco, Firearms and Explosives; officers with the Bureau of Prisons; deputy marshals with the U.S. Marshals Service; analysts; and numerous other professionals. The DOJ must be a good steward of its budget and a good manager of hardworking career employees.

All this work promotes the rule of law in the United States' democracy—if done in the right way, for the right reasons. This means that the DOJ must act independently and be free from politicization. Yet, the DOJ is not independent in the way that judges are, nor even in the way that some other federal agencies are, such as the Federal Reserve Board of Governors or the Securities and Exchange Commission. The DOJ is led by an attorney general and other political appointees who are nominated by the president, confirmed by the U.S. Senate, and who serve at the pleasure of the president. These appointees help implement the president's policy goals and enforcement priorities and generally enable the president to fulfill his or her constitutional obligation to “take care” that the laws be faithfully executed, as mandated in Article 2 of the U.S. Constitution. In this way, political appointees provide a measure of democratic accountability at the DOJ, in the same way that civilian leaders provide a measure of democratic accountability over the military at the U.S. Department of Defense.

Such democratic accountability is healthy in a constitutional republic such as the United States'. It helps serve as a check on the awesome powers that prosecutors wield. That is part of the reason why, in the wake of the Watergate scandal, when Sen. Sam Ervin proposed to make the DOJ a truly independent agency—with an attorney general appointed by the president every six years and removable only for neglect—the proposal was opposed by the American Bar Association, leading constitutional scholars, and even Archibald Cox, the prosecutor whose removal caused the Saturday Night Massacre itself.⁶

Strong norms of independence have, however, long protected certain core DOJ activities. According to the Justice Manual, the guidebook for all DOJ action, DOJ's “legal judgments” must be “impartial and insulated from political influence,” and its “investigatory and prosecutorial powers” must be “exercised free

from partisan consideration.”⁷ In other words, decisions about who to investigate, who to prosecute, who to sue, and how to do it are supposed to be made based on the facts and the law, free of politics or partisanship. This is what is meant by “DOJ independence.” Chief among these norms—some of which should be incorporated into a revised DOJ mission statement—are the following:

- **The DOJ must always seek to do justice—to carry out its mission reasonably, equitably, and responsibly, consistent with the Constitution and laws of the United States.**
- **DOJ lawyers must abide by the highest ethical standards and comply fully with the law and all applicable rules of professional responsibility.** The Justice Manual states that “public service is a public trust,” and compliance with ethical standards “supports the credibility of and faith in government decisions and promotes the common good.”⁸
- **The DOJ must fairly and impartially enforce the law.** Decisions about individual investigations, prosecutions, and civil enforcement actions must be based solely on the facts and law and must be independent of political influence.
- **The DOJ must appropriately defend the interests of the government and the people who have elected its leaders.** It is imperative that the DOJ acts to defend the federal government in court—not any particular president and not any particular Congress.
- **To provide effective counsel, DOJ lawyers must be free to exercise and express their best professional judgment.** Attorney General Bell explained that “the President is best served if the Attorney General and the lawyers who assist him are free to exercise their professional judgments. Just as important, they must be perceived by the American people as being free to do so.”⁹
- **The DOJ must respect the need for public accountability.** Public accountability is critical to a well-functioning government. That is why the DOJ has long worked with Congress to ensure that it gets the information it needs to exercise responsible oversight, and that is why the DOJ has worked to provide information to the public, including the media, where appropriate and lawful.

- **The DOJ must establish and publish clear policies and procedures to govern its work so that the public can have the utmost confidence in that work.** The more the DOJ establishes and publishes clear policies and procedures, the easier it will be for the public to understand its actions and the more confidence the public can have in its work.
- **The DOJ must respect its workforce.** The appointed leaders of the DOJ must always treat the career men and women of the agency with the respect and esteem that they deserve, and they must do everything possible to ensure that this extraordinary workforce reflects the rich and broad diversity of the United States itself.

Recommendations to restore the DOJ's independence and integrity

The rationale for this kind of DOJ independence is obvious. The rule of law—and the public's confidence in the rule of law—demands that justice be meted out without regard to who you are, who you know, who you voted for, or what you believe. Anything else is incompatible with democracy. As Edward H. Levi said at his swearing in as President Gerald Ford's attorney general in the aftermath of Watergate, "Nothing can more weaken the quality of life or more imperil the realization of the goals we all hold dear than our failure to make clear by words and deed that our law is not an instrument of partisan purpose."¹⁰ This is as true now as it was then.

Yet the current administration, by word and by deed, has too often seemed to treat the DOJ as a partisan instrument. Political allies have been rewarded with dropped cases, lenient sentencing recommendations, and pardons.¹¹ Political foes have been punished with investigations and threats of imprisonment.¹² And the disinterested judgments of career prosecutors have been publicly criticized and in some cases unduly cast aside to promote what appear to be partisan purposes.¹³ In short, in the words of thousands of DOJ alumni who served in administrations of both parties, "[P]olitical interference in the conduct of a criminal prosecution is anathema to the Department's core mission and to its sacred obligation to ensure equal justice under the law"; the current administration has "repeatedly flouted this fundamental principle."¹⁴

Restoring and strengthening the norms of DOJ independence will require much of many: leaders who honor DOJ independence; a public that understands the importance of DOJ independence; and an attorney general who takes action to promote such honor and understanding. The following are some of the actions the next attorney general could take.

1. Codify stronger limits on contacts and communications with the White House

To prevent improper political influence on DOJ decision-making, every administration since Watergate has established rules about communications between the White House and the DOJ—rules about who can have the communications, what they can talk about, and who needs to know about them. These rules, however, must be clarified, strengthened, and made more durable.

The rules most in need of improvement concern communications between the DOJ and the White House regarding specific investigations, prosecutions, and civil enforcement actions.¹⁵ Communications about such matters are supposed to be limited. Only a very few people at the highest levels have typically been permitted to be involved—for example, the attorney general, deputy attorney general, and associate attorney general at the DOJ, and the president, vice president, White House counsel, and deputy White House counsel at the White House. And the communications are supposed to occur only in a limited context: According to both Attorney General Michael B. Mukasey, who served during the George W. Bush administration, and the Obama administration Attorney General Eric H. Holder Jr., the DOJ could “advise the White House” about specific matters “when—but only when—it is important for the performance of the President’s duties and appropriate from a law enforcement perspective.”¹⁶

These principles appear to have been violated with some frequency during the current administration, and corrective action is needed.¹⁷ First, the DOJ’s policy should provide more detailed guidance about the types of communications that are and are not permitted regarding specific investigations and cases. The governing principle is sound—DOJ should advise the White House about a specific matter only as necessary to enable the president to fulfill his or her duties and as appropriate from a law enforcement perspective—but it is not especially clear. It would help to illustrate, by examples, what kinds of communications are appropriate and what kinds of communications are inappropriate. For example, it would be appropriate for the DOJ to advise the president that it is about to unseal the indictment of a foreign official, because that could have foreign policy consequences for which the president might need to prepare. By contrast, the White House chief of staff ordering the DOJ to prosecute a particular critic or opponent of the president would be inappropriate. The DOJ must provide greater clarity so that political leaders, and the country at large, understand how insulated the DOJ is against improper political influence.

Second, the DOJ's policy should be expanded to cover communications between DOJ and other administration officials. Improper political interference can, after all, come from many quarters. And in the past few years, there have been troubling reports of occasions on which Cabinet officials and other presidential appointees have attempted to improperly influence DOJ decision-making and enforcement.¹⁸ To more effectively ensure that the DOJ is protected against such partisan interference, it should widen its scope and regulate communications across the executive branch in much the same way that it historically regulated communications with the White House.

Third, the DOJ should require that any improper communications be promptly disclosed to Congress. Too often, in recent years, the public learned of efforts to unduly influence DOJ decision-making only as a result of Freedom of Information Act litigation, oversight hearings, or disclosures by involved parties long after the fact.¹⁹ DOJ independence requires greater protection and transparency than this haphazard and incidental approach.

Finally, the DOJ should codify its policy in the *Federal Register*, following notice and comment rule-making. Right now, an attorney general can change the policy with the stroke of a pen. And the policy itself has not always been readily and publicly available. Codifying it as a rule, following notice and comment rule-making, would ensure that the policy is public, that it is considered, and that it is that much harder for the next administration to undo or ignore. The attorney general should direct the adoption of a policy, pursuant to notice and comment rule-making, on day one.

2. Adopt a clear, consolidated policy regarding election-year activity

The presidential election of 2016 gave rise to criticism from both Democrats and Republicans that the DOJ generally, and the FBI specifically, acted in ways that improperly affected major presidential campaigns and the election of 2016 itself.²⁰ The DOJ inspector general concluded that DOJ and FBI officials did not act with any improper intent to influence the election.²¹ But to reinforce the importance of acting neutrally—and to bolster public confidence—the DOJ must adopt a strong, consolidated policy regarding election-year activity.

The DOJ has long expressed its commitment to principles of nonpartisanship and neutrality when it comes to elections. For decades, various editions of the DOJ’s Manual on Federal Prosecution of Election Offenses have stated that the DOJ should avoid taking investigative action that would make an investigation a part of the election debate and should, as a result, generally take overt—that is, public—investigative steps only after an election.²² Attorneys general during the Bush and Obama administrations sent out election-year reminders reaffirming the importance of safeguarding the DOJ’s “reputation for fairness, neutrality, and nonpartisanship” and directing DOJ employees not to take action “for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.”²³ DOJ employees, like all federal employees, are subject to the strictures of the Hatch Act, which generally prohibits executive branch employees from engaging in partisan activity while at work.²⁴

The DOJ’s policy on election-year activity must explain in emphatic, clear terms that: 1) The DOJ has an obligation to prosecute election-related crimes, but it must do so in a fair, impartial, nonpartisan way; 2) enforcement activity can never take place for the purpose of affecting an election or of giving an advantage or disadvantage to any candidate or political party; and 3) election-related or candidate-related investigations should be undertaken in a way that minimizes, to the greatest extent possible, any impact on an election. The DOJ should consider whether it is sensible to create a presumption that no overt steps will be taken within a defined period of time before an election, such as during the 60 preceding days.

The DOJ should also reconsider what level of approval is necessary to initiate an investigation or prosecution into candidates for federal office. The agency’s recently adopted policy—which requires the express approval of the highest-ranking political appointees—easily could create the appearance of injecting partisanship into law enforcement decision-making.²⁵ Historically, election-related investigations had to be approved by the Public Integrity Section of the DOJ’s Criminal Division. The next attorney general should revisit this issue.

3. Establish smarter charging policies free from politicization

A core mission of the DOJ is to investigate and prosecute cases under federal law and to ensure that justice is served. Federal prosecutors have significant authority to determine which charges to pursue, the terms of a plea agreement, the sentence to recommend after a conviction, and whether any charges should be dismissed.

For the past few decades, changes in administration have brought about changes in the DOJ’s charging policies. In some administrations, DOJ policy has directed prosecutors to charge “the most serious, readily provable offenses”—that is, offenses that trigger the most substantial sentences, including mandatory minimum sentences.²⁶ In other administrations, DOJ policy has indicated that prosecutors should “ordinarily” charge the most serious, readily provable offense, but has then directed prosecutors to make an “individualized assessment” of the circumstances of the case to determine what charges are most appropriate in light of a range of factors, including the purposes of the federal criminal code.²⁷

The DOJ should reinstate charging policy that encourages individualized assessment of the appropriate charges in a given case. To be sure, it is important for the DOJ to have policies in place that promote similar treatment of similarly situated cases. Unwarranted disparities in treatment—based on geography, the specific prosecutor bringing the case, or otherwise—only serve to undermine public confidence in the law. At the same time, as then-Attorney General Holder noted, unwarranted disparities can likewise result “from a failure to analyze carefully and distinguish the specific facts and circumstances of each particular case.” Furthermore, he explained, “equal justice depends on individualized justice, and smart law enforcement demands it.”²⁸ The DOJ should therefore restore the policy that encourages the individualized assessment of what charges are appropriate in a given case—an assessment that requires consideration of a variety of factors, including the specific facts and circumstances of the case; the purposes of the federal criminal code; the impact of the offense on the public, including the impact on victims; and the overall interests of justice.

In no circumstance, however, should the defendant’s relationship with the president or other elected official have any impact on any criminal matter. Furthermore, the DOJ must review its current recusal policies to determine whether they sufficiently protect against even the appearance of impropriety.

4. Adopt a written policy regarding the DOJ’s obligation to defend the federal government in litigation

In order to prevent itself from becoming a partisan instrument, the DOJ must be sure that it is fair and impartial when defending cases, just as it must be fair and impartial in bringing them. And the public must likewise have confidence that the DOJ is acting fairly and impartially when it defends a presidential executive action, agency rule, or

statute of Congress. Transparency and consistency are crucial. Accordingly, the DOJ should adopt a written policy making clear when its lawyers will defend the federal government in court—and the limited occasions when they won't.

The DOJ has generally taken the position that it must defend an act of Congress where a reasonable argument can be made in its support. Such a position is reflected in letters and statements of attorneys general over the course of decades, from William French Smith²⁹ to Eric H. Holder Jr.³⁰ This helps the DOJ insulate its approach to defensive litigation from political influence. The DOJ also helps to reinforce continuity, stability, and reliability in government and law.

In recent years, attorneys general under administrations of both parties have made exceptions to this general rule. In 2011, then-Attorney General Holder announced that the DOJ would no longer offer arguments in support of the portion of the Defense of Marriage Act that defined marriage, for federal purposes, as the union between a man and a woman.³¹ In 2018, then-Attorney General Jefferson B. Sessions III explained that the DOJ would no longer offer arguments in support of the provision of the Affordable Care Act that requires individuals to obtain health insurance,³² and in 2019, the DOJ announced it would no longer argue that the entire law is constitutional.

Consistent with the president's constitutional prerogatives, the DOJ must develop a clear, written policy explaining when such decisions are appropriate and who ultimately is responsible for making them. This will best promote the perception and reality that partisanship does not inform the DOJ's legal judgments.

The written policy should also clarify what standard the DOJ applies in determining whether to defend other policies of the federal government such as presidential executive actions or agency rules. If there are lawsuits challenging such policies, will the DOJ defend them so long as a reasonable argument can be made in their support? Or should some other standard apply because acts of Congress deserve more deferential treatment than administration policy?

Regardless, identifying and explaining the standard is critical because it will help orient and guide career DOJ lawyers, and it will help educate the public. DOJ lawyers regularly stand up in court to defend policies of the administration in power without regard to their own policy preferences. The public should understand that because it will further reinforce public confidence that the DOJ fairly and impartially defends the law, just as it fairly and impartially enforces it.

5. Prioritize restoring trust in the justice system by coordinating at the departmental level

Trust in the efficacy and impartiality of the country's systems of justice is integral to a well-functioning democracy. In recent years, an overwhelming consensus has emerged about the need to make significant changes to the criminal justice system in order to make it fairer and more effective. It is easy to understand why. With 5 percent of the world's population—but 25 percent of the world's jail and prison population³³—the United States incarcerates a disproportionate number of people, treats too many social issues as criminal problems, and makes it too hard for people impacted by the criminal justice system to be untethered from it. This is true at both the federal level and at the state and local levels.

The next attorney general must vigorously pursue and champion reform on the broadest range of issues: charging and sentencing; bail; alternatives to incarceration; juvenile justice; solitary confinement; prison conditions; compassionate release, including in the face of a crisis such as the COVID-19 pandemic; education and training in prisons; private prisons; reentry; fees and fines; and so many others. The attorney general should promote such reform in all aspects of the DOJ's work and using all tools available to the agency—in the cases it brings, in the prisons it runs, in the grants it gives, and in the state and local partnerships it forges.

Because these efforts could span the offices and divisions of the DOJ—from the Criminal Division to the Office of Justice Programs to the Bureau of Prisons—the attorney general should consider appointing one high-profile leader at the DOJ to coordinate its reform efforts. There is precedent for such an approach. For example, in 1964, then-Attorney General Robert F. Kennedy announced the creation of an Office of Criminal Justice to be headed by professor James Vorenberg from Harvard Law School. This office, as Attorney General Kennedy conceived it, would deal with “the whole spectrum of the criminal process, from arrest to rehabilitation.” It would be a “voice inside the Department and a forum outside the Department” and would help bridge a “widening ... gulf between law enforcement officials on the one side and other legal figures concerned with protecting the rights of the individual on the other.”³⁴ Whether or not the next attorney general creates a new office or appoints a designated leader from an existing office such as the Office of Legal Policy, it is critical to focus on reform and take steps to ensure a coordinated, coherent, and aggressive approach to it.

6. Take a whole-of-government approach to civil rights

At the height of the civil rights movement, then-acting Attorney General Nicholas deB. Katzenbach observed, “We have much to achieve before the left eye of fact and the right eye of ideal converge on the image of equal justice and equal opportunity. Our work is far from complete.”³⁵ Nearly 50 years later, this statement unfortunately remains true. Despite considerable progress, equal justice and equal opportunity remain ideals for which society must fight. And the DOJ has long been—and must continue to be—a leader in that fight.

The DOJ, and in particular its Civil Rights Division, works to ensure equal justice in a number of critical ways. First, it investigates and prosecutes a range of civil rights crimes when civilians as well as state actors, including police officers, deprive someone of their civil rights. Second, the DOJ has broad power to bring civil lawsuits to enforce civil rights laws. Under statutes such as the Civil Rights Act of 1964, the Voting Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, the DOJ has used its civil enforcement authority to aggressively safeguard the rights of protected classes; to combat discrimination in education, employment, housing, and public accommodations; to enforce voting rights; to hold police officers, and even entire police departments, accountable for civil rights violations; to defend religious freedom; to protect immigrants; to defend older people; and to ensure broad public access for people with disabilities. Finally, the DOJ also helps to ensure equal justice by taking legal positions and filing statements of interest in cases brought by other parties and by advocating for legal policies and approaches that protect and enhance civil rights and access to justice.

But the work of protecting civil rights for everyone in this country does not reside with the DOJ or the Civil Rights Division alone. The Equal Employment Opportunity Commission, the U.S. Commission on Civil Rights, and the Offices of Civil Rights at executive branch agencies, as well as a range of Cabinet departments, from the U.S. Department of Agriculture to the U.S. Department of State, are dedicated to promoting and defending the civil rights of all Americans. The DOJ has partnered with one or more of these agencies on determining litigation matters, on developing civil rights policy, and on clarifying rights and responsibilities. For example, the DOJ’s Civil Rights Division and the U.S. Department of Education’s Office for Civil Rights historically issued guidance to schools on a range of matters including school discipline, students with disabilities, racial discrimination, and LGBTQ rights.

To promote equal justice, the DOJ—and the Civil Rights Division especially—must lead a whole-of-government effort to revive the crucial work of enforcing civil rights, which has been dormant for the past 3 1/2 years. The next attorney general should consider establishing an interagency task force on civil rights, working with the DOJ’s federal partners to ensure a coordinated, dedicated, and thoughtful approach to legal questions and policies affecting the civil rights of Americans. There is ample precedent for such an approach. Over the years, the DOJ has led or participated in numerous interagency task forces on a broad range of matters, from financial fraud enforcement³⁶ to reentry³⁷ to monitoring and combating human trafficking.³⁸ Civil rights enforcement and protection could benefit from this kind of joint effort, particularly with the DOJ taking a leadership role. Looking beyond the federal government, the DOJ should also continue to seek out appropriate opportunities to partner with state and local governments on civil rights matters, including with state attorneys general to investigate patterns and practices of unconstitutional policing. Federal civil rights affect the roles and responsibilities of state and local governments, and the DOJ can be a force multiplier to ensure equal justice and equal opportunity.

7. Restore integrity and fairness in immigration proceedings

Although the U.S. Department of Homeland Security is most often the public face of an administration’s immigration policy, the DOJ also plays an important role when it comes to the management of the nation’s immigration laws. Among other things, it is the DOJ that oversees the U.S. immigration court system, and immigration judges and members of the Board of Immigration Appeals ultimately report up to the attorney general. Unfortunately, however, in recent years, the DOJ has unduly interfered with the independence of immigration judges, made it harder for immigrants to receive fair and just outcomes, and issued numerous legal opinions reversing long-settled law.³⁹

The next attorney general must take aggressive action to restore integrity and fairness in immigration proceedings. In addition to reviewing the ways in which the DOJ has used its criminal authority to investigate and prosecute immigration-related cases—including in ways that contributed to the separation of immigrant children from their parents—the agency must undertake a comprehensive review of current immigration policy to ensure that it is acting in full accord with the Constitution, acts of Congress, international treaties, and fundamental concepts of justice. The next attorney general should make sure that the DOJ is provid-

ing immigrants with the full set of rights that they are entitled to under law; that immigrants have a full and fair opportunity to be heard, including when seeking asylum; and that immigration judges have the independence and autonomy they need to effectively manage their dockets and deliver justice.⁴⁰

8. Improve the FISA process

FISA is the central law governing when and how the U.S. Intelligence Community (IC) must obtain judicial authorization to collect and monitor information on foreign powers and their agents. Enacted in 1978 and amended and modernized multiple times since then, it is part of a national effort, as then-Attorney General Mukasey once put it, to counter foreign threats such as terrorism but “with scrupulous respect for civil liberties and within the rule of law.”⁴¹ It provides the IC with specific tools, such as an ability to intercept wire communications; explains what standard the IC must meet to use the tools; and sets up a special court—the U.S. Foreign Intelligence Surveillance Court (FISC), comprising 11 federal judges selected by the chief justice of the U.S. Supreme Court—to rigorously review applications from the government for such use. As has been true in the past, however, the FISA process needs reform, and the next attorney general must spearhead that effort.

The DOJ inspector general recently issued a series of reports revealing significant and troubling errors in FISA applications submitted by the DOJ, particularly the FBI.⁴² These errors—some of which were substantive, some of which were procedural—have given rise to real and abiding concerns about the accuracy and reliability of information included in FBI applications made to the FISC. Indeed, the FISC itself was so troubled by the inspector general’s reports and observations that the court ordered the government to advise it of “what it [the government] has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue” presented in a FISA application.⁴³ To its credit, the FBI instituted 40 corrective measures it had adopted to improve the accuracy and reliability of information in FISA applications. A court-appointed amicus curiae told the FISC, however, that those reforms—while improvements—did not go far enough.⁴⁴

Any time the DOJ presents information to a court, the agency must ensure that the information is truthful, accurate, reliable, and complete. This is particularly true of applications to the FISC, which, unlike most applications in criminal cases, will

not become public and will not be tested by defendants in adversarial proceedings. Accordingly, to ensure that the FISA process continues to operate effectively but “with scrupulous respect for civil liberties and within the rule of law,”⁴⁵ the next attorney general must undertake a comprehensive review to ensure that the inspector general’s recommendations for reform have been appropriately implemented; that the FBI’s corrective measures have been effectively adopted; and that additional changes have been made to make certain that information submitted to the FISC is, as it must be, truthful, accurate, reliable, and complete.

9. Restore productive congressional oversight

The DOJ has long understood the value of responsible oversight by Congress. As explained in a well-known letter sent to then-Rep. John Linder (R-GA), the chair of a House subcommittee, the DOJ recognizes, “By helping Congress be better informed when it makes legislative decisions, oversight promotes the accountability of government.” At the same time, the DOJ understands that “the oversight process can shed valuable light on Department operations and assist our leadership in addressing problems that might not otherwise have been clear.”⁴⁶ Although the DOJ and Congress have not always seen eye to eye on the scope and character of information that can appropriately be shared, they have generally tried to accommodate one another’s institutional concerns.

The DOJ has maintained especially respectful relationships with the House and Senate committees that oversee matters related to its activities and functions, especially the Judiciary committees. For national security matters, the DOJ has maintained productive relationships with the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. These committees have historically worked to exercise responsible oversight of the agencies within their ambits, and the DOJ has historically responded in kind. In recent years, however, the oversight process has too often broken down, as some of these committees have operated in a more partisan fashion, and the executive branch has generally been less responsive to certain oversight requests.

The next attorney general must try to restore respectful, collaborative relationships with the committees that oversee its work—and indeed, where possible, the attorney general must try to restore respectful, collaborative relationships with Congress more generally. Particularly on national security matters, which often involve classified material that cannot be made public, oversight is critical to ensuring democratic accountability and fidelity to the law. Congress stands in

for the public in making sure that the DOJ is carrying out its work lawfully and appropriately. The leader of the DOJ certainly has a deep and abiding interest in promoting those goals as well.

10. Adopt better goals and metrics

The DOJ is a large bureaucracy with installations and people spread out across the country and indeed around the world. To marshal its disparate resources in pursuit of common causes, DOJ leaders set goals, establish performance metrics to assess whether the goals have been met, and mete out resources such as funding and personnel based on those performance metrics.

Of course, DOJ lawyers and staff will not completely alter their courses of conduct to achieve performance metrics set at headquarters. For one thing, even where goals are set, such as pursuing particular enforcement priorities, different goals, such as other enforcement targets outside the priority groups, remain. Plus, prosecutors otherwise operate under the view that they must always do the right thing for the right reasons—even if that means devoting time and attention to matters other than the specific goals set for the agency writ large. To quote then-Attorney General Robert H. Jackson’s legendary 1940 speech about federal prosecutors: “Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character.”⁴⁷

But goals and metrics matter, and the DOJ should employ a better suite of performance metrics for attorneys and agents alike that focus not on raw outputs such as numbers of arrests, but on outcomes such as reducing crime or mitigating threats. Some of the performance metrics the DOJ has adopted—such as the number of terrorist plots disrupted—make sense because they target community impact. Other metrics, such as the number of wiretaps an agent has sponsored, make less sense as a measure of effective law enforcement. Similarly, some metrics may apply to all DOJ components equally, and some might sensibly be more tailored. For example, it would be productive to consult with local U.S. attorneys’ offices to determine the most significant public safety threats they face and to establish performance metrics designed to assess whether those particular threats have been effectively mitigated or addressed. Appropriate metrics are not always one-size-fits-all. Regardless, the next attorney general should do a top-to-bottom reevaluation to ensure that the appropriate quantitative and qualitative performance measures are in place.

11. Respect professionalism of career staff and ensure a diverse workforce

When Eric Holder first addressed the career men and women of the DOJ as attorney general, he told them: “The Justice Department has aptly been described as the ‘crown jewel’ of the federal government. It has attained this distinction not because of any laws or regulations, cases or controversies, buildings or equipment, but rather because of the quality, integrity, and dedication of the people who work tirelessly to carry out the Department’s vital mission. Simply stated, you – the employees of the United States Department of Justice – are the backbone, the heart, and the soul of this great agency.”⁴⁸

Day in and day out, more than 100,000 career lawyers, agents, analysts, and professional staff do their part to ensure that the wheels of justice keep turning. Many of them continue to put their lives on the line to protect, defend, and maintain the rule of law. Nevertheless, these have not been easy times for the men and women who give the DOJ life. They have been mocked on social media, their ethics have been questioned, and their judgments in particular cases have been disparaged—often by the president himself.⁴⁹ And morale at the department has suffered in the process: In the annual survey of federal employee satisfaction conducted by the Partnership for Public Service, the DOJ tied for sixth among large agencies in 2016; by 2019, it had dropped to 12th.⁵⁰

For the DOJ to get back on the right track, the next attorney general will not simply need to invest time and resources in rebuilding morale but must also aggressively foster a culture of respect for the professionalism of DOJ employees. The attorney general should launch an initiative to respect professionalism of career staff on day one and publicly state that all of DOJ leadership will respect the judgment, integrity, and ethics of career employees. They will vigorously defend career employees against unfair attacks, whether from the president or anyone else. And they will make sure the public understands the critical and essential work career employees are doing on the country’s behalf.

The attorney general must pledge to continue to engage with career employees; solicit and consider their views as appropriate; and give them the opportunity and space to be heard on matters of concern. This could be accomplished by establishing advisory committees that include career employees to advise the attorney general and respective assistant attorneys general who lead the DOJ’s various divisions. The concept of an attorney general’s advisory committee is, of course,

nothing new. Since Attorney General Elliot L. Richardson first announced its creation in 1973, a group of U.S. attorneys known as the Attorney General’s Advisory Committee (AGAC) has advised the attorney general in each administration.⁵¹ The AGAC—whose members are selected by the attorney general and are “intended to represent office size, judicial district, issues and diversity”⁵²—serves two valuable functions: It “gives United States Attorneys a voice in Department policies,” and it “advises the Attorney General of the United States.”⁵³

The AGAC has been critical in helping the attorney general develop policies that reflect the needs and views of a diverse department, that are workable, and that are advisable. Similarly, it would be helpful for the attorney general or other DOJ leaders to establish advisory committees to solicit and consider the input of the diverse views of the career employees in the department. Such committees could not only help the leadership of DOJ craft smart policy, but also help strengthen the relationship between the leadership and the career employees—and strengthen the department in the process.

The DOJ also needs to do everything possible to ensure that a diverse pool of talented, committed, honorable individuals is aware of opportunities for DOJ employment, finds them appealing, and actually applies for jobs. Among other things, this will require extensive outreach at a broad array of law schools in order to recruit law students; partnerships with a range of professional organizations including specialty bar associations, such as the Minority Bar Association, the Women’s Bar Association, and the National LGBT Bar Association, in order to recruit laterals; and outreach to colleges and universities across the country, especially those with strong talent from underrepresented communities, such as historically Black colleges and universities. And because DOJ internships are such an important way of introducing talented students to the value of DOJ employment, the agency should consider creating certain paid internships so that students will not have to choose between a paycheck and an important public service experience.

Conclusion

Etched above one of the entrances to Main Justice is the inscription, “The place of justice is a hallowed place.” These words from English philosopher Francis Bacon not only mark the walls of the DOJ, but describe agency itself. It is the DOJ, after all, that safeguards the rule of law essential to the United States’ constitutional democracy and that protects and defends the civil rights, civil liberties, and equality that define Americans.

The DOJ’s critical mission remains unchanged, and its workforce remains unwavering in its dedication to that mission. But the DOJ faces serious challenges, and the next attorney general must confront them head-on. The recommendations contained in this report, while surely far from exhaustive, provide a start. They are a guide to the sorts of concrete steps the attorney general can take, on day one and without the need for legislation, to repair, rebuild, and restore justice at the DOJ.

About the authors

The Criminal Justice team at the Center for American Progress is dedicated to developing policies that (1) shrink the footprint of the criminal justice system while improving public health and safety; (2) promote equity and accountability within the justice system; and (3) provide opportunities for people directly impacted by a criminal conviction.

This report was edited by **Ed Chung**, the vice president for Criminal Justice Reform at the Center. Chung is also the former special counsel in the DOJ's Civil Rights Division and the former senior adviser in the DOJ's Office of Justice Programs.

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