



A Report of Investigation Into the Department's  
Release of Public Statements Concerning a  
Luzerne County, Pennsylvania, Election Fraud  
Investigation in September 2020



OVERSIGHT AND REVIEW DIVISION

24-082

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**JULY 2024**

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## I. Introduction

This report describes the Department of Justice (Department or DOJ) Office of the Inspector General's (OIG) investigation into allegations of potential misconduct committed in connection with DOJ's issuance of several public statements regarding an ongoing DOJ criminal investigation into alleged election crimes in Luzerne County, Pennsylvania.

On September 18, 2020, the Federal Bureau of Investigation (FBI) was advised by the District Attorney's Office (DA's Office) in Luzerne County, Pennsylvania, that a Luzerne County Bureau of Elections employee had discarded completed mail-in election ballots for the upcoming November 2020 general election in a garbage dumpster. The FBI and the DA's Office determined that seven military absentee ballots were discarded, all of which were loose and separated from their original envelopes, and therefore the votes cast on the ballots for each federal, state, and local race were identifiable. Luzerne County election officials also provided the FBI with two sealed ballot envelopes that election officials stated the employee had mishandled. On September 21, the DA's Office requested that the FBI take over the investigation, which the FBI agreed to do. The following day, September 22, the Luzerne County District Attorney consulted with then U.S. Attorney for the Middle District of Pennsylvania David Freed about a potential press release. Later that day, the DA's Office issued a press release stating that there had been "issues with a small number of mail-in ballots which were received by the Luzerne County Bureau of Elections," that the office had "consulted with the United States Attorney's Office," and that "federal authorities [had] assumed lead investigative authority of this incident."

On September 24, 2020, then U.S. Attorney Freed issued a public statement announcing that the U.S. Attorney's Office for the Middle District of Pennsylvania (MDPA) and the FBI had initiated "an inquiry" into potential issues with mail-in ballots in Luzerne County.<sup>1</sup> Freed's announcement stated that FBI personnel and local law enforcement had already "conducted numerous interviews and recovered and reviewed certain physical evidence" and that "election officials in Luzerne County have been cooperative."<sup>2</sup> It went on to state:

At this point we can confirm that a small number of military ballots were discarded. Investigators have recovered nine ballots at this time. Some of

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<sup>1</sup> DOJ MDPA, Press Release, "Statement of U.S. Attorney Freed on Inquiry into Reports of Potential Issues with Mail-In Ballots," September 24, 2020. A copy of Freed's initial statement is attached to this report at Appendix A.

<sup>2</sup> *Ibid.*

those ballots can be attributed to specific voters and some cannot. All nine ballots were cast for presidential candidate Donald Trump.<sup>3</sup>

The release did not reference votes cast on the discarded ballots in any of the federal, state, or local races other than the Presidential vote. Freed's announcement concluded by stating that the inquiry "remains ongoing," that MDPA "expect[s] later today to share...up to date findings with officials in Luzerne County," and that "it is the vital duty of government to ensure that every properly cast vote is counted."<sup>4</sup>

Later that day, MDPA retracted Freed's original press release and issued a corrected statement. The corrected statement was identical to the original statement except that the sentence that "all nine ballots were cast for presidential candidate Donald Trump" was deleted and replaced with the following:

Of the nine ballots that were discarded and then recovered, 7 were cast for presidential candidate Donald Trump. Two of the discarded ballots had been resealed inside their appropriate envelopes by Luzerne elections staff prior to recovery by the FBI and the contents of those 2 ballots are unknown.<sup>5</sup>

That evening, MDPA also made public an unsolicited letter Freed had sent to the Director of the Luzerne County Bureau of Elections just 14 minutes earlier. Freed's letter provided additional details beyond the press release, including that three of the nine recovered ballots could be potentially tied to specific voters; that investigators also recovered four empty absentee ballots; that the majority of the recovered materials were found in an outside dumpster; that the envelopes appeared to be opened "as a matter of course" due to a similarity between ballot envelopes and ballot request envelopes, which caused the election staff to believe that adhering to the protocol of preserving envelopes unopened would cause them to miss ballot requests; that this issue of opening all envelopes was known since the primary and had not been corrected; and that "the assigned investigators are continuing their work including reviewing additional discarded materials."<sup>6</sup>

The selective details about the investigation included in the initial MDPA statement and the letter suggested that the actions of the individual who engaged in the conduct were intentional and likely chargeable criminally; however, even at that early stage of the

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> DOJ MDPA, Press Release, "Revised Statement of U.S. Attorney Freed on Inquiry into Reports of Potential Issues with Mail-In Ballots," September 24, 2020. A copy of Freed's revised statement is attached to this report at Appendix B.

<sup>6</sup> DOJ MDPA, Press Release, "Letter to Luzerne County Bureau of Elections," September 24, 2020. A copy of Freed's letter to Luzerne County election officials is attached to this report at Appendix C.

investigation, Department leadership was aware of information that substantially undercut this narrative—including that the subject of the investigation was mentally impaired, appeared to have discarded the ballots by mistake, and would likely not be criminally charged. Indeed, the Department determined before Election Day that no charges would be brought in the matter, although it failed to inform the public of that fact until well after the election.

The initial MDPA statement and the letter raised questions about the Department’s compliance with its own policies against commenting publicly about ongoing, uncharged investigations and its motivation for releasing public statements in the middle of an election cycle highlighting discarded mail-in ballots and, contrary to long-standing Department practice, specifying the name of a candidate for whom the votes were cast on the discarded ballots. The OIG initiated an investigation into the circumstances surrounding the issuance of Freed’s public statements to determine if any DOJ policies were violated, including various provisions of the Justice Manual and the Department’s Election Year Sensitivities Memorandum.<sup>7</sup>

The Department has a longstanding policy prohibiting Department employees from commenting publicly about ongoing, uncharged investigations. This policy, currently in the Department’s Justice Manual, is designed to protect the integrity of DOJ investigations, ensure cases are pursued based solely on admissible evidence presented in courtrooms, safeguard the privacy rights of individuals who may never be charged criminally, and protect the constitutional and fair trial rights of those who are accused of wrongdoing. DOJ policy includes two limited exceptions to the general prohibition on commenting about pending investigations, namely where “the community needs to be reassured that the appropriate law enforcement agency is investigating a matter” or “release of information is necessary to protect the public safety.”<sup>8</sup> In those circumstances, the policy states that “comments about or confirmation of an ongoing investigation may be necessary.”<sup>9</sup>

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<sup>7</sup> The OIG has jurisdiction to investigate allegations of improper political influence or considerations when such allegations are factually predicated. Because the allegations in this case also implicated the exercise of Department attorneys’ authority to investigate, *see* 28 C.F.R. § 0.39a, the OIG consulted with the Department’s Office of Professional Responsibility (OPR) prior to initiating the investigation, consistent with the OIG’s practice on matters in which the OIG and OPR may both have the jurisdiction to investigate. After consulting with OPR, OPR deferred to the OIG’s investigative jurisdiction, noting that aspects of the investigation implicated potential improper political activity. Additionally, the OIG notified the U.S. Office of Special Counsel (OSC) that it had opened an investigation into the issuance of the initial MDPA statement and the letter, and that the conduct at issue could potentially implicate the federal Hatch Act, violations of which the OSC has sole jurisdiction to investigate. *See* 5 C.F.R. § 734.102(a). The OSC asked the OIG to keep the OSC informed of any information indicating a Hatch Act violation.

<sup>8</sup> Justice Manual § 1-7.400(C).

<sup>9</sup> Justice Manual § 1-7.400(C). Section 1-7.400 of the Justice Manual was updated in February 2024 and now states that “comments about or confirmation of an ongoing investigation may be permissible.”

A still extant DOJ policy that pre-dates the Justice Manual provision, 28 C.F.R. § 50.2(b)(9), also provides guidance and limitations on the release of information in a criminal action.<sup>10</sup> However, that provision, unlike the Justice Manual provision, specifically references the ability of the Attorney General (AG or Attorney General) or the Deputy Attorney General to approve disclosure of information “beyond these guidelines” that is “in the interest of the fair administration of justice.”

The Department’s Election Year Sensitivities Memorandum, issued regularly by Attorneys General (including then Attorney General Barr) during major election cycles, recognizes the sensitivities of DOJ making public statements about election-related investigations during an election season. The memorandum issued by Barr on May 15, 2020, admonished Department employees to “be particularly sensitive to safeguarding the Department’s reputation for fairness, neutrality, and non-partisanship” near an election. The memorandum went on to state, among other things, that “law enforcement officers and prosecutors may never select the timing of public statements (attributed or not)...in any matter or case for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.”<sup>11</sup>

Our investigation included a review of documents, emails, and text messages; analysis of relevant laws, regulations, and DOJ policies; and interviews of 19 witnesses, including Freed, relevant MDPA and FBI personnel, and several senior DOJ officials. The OIG contacted Barr on or about December 17, 2020, to request his participation in a voluntary interview. Barr stated that he would consider the request. On January 5, 2021, after having resigned from the Department, Barr sent a 3-page letter to the Inspector General discussing his role in the events under investigation (“Barr’s letter to the IG,” or “Barr’s letter”). Barr’s letter did not address certain issues that the OIG became aware of during the investigation. The OIG contacted Barr on March 10, 2021, to again request his participation in a voluntary interview, but he declined to participate.<sup>12</sup> Barr’s Chief of Staff during the events in question had already left the Department when the OIG contacted him, and he also declined to participate in a voluntary interview.<sup>13</sup> The OIG does not have

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<sup>10</sup> Although found in the Federal Code of Regulations, as we describe below, Section 50.2 is a “Statement of Policy.”

<sup>11</sup> See William Barr, Attorney General, Memorandum for All Department of Justice Employees, Election Year Sensitivities (May 15, 2020) (Barr Election Year Sensitivities Memorandum), p. 1.

<sup>12</sup> Upon reviewing a draft of this report, Barr submitted comments to the OIG, which are identified as such when referenced in this report, which differentiates them from Barr’s letter.

<sup>13</sup> Barr’s Chief of Staff later offered to respond in writing to any questions we provided. The OIG does not believe that responding to written questions is a substitute for an interview under oath and therefore, consistent with our practice, the OIG declined this offer.

the authority to compel or subpoena testimony from former Department employees, including those who retire or resign during the course of an OIG investigation.

As detailed below, our investigation found that then Attorney General Barr was personally involved in the events in question and called Freed by telephone twice to discuss the Luzerne County matter prior to the initial MDPA statement being issued, but that he had no further contact with Freed after the initial statement was issued. We found that Barr encouraged and authorized Freed to issue the initial MDPA statement and specifically approved inclusion of the details about the discarded ballots, including that all the recovered ballots had been cast for President Trump; that Freed sought, and received, go-ahead from the Director of the Department's Office of Public Affairs (OPA Director) to publicly issue both the statement and the letter; and that Freed did not consult with either the FBI or the Department's Public Integrity Section (PIN) about the MDPA statement or the letter to the Director of the Luzerne County Bureau of Elections, or notify either that the Department planned to issue them publicly. We found no evidence that Barr was aware of or authorized Freed's decision to publicly issue the letter to the Director of the Luzerne County Bureau of Elections. Our investigation also found that Barr briefed President Trump about the Luzerne County investigation the day before the statements were issued and specifically disclosed to the President that the recovered ballots were "marked for Trump," information that was not public at that time and that Trump revealed on a national radio show the next morning.

Other than Freed and the OPA Director, nearly every DOJ lawyer we interviewed—both career employees and Trump Administration political appointees—emphasized how "unusual" it would be for the Department to issue a public statement containing details about an ongoing criminal investigation, particularly before any charges are filed. As one then U.S. Attorney told us: "If [we] don't have a charge, we don't say anything about an investigation; we just don't do that." Another then senior DOJ official noted that "it would be very unusual to issue a public statement in the middle of an investigation" and that DOJ prosecutors "don't typically" do so. At most, this official stated, "if there was a lot of coverage already and if people are already reporting that the federal government was involved," the Department might issue a statement saying "hey, we're looking at this, just to assure people that we're looking at it"; but issuing a statement containing details about the investigation before indictment would be "very unusual."

Based on our factual findings described in detail in this report, we concluded that, while the decision by Barr and Freed to issue a statement was within their discretion, the statement ultimately issued did not comply with the Justice Manual. However, we did not find that either Barr or Freed committed misconduct in issuing the statement because of ambiguity regarding the applicability of 28 C.F.R. § 50.2, which recognizes the Attorney General's discretion to publicly disclose information about an ongoing criminal investigation that the Attorney General believes is "in the interest of the fair administration of justice."

We found that Freed violated the DOJ policy generally prohibiting comment about ongoing criminal investigations before charges are filed when he publicly released his letter to Luzerne County officials. We also found that Freed violated DOJ policies requiring employees to consult with PIN before issuing a public statement in an election-related matter and requiring U.S. Attorneys to coordinate comments on pending investigations with any affected Department component—in this case, the FBI.

We also considered whether Barr's briefing to President Trump about the Luzerne County investigation violated DOJ's White House communications policy. Although we were troubled by the investigative facts about the Luzerne County matter that Barr relayed to President Trump in the briefing, we concluded, for reasons described below, that the policy appears to leave it to the Attorney General's discretion to determine precisely what information can be shared with the President where a communication is permissible under the policy, as we found was the case with Barr's briefing. Accordingly, we did not find that Barr violated the Department's policy regarding communications with the White House about criminal matters.

We make a number of recommendations in this report. First, as DOJ policy does not address what information Department personnel may include in a statement that is determined to be necessary to reassure the public that the appropriate law enforcement agency is investigating a matter or to protect public safety, we recommend that the Department revise this policy to require that the information contained in a statement released pursuant to JM 1-7.400(C) be reasonably necessary either to reassure the public that the appropriate law enforcement agency is investigating a matter or to protect public safety. Second, we recommend that the Department make clear whether the Justice Manual's Confidentiality and Media Contacts Policy, Justice Manual § 1-7.000, applies to the Attorney General. Third, we recommend that the Department clarify its policies to address whether any of the provisions of 28 C.F.R. § 50.2 remain Department policy in light of the existence of the Confidentiality and Media Contacts Policy contained in the Justice Manual. Fourth, if 28 C.F.R. § 50.2(b)(9) remains valid Department policy, we recommend that the Department require that requests to the Attorney General or Deputy Attorney General for approval to release information otherwise prohibited from disclosure and any approval to release such information pursuant to § 50.2(b)(9) be documented. Lastly, we recommend that the Department consider revising its White House communications policy to clarify what information can be disclosed to the White House in situations where the policy permits communication about a contemplated or pending civil or criminal investigation.

The OIG has completed its investigation and provided this report to the Office of the Attorney General, the Office of the Deputy Attorney General, the Executive Office for U.S. Attorneys, and the Professional Misconduct Review Unit for any action they deem appropriate. We have also referred our findings to the U.S. Office of Special Counsel for its review and determination as to whether any of the conduct described herein violated the federal Hatch Act. Unless otherwise noted, the OIG applies the preponderance of the

evidence standard in determining whether Department personnel have committed misconduct. The Merit Systems Protection Board applies this same standard when reviewing a federal agency's decision to take adverse action against an employee based on such misconduct. See 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b)(1)(ii).

## **II. Background**

William Barr served as the Attorney General of the United States from February 14, 2019, until his resignation from the Department on December 23, 2020. Jeffrey Rosen was the Deputy Attorney General (DAG) from May 22, 2019, until January 20, 2021; Rosen also served as Acting Attorney General from December 24, 2020, until January 20, 2021, following Barr's departure from the Department. Richard Donoghue served as the Principal Associate Deputy Attorney General from July 10, 2020, until January 20, 2021.

David Freed was sworn in as the U.S. Attorney for the Middle District of Pennsylvania on November 27, 2017, and served in that role until his resignation on January 1, 2021. Prior to that appointment, Freed served for 12 years as the elected District Attorney of Cumberland County, Pennsylvania. Bruce Brandler became the First Assistant U.S. Attorney for MDPA in 2017. Upon Freed's resignation, Brandler became the Acting U.S. Attorney for MDPA. Brandler resumed his role as First Assistant U.S. Attorney in November 2021, when an interim U.S. Attorney was appointed.<sup>14</sup>

## **III. Applicable Statutes, Regulations, and Policies**

A number of laws, regulations, and DOJ policies are relevant to the conduct under investigation here. We outline those authorities below.

### **A. DOJ Justice Manual Confidentiality and Media Contacts Policy**

Sections 1-7.000 *et seq.* of the DOJ Justice Manual set forth the Department's Confidentiality and Media Contacts Policy.<sup>15</sup> Justice Manual § 1-7.700(C) states generally that "DOJ personnel must avoid making public statements that violate DOJ guidelines, regulations, or legal requirements." Additionally, several specific provisions of the Confidentiality and Media Contacts Policy are pertinent to this investigation:

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<sup>14</sup> Brandler has since become the Chief of MDPA's Criminal Division.

<sup>15</sup> The Justice Manual contains publicly available internal DOJ policies and procedures. It is prepared under the supervision of the Attorney General and under the direction of the Deputy Attorney General. Justice Manual §§ 1-1.100 & 1-1.200.



## 1. Prohibition on Commenting on Ongoing Investigations

Justice Manual § 1-7.400(B) provides that “DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations.” Section 1-7.400(B) continues: “Except as provided in subparagraph C of this section, DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed.” Section 1-7.400(C) provides an exception to that general rule, stating that “comments about or confirmation of an ongoing investigation may be necessary” when “the community needs to be reassured that the appropriate law enforcement agency is investigating a matter” or when “release of information is necessary to protect the public safety.”<sup>16</sup>

Even after criminal charges have been brought, DOJ policy carefully limits the types of information DOJ personnel may make public outside of court proceedings.<sup>17</sup> Justice Manual § 1-7.500 permits DOJ personnel to make public four categories of information in any criminal case in which charges have been brought: (1) background information about the defendant, such as name, age, residence, employment, and marital status; (2) the substance of the charge, “as contained in the complaint, indictment, information, or other public documents”; (3) the identity of the investigating agency and the “length and scope of the investigation”; and (4) the circumstances immediately surrounding an arrest. Section 1-7.500 also requires any news release before a conviction to “state that the charge is merely an accusation, and the defendant is presumed innocent until proven guilty.” Consistent with § 1-7.500, Justice Manual § 1-7.700(B) requires DOJ employees to limit any communications with the media on a pending criminal matter to “the information contained in publicly available material, such as an indictment or other public pleadings.” And Justice Manual § 1-7.610 provides that “because the release of certain types of information could prejudice an adjudicative proceeding, DOJ personnel should refrain from disclosing” certain categories of information “except as appropriate in the proceeding or in an announcement after a finding of guilt,” including “[r]eference to investigative procedures”; “[s]tatements concerning the identity, testimony, or credibility of prospective witnesses”; and “[s]tatements concerning anticipated evidence or argument in the case.”

## 2. Requirement that U.S. Attorneys Coordinate Media Contacts with OPA

Justice Manual § 1-7.310 states that U.S. Attorneys “will exercise discretion and sound judgment, consistent with this Policy, as to matters affecting their own district, but

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<sup>16</sup> As noted above, § 1-7.400 of the Justice Manual was updated in February 2024 and now states that “comments about or confirmation of an ongoing investigation may be permissible.”

<sup>17</sup> Justice Manual § 1-7.100, entitled “General Need for Confidentiality,” authorizes the disclosure of “non-public, sensitive information” when “needed to fulfill official duties of DOJ personnel and as allowed by court order, statutory or regulatory prescription, or case law and rules governing criminal and civil discovery.”

must coordinate their news media contacts with OPA in cases that transcend their district or are of national importance.”<sup>18</sup>

### **3. Requirement that U.S. Attorneys Coordinate Public Statements with Affected Components**

Justice Manual § 1-7.700(A) states, in relevant part, that “[b]efore...making comments on a pending investigation regarding another DOJ component,” a U.S. Attorney “shall coordinate any comments, including written statements, with the affected component.”

#### **B. DOJ Statement of Policy Concerning Release of Information by DOJ Personnel Relating to Criminal and Civil Proceedings**

Part 50 of Title 28 of the Code of Federal Regulations is entitled “Statements of Policy” and includes provisions that it refers to as “guidelines.” Section 50.2 is a policy statement that was promulgated by then Attorney General Nicholas Katzenbach in 1965 without notice and comment and was later amended by then Attorney General John Mitchell in 1971.<sup>19</sup> Section 50.2(a)(1) states that the purpose of the policy statement “is to formulate specific guidelines for the release of” information relating to criminal and civil proceedings.<sup>20</sup>

The guidelines applicable to criminal matters state that they “shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.”<sup>21</sup> The guidelines specifically authorize the release of some information (such as the defendant’s name, age, and residence) and strongly

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<sup>18</sup> According to OPA’s public website, OPA “is the principal point of contact for the Department of Justice with the news media” and “is responsible for ensuring that the public is informed about the Department’s activities and about the priorities and policies of the Attorney General and the President with regard to law enforcement and legal affairs.” The OPA Director is a non-career Senior Executive Service appointment.

<sup>19</sup> See 30 Fed. Reg. 5510-02 (Apr. 17, 1965); 36 Fed. Reg. 21028 (Nov. 3, 1971). In comments submitted after reviewing a draft of this report, former Attorney General Barr inaccurately asserted that 28 C.F.R. § 50.2 has the force of law and cannot be supplanted by the Justice Manual policy statement.

<sup>20</sup> The Department’s current Confidentiality and Media Contacts Policy does not reference 28 C.F.R. § 50.2. A prior version of the Justice Manual—then known as the U.S. Attorneys’ Manual (USAM)—explicitly incorporated Section 50.2 by stating that the “purpose of this policy statement is to establish specific guidelines consistent with the provisions of 28 [C.F.R. §] 50.2.” USAM § 1-7.001.

<sup>21</sup> 28 C.F.R. § 50.2(b)(1).

discourages the release of other types of information (such as observations about a defendant's character).<sup>22</sup> The guidelines applicable to criminal matters conclude by stating:

Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

28 C.F.R. § 50.2(b)(9).

### **C. DOJ Policy on Communications with the White House**

The Department of Justice has a longstanding policy governing communications between Department representatives and the White House. At the time of the events described here, the effective iteration of that policy was then Attorney General Eric Holder's May 11, 2009 memorandum titled "Communications with the White House and Congress" (White House Communications Memorandum).<sup>23</sup> On December 3, 2019, during Attorney General Barr's tenure, the Office of the Deputy Attorney General recirculated the White House Communications Memorandum to all Department components via email and directed component heads to remind their staff that the memorandum was still in effect.

As the White House Communications Memorandum explains, the Department's "legal judgments...must be impartial and insulated from political influence," and it "is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration."<sup>24</sup> To that end, the White House Communications Memorandum "sets out guidelines to govern all communications between representatives of the Department...and representatives of the White House and Congress."<sup>25</sup> Two

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<sup>22</sup> 28 C.F.R. §§ 50.2(b)(3), (6).

<sup>23</sup> Eric Holder, Attorney General, Memorandum for Heads of Department Components and U.S. Attorneys, Communications with the White House and Congress, May 11, 2009. In December 2019, a section on Congressional and White House Relations was added to the Justice Manual, but the subsection titled "Communication with the White House" remained blank ("[TBD]") until November 2021. On July 21, 2021, Attorney General Merrick Garland issued an updated memorandum titled "Department of Justice Communications with the White House" (Garland Memorandum), the contents of which have been incorporated into the Justice Manual at § 1-8.600.

<sup>24</sup> White House Communications Memorandum, p. 1.

<sup>25</sup> White House Communications Memorandum, p. 1.

paragraphs of the White House Communications Memorandum’s section on “Pending or Contemplated Criminal or Civil Investigations and Cases” are relevant here.

Paragraph 1(a) states that:

[i]n order to ensure the President’s ability to perform his constitutional obligation to ‘take care that the laws be faithfully executed,’ the Justice Department will advise the White House concerning pending or contemplated criminal or civil investigations or cases when—but only when—it is important for the performance of the President’s duties and appropriate from a law enforcement perspective.<sup>26</sup>

Paragraph 1(b) states, in relevant part, that:

[i]nitial communications between the Department and the White House concerning pending or contemplated criminal investigations or cases will involve only the Attorney General or the Deputy Attorney General, from the side of the Department, and the Counsel to the President, the Principal Deputy Counsel to the President, the President or the Vice President, from the side of the White House.<sup>27</sup>

Paragraph 1(b) clarifies that “this policy does not, however, prevent officials in the communications, public affairs, or press offices of the White House and the Department of Justice from communicating with each other to coordinate efforts.”<sup>28</sup>

#### **D. DOJ Election Year Sensitivities Policy**

It has been the Department’s practice, every Presidential election year, to have the Attorney General issue an “Election Year Sensitivities” Memorandum to all DOJ employees to remind them of the Department’s policies regarding the investigation and prosecution of election crimes as well as the restrictions on political activities during an election cycle.<sup>29</sup> Barr issued his Election Year Sensitivities Memorandum on May 15, 2020. That memorandum emphasized that DOJ employees’ responsibility to enforce the laws “in a

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<sup>26</sup> White House Communications Memorandum, p. 1.

<sup>27</sup> White House Communications Memorandum, p. 2. Paragraph 1(b) permits the official who participated in the initial communication to designate subordinates to carry on any continuing contacts, but the designating official “must monitor subsequent contacts, and the designated subordinates must keep the superiors regularly informed of any such contacts.” White House Communications Memorandum, p. 2.

<sup>28</sup> White House Communications Memorandum, p. 2.

<sup>29</sup> See, e.g., Loretta Lynch, Attorney General, Memorandum to All Department Employees, Election Year Sensitivities (April 11, 2016); Eric Holder, Attorney General, Memorandum to All Department Employees, Election Year Sensitivities (March 9, 2012); Michael Mukasey, Attorney General, Memorandum to All Department Employees, Election Year Sensitivities (March 5, 2008).

neutral and impartial manner” is “particularly important in an election year.”<sup>30</sup> It went on to “remind” employees handling election-related matters that they “must be particularly sensitive to safeguarding the Department’s reputation for fairness, neutrality, and non-partisanship,” and that “[s]imply put, partisan politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges.” The memorandum then stated:

Law enforcement officers and prosecutors may never select the timing of public statements (attributed or not), investigative steps, criminal charges, or any other action in any matter or case for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department’s mission and with the Principles of Federal Prosecution.

Barr’s memorandum required employees who “face an issue, or the appearance of an issue, regarding the timing of statements, investigative steps, charges, or other actions near the time of a primary or general election” to consult with the Public Integrity Section (PIN) of the Criminal Division.<sup>31</sup>

#### **E. The Hatch Act and Related Regulations and Policies**

The Hatch Act, 5 U.S.C. § 7323 *et seq.*, governs the political activities of executive branch employees. Relevant here, the Hatch Act states that an “employee” may not “use his official authority or influence for the purpose of interfering with or affecting the result of an election.”<sup>32</sup> The Hatch Act defines “employee” to include “any individual, other than the President and the Vice President, employed or holding office in...an Executive agency other than the Government Accountability Office.”<sup>33</sup> The U.S. Office of Special Counsel is the agency responsible for investigating Hatch Act violations.<sup>34</sup>

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<sup>30</sup> Barr Election Year Sensitivities Memorandum, p. 1.

<sup>31</sup> *Ibid.* In August 2022, the Department added the Election Year Sensitivities policy to the Justice Manual at § 9-85.500 (“Actions that May Have an Impact on an Election”). Justice Manual § 9-85.500 requires employees to consult PIN before taking “[a]ny action likely to raise an issue or the perception of an issue under this provision” and prohibits taking such action if PIN “advises that further consultation is required” with the Attorney General or DAG.

<sup>32</sup> 5 U.S.C. § 7323(a)(1). The Hatch Act regulations, codified at 5 C.F.R. Part 734, reiterate the statutory language prohibiting use of official authority or influence for the purpose of interfering with or affecting an election and then provide a non-exhaustive list of “activities prohibited by” that language, none of which is applicable to the conduct alleged here. 5 C.F.R. § 734.302(b).

<sup>33</sup> 5 U.S.C. § 7322(1)(A).

<sup>34</sup> 5 C.F.R. § 734.102(a).

DOJ policy requires Department employees “to be aware of, and to comply with, all ethics-related laws, rules, regulations, and policies” and expressly identifies the Hatch Act as one of those ethics-related laws.<sup>35</sup> Consistent with DOJ practice in presidential election years, on June 10, 2020, the Assistant Attorney General for Administration issued two memoranda—one to career Department employees and one to non-career appointees—reminding employees of the Hatch Act’s restrictions on partisan political activities. Both memoranda stated that Department employees, whether career or non-career, may not “use their official authority or influence to interfere with or affect the result of an election.”<sup>36</sup> The Department’s Election Year Sensitivities Memorandum, discussed in more detail above, also reminds employees of their Hatch Act obligations, including the prohibition on “using [their] authority for the purpose of affecting election results.”<sup>37</sup>

Additionally, the federal ethics regulations, known as the Standards of Ethical Conduct for Employees of the Executive Branch, identify the Hatch Act as one of the “statutes that establish standards to which an employee’s conduct must conform.”<sup>38</sup>

#### **IV. Factual Findings**

##### **A. Monday, September 21, 2020**

##### **1. Initiation of Federal Investigation**

On September 18, 2020, a detective with the Luzerne County District Attorney’s Office (DA’s Office) referred an investigative matter to the FBI’s Scranton Resident Agency, which is a satellite office of the Philadelphia Field Office.<sup>39</sup> According to the FBI’s Electronic Communication (EC) opening the investigation, the detective advised the FBI that the suspect—a seasonal employee of the Luzerne County Bureau of Elections—had discarded election ballots into a garbage dumpster. The EC stated that, according to the detective, the suspect “was under the impression the ballots were fraudulent and took it upon

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<sup>35</sup> Justice Manual §§ 1-4.010, 1-4.100(C); *see also* DOJ Ethics Handbook for On and Off-Duty Conduct, p. 7 (January 2016).

<sup>36</sup> *See* Memorandum from Lee Lofthus, Assistant Attorney General for Administration, for All Department of Justice Career Employees Re: Restrictions on Political Activities, p. 2 (June 10, 2020); Memorandum from Lee Lofthus, Assistant Attorney General for Administration, for All Department of Justice Non-Career Employees Re: Restrictions on Political Activities, p. 2 (June 10, 2020).

<sup>37</sup> Barr Election Year Sensitivities Memorandum, p. 2.

<sup>38</sup> 5 C.F.R. § 2635.901; *see* 5 C.F.R. § 2635.902(o).

<sup>39</sup> Resident Agencies are satellite offices of an FBI field office and are managed by a Supervisory Senior Resident Agent. The Scranton Resident Agency covers eight counties in northeastern Pennsylvania, including Luzerne County.

himself to discard the ballots into the garbage without notifying anyone.” The EC stated that the detective requested the FBI’s assistance in searching and securing the dumpster.

On September 21, 2020, DA’s Office detectives and the FBI concluded their search of the dumpster and found six completed military absentee ballots for the 2020 general election that were loose and separated from their original envelopes. That same day, Luzerne County election officials also provided the FBI with two sealed ballot envelopes that election officials stated contained ballots that the suspect had mishandled. According to the opening EC, the election officials told the FBI that these two ballots could be attributed to specific voters and therefore “had been replaced in appropriate envelopes and resealed” by a Bureau of Elections employee.

Later on September 21, Luzerne County District Attorney (DA) Stefanie Salavantis requested that the FBI take over the investigation as the lead investigative agency. The opening EC states that MDPA also advised the FBI on September 21 that “they would fully support a federal investigation of possible election fraud.” The FBI designated the case a “sensitive investigative matter” to ensure that FBI Headquarters and the Department were made aware of it.

MDPA personnel told us that they first learned of the Luzerne County investigation on September 21. The MDPA Criminal Chief assigned the matter to a Deputy Criminal Chief. Emails circulated among MDPA personnel show that they were initially informed that five or six ballots—all of which had been cast for President Trump—had been discovered in a dumpster by a Luzerne County employee. The emails also stated that the Pennsylvania State Police identified and interviewed the suspect, who admitted he threw the ballots in the dumpster because he was “on the lookout for fraudulent ballots.”

In response to this information, Freed stated in an email to MDPA personnel, “I’d like to see rapid movement on this so that if the evidence pans out we can lay down a marker here for misbehavior on either side of the aisle.” Freed explained to the OIG that this statement was meant to convey that if they found “evidence of any sort of voter fraud, ballot fraud, shenanigans as it relates to voting on either [side] of the aisle,” he “wanted to get that information out there” because doing so, in his view, was “the best way to keep the public officials honest who are running these elections.” The MDPA personnel who received Freed’s email told us they interpreted it similarly—that if they found evidence of ballot fraud, they would prosecute it “whether it favored one party or the other.”

## **2. MDPA Submits an Urgent Report to DOJ Leadership**

At 12:52 p.m. on September 21, 2020, then MDPA First Assistant U.S. Attorney Bruce Brandler submitted an “Urgent Report” to the Office of the Attorney General and the Office

of the Deputy Attorney General.<sup>40</sup> The report, titled “Ballot Fraud Investigation Initiated Regarding Mail In Ballots in PA,” stated:

The FBI has initiated an investigation of possible ballot fraud in Luzerne County, Pennsylvania[,] regarding mail-in ballots. According to the FBI, Scranton office, five or six 2020 federal election ballots were found in a dumpster today and all the ballots cast votes for President Trump. [The subject], a seasonal worker for Luzerne County, has admitted to throwing the ballots in the dumpster. [The subject] has been fired. The Public Integrity Section has been notified.

Brandler told us he submitted the Urgent Report because he “thought it was a significant investigation” and his understanding is that U.S. Attorney’s Offices are required to submit Urgent Reports at “the initiation of a significant investigation.”<sup>41</sup>

Additionally, Brandler told us that he included the fact that “all the ballots cast votes for President Trump” in the Urgent Report because he considered that fact “significant,” adding, “I was looking at it as a potential criminal investigation and to me, the fact that...all of the ballots that were discarded were for one candidate was a red flag. If it had been an equal number on each side...it would be...less suspicious that it was done intentionally.” The then MDPA Criminal Chief similarly stated that the fact that all of the discarded ballots were cast for one candidate was something “that kind of stuck out” early on when analyzing the subject’s intent, noting, “what are the odds that the ones that were in the garbage were all” for the same candidate.

### **3. PADAG Richard Donoghue Calls Freed**

At 3:33 p.m., Freed emailed MDPA leadership that he had just received a phone call from then Principal Associate Deputy Attorney General (PADAG) Richard Donoghue. Freed’s email stated that Donoghue had seen the Urgent Report and said that MDPA was “first out of the gate.”

Freed told us that his phone conversation with Donoghue was brief, and that Donoghue requested that Freed keep him posted on any developments in the case. Asked what he took Donoghue’s “first out of the gate” comment to mean, Freed stated that he

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<sup>40</sup> Justice Manual § 1-13.100 requires U.S. Attorney’s Offices to submit “Urgent Reports” notifying Department leadership of certain matters, emergencies, or events, including “major developments in significant investigations” and matters “likely to generate national media or Congressional attention.” The Justice Manual states that these reports should include a “brief description of the general nature of the matter;” the potential subjects of the investigation, and the investigative agencies involved.

<sup>41</sup> Brandler was out of the office on annual leave the week of September 21. Brandler told us that he was monitoring his emails that week but had “very limited contact” with Freed during the events described here.



understood Donoghue to be saying that “in all the discussions going on about” voter fraud cases, and “especially the focus on swing states,” MDPA was “the first” U.S. Attorney’s Office “with some concrete information about the potential.” We asked Donoghue about the “first out of the gate” language in Freed’s email. Donoghue stated that he found it confusing and did not know what Freed meant.

Donoghue further told the OIG that he spoke with Freed around the initiation of the investigation but could not recall the precise details of their conversation. Donoghue thought that he recalled Freed mentioning that he had received press inquiries about some ballots found in a dumpster in Luzerne County and that “his team, with FBI, were taking some steps to try to find out what happened.” Donoghue also recalled Freed saying that MDPA had been in contact with PIN, and that PIN was “okay with” MDPA taking some preliminary investigative steps. Donoghue told us that he did not specifically recall seeing the Urgent Report but stated that he “obviously...must have read” it, and that it was “available to the PADAG, the DAG, [and] the AG” among others.

#### **4. PIN is Notified and Concurs in MDPA Taking Overt Investigative Steps**

In the afternoon on September 21, the MDPA Deputy Criminal Chief contacted the Director of PIN’s Election Crimes Branch to alert him to the existence of the Luzerne County investigation.<sup>42</sup> The Election Crimes Branch Director told the OIG that, consistent with his standard practice, he asked the Deputy Criminal Chief to email him a summary of their telephone conversation. At 3:46 p.m., the Deputy Criminal Chief emailed the Election Crimes Branch Director an overview of the basic allegations and also detailed the proposed investigative steps, stating:

FBI plans to interview suspect who reportedly confessed to the Pennsylvania State Police. FBI also plans to check with election officials in state and county to authenticate ballots. FBI also plans to attempt to interview military personnel who completed and mailed the ballots.

After his communications with the Deputy Criminal Chief, the Election Crimes Branch Director discussed the Luzerne County matter over email with other PIN supervisors, including PIN Chief Corey Amundson. Those email communications show that PIN supervisors considered the Department’s policy of delaying overt investigative steps until after an election is certified.<sup>43</sup> PIN leadership concluded that overt investigative

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<sup>42</sup> Justice Manual § 9-85.210 requires U.S. Attorney’s Offices to consult with PIN “before an investigation beyond a preliminary inquiry is requested or conducted” in most election crime matters. The Attorney General’s Election Year Sensitivities Memorandum also required such consultation with PIN.

<sup>43</sup> The Department’s Federal Prosecution of Election Offenses handbook states that overt investigative measures “should not ordinarily be taken in matters involving alleged fraud in the manner in which votes were cast or counted until the election in question has been concluded, its results certified, and all recounts and

(Cont’d.)

measures were warranted in the Luzerne County investigation for three reasons: (1) MDPA believed the investigation could be concluded and possibly charged rapidly; (2) the subject had already been terminated from his employment at the Luzerne County Bureau of Elections; and (3) state and local authorities had already taken overt investigative steps. The Election Crimes Branch Director cautioned in an email to PIN supervisors, however, that although he “plan[ned] to concur” with MDPA taking overt investigative steps, “the only rub is the ballots are opened and all for one party (I do not know which one and instructed [the Assistant U.S. Attorney] not to communicate that). This implicates the non-interference policy to the extent that party motive is known to some federal personnel.”

The Election Crimes Branch Director told us that the matter arose “early enough in the election cycle” that he thought the Department could be “proactive” while still complying with both the non-interference policy and the Election Year Sensitivities Memorandum, but that he was “trying to limit the exposure of any partisan angle.” The Election Crimes Branch Director said there were two reasons it was important for DOJ to limit exposure to the substance of the ballots. First, the Election Crimes Branch Director explained that, from an “institutional perspective,” the Department does not “want to appear in any way like we’re taking sides.” Accordingly, the Election Crimes Branch Director stated, one of the ways the Department preserves its neutrality in voting investigations is by trying not to “figure out which side was being hurt on any given ballot.” Second, the Election Crimes Branch Director told the OIG that most states provide for a secret ballot and the Department tries “not to interfere with the secrecy of the voter’s choices.” PIN Chief Amundson echoed these concerns, stating that “PIN, generally speaking, does not like to discuss things in terms of parties or candidates” because it “could be suggestive of a bias.” As Amundson explained, PIN attempts to minimize its exposure to that type of information so that “people [can] trust that we’re doing things for the right reasons.”

At 4:59 p.m. on September 21, the Election Crimes Branch Director emailed the MDPA Criminal Chief and Deputy Criminal Chief stating that PIN concurred in MDPA’s proposed investigative steps “provided the FBI can move rapidly, and minimizes its exposure of or to the substance of the ballots (ie who was voted for by whom) [sic].” The Election Crimes Branch Director’s email advised MDPA that “authentication should attempt to rely on form and format, rather than content, of ballots and envelopes.” The Election Crimes Branch Director also told the Criminal Chief and Deputy Criminal Chief to “consult again” with PIN if issues arose or if a search warrant or arrest were possible in the “very near term.” The Criminal Chief forwarded the Election Crimes Branch Director’s email to Freed and Brandler later that evening. Freed told us that he remembered reading the Election Crimes Branch Director’s email.

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election contests concluded.” *Federal Prosecution of Election Offenses*, p. 84 (8th ed. 2017). This policy is known as the Department’s election “non-interference policy.” In August 2022, the Department added the election non-interference policy to the Justice Manual at § 9-85.300.

**B. Tuesday, September 22, 2020**

**1. Barr Asks U.S. Attorney for the Northern District of Ohio Justin Herdman to Set Up a Telephone Call with Freed**

At 11:20 a.m. on September 22, then U.S. Attorney for the Northern District of Ohio Justin Herdman emailed Freed stating that Barr wanted to set up a call with Freed later that day to discuss the Luzerne County investigation. Herdman told us, and documents show, that Herdman was traveling with Barr to Milwaukee that day for a DOJ event. According to Herdman, on the car ride from the airport to the event in Milwaukee, Barr began speaking with his Chief of Staff about the Luzerne County investigation. Herdman stated that he did not know how Barr had become aware of the case. Herdman told us that Barr asked him if he knew Freed and, when Herdman responded that he did, Barr told him to set up a telephone call with Freed. Accordingly, Herdman emailed Freed at 11:20 a.m. to arrange a phone call with Barr.<sup>44</sup>

Herdman told us that he also called Freed to make sure Freed was prepared to speak with Barr. Herdman stated that Freed gave him a factual summary of the investigation during this call, including the fact that at least some of the ballots had been cast for Trump. Herdman continued:

[T]he thing I remember very clearly is...that [Freed] had deep concerns about...the subject's mental capacity. And that there was some indication early on that the guy was working through some sort of program for, you know, mentally disabled people, or something. And so, [Freed's] main concern, factually, the thing that he was going to tell the Attorney General, that [Freed] needed to personally do was review this interview with the FBI, that I think was recorded, and that he wouldn't be in a position to make any decisions about charging until he had reviewed that interview.

Freed told us that he "provided some information to" Herdman during this call, and that Herdman "indicated" that Barr was "looking to have a phone conversation with" Freed. Freed also told us that he impressed upon Herdman that the matter appeared to be "potentially minor" conduct involving only a handful of ballots. Freed told us that he communicated that same point to "multiple people," including Donoghue, because he "didn't want something communicated to the Attorney General that this is some huge case" and then "not have it pan out that way."

Following his communications with Herdman, in preparation for the call with Barr, Freed reached out to his subordinates by email for "up to the second information and any ideas about potential charges, i.e., what charges if the evidence pans out." Among the information Freed received in response to his query was that "[a]ll of the ballots are from

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<sup>44</sup> For clarity, all times in this report reflect the Eastern Time Zone.

overseas military personnel (and they all voted for the same presidential candidate).” Freed also contacted the FBI Philadelphia Field Office’s Special Agent in Charge and Luzerne County DA Stefanie Salavantis to let them know of his forthcoming call with Barr.

## **2. Freed’s Telephone Call with Barr**

At around 3:00 p.m. on September 22, while on the return trip to the airport in Milwaukee, Herdman called Freed and handed his phone to Barr. Herdman told the OIG that he could only hear Barr’s side of the conversation and described Barr as generally being in “receive mode.” However, Herdman stated that, after he hung up, Barr commented on the fact that these were military ballots, which Herdman added was clear that Barr found “very interesting.” Herdman estimated that Barr’s call with Freed lasted approximately 5 minutes. Herdman stated that, after he facilitated the call, he had no other conversations with Barr about the Luzerne County matter.

Freed likewise estimated that the call with Barr lasted about 5 minutes. According to Freed, Barr told him that he was “aware of this potential issue up in Luzerne County” and “wanted to know what was going on” with the investigation. Freed stated that he gave Barr “the basic facts” of the Luzerne County matter and specifically told Barr that it “didn’t appear...to be some sort of large-scale operation” and “looked like, no matter what, it was going to be fairly limited to what had happened there.” Freed also recalled telling Barr in this call that they believed that all of the ballots recovered were cast for President Trump. Freed said that Barr told him to “keep on top of it” and that they would “talk again.” Freed did not recall whether he and Barr discussed the possibility of issuing a public statement in this call.

As noted above, Barr declined the OIG’s request for an interview. Barr’s January 5, 2021 letter to the Inspector General did not mention his September 22, 2020 phone call with Freed.

## **3. Freed and Herdman Exchange Text Messages after Freed’s Call with Barr**

Immediately following Freed’s call with Barr, beginning at 3:06 p.m., Herdman and Freed exchanged the following text messages:

Herdman: “Nice job”

Herdman: “I think you got him fired up”

Freed: “Haha That was not my goal, however I was a little fired up. Thanks for your help. If you have time for any more feedback later I’d appreciate it I know you’re busy”

Herdman: “I’ll call you when we get back to DC, about to go wheels up.”

Freed: “Perfect safe flight”

(Punctuation retained from original.)

In explaining the text message exchange, Herdman observed that Barr had been “bothered by the fact that these were military ballots” and believed that was the “context” for his comment to Freed that Freed “got [Barr] fired up.” Freed recalled that he and Herdman “traded some more calls and emails” but did not recall Herdman providing him feedback regarding his call with Barr.

#### **4. Luzerne County District Attorney Issues a Press Release**

Shortly after 4 p.m. on September 22, Luzerne County DA Stefanie Salavantis issued a press release about the ballot investigation. Salavantis’s press release stated that the DA’s Office had learned of “issues with a small number of mail-in ballots which were received by the Luzerne County Bureau of Elections,” that her office had “consulted with the United States Attorney’s Office,” and that “federal authorities [had] assumed lead investigative authority of this incident.”

Documents show that, at 12:07 p.m. that day, the FBI Philadelphia Field Office Public Affairs Officer (PAO) emailed the FBI Philadelphia Field Office leadership stating that the FBI’s state and local partners had received their first press inquiries about the Luzerne County investigation and that the Luzerne County DA’s Office wanted “to put out a statement this afternoon” and “would like to confirm they’re working with federal authorities on the matter.” The PAO’s email also mentioned that the FBI Philadelphia Field Office’s Election Crimes Coordinator had contacted PIN “on how best to handle from our end.” The PAO told the OIG that the DA’s Office specifically wanted to mention “that the FBI was investigating” and was therefore “looking for language that [the FBI] would be comfortable with” in a public statement. According to the PAO, PIN advised the FBI Philadelphia Field Office to adhere to the FBI’s standard policy of neither confirming nor denying the existence of an investigation and to request that the DA not mention the FBI’s involvement. The PAO said that, based on PIN’s advice, the FBI Philadelphia Field Office subsequently requested that Salavantis not reference the FBI’s involvement.<sup>45</sup>

At 1:41 p.m., Salavantis emailed Freed a draft press release, stating, “Be honest. If there is something you recommend changing or not saying, please let me know.” Salavantis’s draft press release included two references to the FBI: (1) it stated that the

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<sup>45</sup> The Supervisory Senior Resident Agent (SSRA) overseeing the FBI’s Scranton Resident Agency and the Luzerne County investigation provided us with his notes from that day, which state, “[FBI Philadelphia PAO]: declined comment. DOJ said we would ask her not to mention federal law enforcement. This investigation is ongoing.” The SSRA’s notes also contain contact information for “DOJ PIN: [Election Crimes Branch Director],” next to which the SSRA wrote, “Standard FBI—we don’t comment on investigations.” The Election Crimes Branch Director told the OIG that the FBI Philadelphia Field Office contacted him about whether it could or should make any public statement about the investigation, and that he told them they should not and “that was the end of it.”

DA's Office had "consulted with" the FBI, and (2) it noted that the FBI had "assumed lead investigative authority of this incident." At 1:46 p.m., Freed responded to Salavantis, "Thanks. Has FBI signed off? I was told that DOJ Public Integrity had some concerns about specific mention of FBI. I plan to address this with...AG Barr when I speak with him." Salavantis replied at 1:56 p.m. that it was a "good question" and added, "I was going to wait to see if they will give the go ahead to say that. If not, I will just change it to federal authorities, if that works." As noted above, the final version of Salavantis's press release issued later that afternoon stated that the DA's Office had "consulted with the United States Attorney's Office" and that "federal authorities [had] assumed lead investigative authority of this incident" but did not include specific reference to the FBI.

Salavantis told the OIG that she decided to issue a press release because her office began receiving media inquiries about the investigation, and she was concerned other Luzerne County officials would begin publicly discussing the details of the investigation. Salavantis told us that she reached out to both the FBI and MDPA to find out whether she could name them specifically or whether she should use the more generic term "federal authorities." Salavantis told us that she ultimately left out any specific mention of the FBI either because the FBI requested not to be named or because the FBI had not responded by the time she issued her release, but that Freed expressly authorized her to say that she had consulted with the U.S. Attorney's Office on the investigation. Salavantis stated that she believed that, as a former DA, Freed "understood the position [she] would be in with the media" and "was trying to assist" by providing her a specific agency to identify for the media. Salavantis told us that, had Freed told her that he did not want her to mention the U.S. Attorney's Office or federal authorities, she "probably would have kept it vague" and stated only that her office was "working with other agencies."

Freed could not recall how he had learned that PIN "had some concerns about specific mention of FBI," as he relayed in his email to Salavantis, but he believed he would have heard it from the MDPA PAO, who was communicating with the FBI Philadelphia PAO. Freed stated that he did not know specifically what PIN's concerns were but believed it had to do with the Department's Election Year Sensitivities policy. Freed told the OIG that he did not believe that he discussed PIN's concerns about the DA mentioning the FBI during his call with Barr that day, despite his email to Salavantis stating that he "plan[ned] to address" the issue with Barr.

Freed stated that he did not have concerns about Salavantis specifically mentioning MDPA in her press release because "that's the normal course of business in working with the local authorities" and he "can't control what she says," although he acknowledged that he did not ask Salavantis to refrain from mentioning MDPA in her release. Freed also told us that he did not reach out to PIN regarding Salavantis's request to specifically mention MDPA and was not aware that anybody from his office did either. The MDPA Deputy Criminal Chief, who had been communicating with PIN, told us that he was not part of the discussions about Salavantis's press release and was not even aware that Salavantis was

going to issue a press release until after it was issued, and thus he did not reach out to PIN about it beforehand. The FBI Scranton Supervisory Senior Resident Agent (SSRA) forwarded Salavantis's press release to PIN the next day.

**5. Freed Forwards the DA's Press Release to Herdman and Suggests that a Letter to Pennsylvania Officials "May Be the Vehicle"**

On the evening of September 22, Freed forwarded the DA's press release to Herdman with the comment, "FYI." Freed's email continued, "[Pennsylvania (PA or Pennsylvania) Department] of State [(DOS)] has oversight powers. County elections offices execute. PA DOS has issued multiple guidance documents in 2020. A letter to PA DOS outlining our findings may be the vehicle. I'll start some folks working on that. Also sending link to some local news coverage via separate email." A few minutes later, Freed sent Herdman a link to a local news story about the investigation titled, "DA: Federal authorities investigating unspecified Luzerne County ballot issues."

Freed told the OIG that he intended to convey in his email to Herdman that a letter to the PA DOS could provide a vehicle "if the Attorney General needs something to communicate about his concerns about voter fraud." Freed explained, "If we're going to be out there talking about a case, or an investigation, we need something upon which to base that" and stated that a letter "potentially to Luzerne County or to the Department of State" outlining problems they had identified could provide Barr an "opportunity...to discuss it." Freed could not recall "who exactly generated that idea" but noted that he "would not have been making those decisions about what the Attorney General communicates about" and that "the opportunity to communicate about a potential case was something the Attorney General was interested in." Freed stated that "the letter idea was...in [his] head" because "it was a process the Department was using" in other matters. Freed explained that, to him, "it was an analog" to letters the Department had sent to states regarding their handling of COVID-19 issues, which provided "something to base...communication on."<sup>46</sup> However, none of the examples Freed provided involved an ongoing criminal investigation, as was the case here. Freed reiterated that he could not recall whether he and Barr discussed the idea of a letter in their call earlier that day but acknowledged that the letter idea "was certainly in the wind" by that evening, given his email to Herdman.

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<sup>46</sup> As an example, Freed explained that at some point in 2020, his office had drafted a letter to the Pennsylvania governor regarding the governor's withholding of COVID relief funds from a particular county. Freed stated that his office ultimately did not issue the letter because the governor eventually dispersed the funds, but that, if the governor had not, the letter would have provided "something that [Freed] could have commented on" publicly. Freed told us that he believed the Department had sent letters to other states addressing similar issues, which provided a springboard for public comment.

Herdman told the OIG that he spoke to Freed about the possibility of publicly commenting on the Luzerne County investigation.<sup>47</sup> According to Herdman, he told Freed that he found it “very hard” to imagine a way to publicly speak about the criminal investigation other than in a charging document. Herdman specifically recalled telling Freed that Freed would need to consult with PIN before issuing any public comment, and Herdman stated that he told Freed he “should definitely talk to” the Office of the Deputy Attorney General (ODAG) as well. Herdman said that he told Freed that if Freed discovered there was “a systemic problem” with how ballots were being handled, then a letter to the relevant authority might be appropriate; however, Herdman told us that he cautioned Freed that he would have to run anything like that through the various levels of Main Justice, including PIN and ODAG. Herdman stated that he cautioned Freed in this way because of the guidance U.S. Attorneys had received about election year sensitivities. Herdman stated, “I mean, I specifically remember telling him, this is at the heart of everything that we’ve been talking about with respect to election communications, and, in any case, if you don’t have a charge, we don’t say anything about an investigation; we just don’t do that.”

Freed told us that he did not recall Herdman expressing concerns about potentially issuing a public statement. Freed stated that, to the extent he and Herdman discussed the idea of speaking publicly, it was about Barr communicating on the investigation, not about Freed himself putting out a statement.

### **C. Wednesday, September 23, 2020**

#### **1. MDPA and the FBI Philadelphia Field Office Receive Media Requests for Comment**

On the morning of September 23, a local reporter contacted the MDPA PAO seeking information about the Luzerne County investigation and comments on the District Attorney’s press release. In an email, Freed advised the PAO that she could “confirm that [they] are working with authorities in Luzerne County on the case” but instructed her to offer no further information at this time.

The same reporter also contacted the FBI Philadelphia Field Office with the same questions. The FBI Philadelphia PAO reached out to her supervisors by email for guidance on how to respond. An FBI Philadelphia Assistant Special Agent in Charge (ASAC) responded, “Neither confirm nor deny. DOJ PIN concurs with this response.” The ASAC explained to the OIG that PIN does not want the FBI to appear to be “interfering with the

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<sup>47</sup> Herdman did not recall precisely what day this conversation occurred but recalled speaking to Freed “at night” when Herdman was in Alexandria, Virginia, for a U.S. Attorneys’ Conference. Documents show that Barr’s plane from Milwaukee, which Herdman was on, was scheduled to arrive in the D.C. area around 5 p.m. on September 22, and that Freed texted Herdman at 8:27 p.m. asking Herdman to “give [him] two minutes please.”



election” and that the advice to neither confirm nor deny “was a way of making sure of that.”

## **2. Freed, Donoghue, and Herdman Exchange Emails about the DA’s Press Release**

At 10:05 a.m. on September 23, Freed forwarded the DA’s press release from the previous evening to Donoghue, stating, “Yesterday’s statement below. Met with the FBI team this morning and they are continuing to hustle.” Two hours later, Herdman also forwarded to Donoghue the DA’s press release, along with Freed’s email suggesting that a letter to the PA DOS “may be the vehicle.” Herdman’s email to Donoghue stated, “Rich— forwarding the below from Freed related to our conversation last night.” One minute later, Herdman emailed Freed, “I talked to Rich last night and forwarded him [Freed’s email from the previous evening]. He’s happy to talk through the plan before you speak to AG again.”

Herdman told us he had no recollection of a conversation with Donoghue on the evening of September 22 except for suggesting that Donoghue should talk to Freed, but he acknowledged that the emails show that he must have talked to Donoghue about the MDPA matter. Donoghue similarly stated that he did not recall having any conversation with Herdman about the MDPA matter. Donoghue also stated that he did not recall the email from Herdman forwarding Freed’s message containing the “may be the vehicle” statement, nor did he remember seeing the DA’s press release.

Donoghue noted, however, that although he did not recall Freed’s email suggesting that a letter to Pennsylvania officials “may be the vehicle,” it was “possible” that Freed was referring in that email to discussions Freed and Donoghue had had about potential systemic issues with the way Luzerne County elections officials were handling mail-in ballots. Specifically, Donoghue explained that there were concerns that the Luzerne County officials were processing mail-in ballots in a way that violated Pennsylvania law and possibly invalidated the ballots. Donoghue noted that although this concern was “not really a federal criminal issue,” he did recall discussing it with Freed and suggesting that Freed potentially flag this issue for Luzerne County officials.

## **3. Barr Briefs President Trump**

On the afternoon of September 23, while at the White House for an event, Barr briefed President Trump about the Luzerne County investigation. In his January 5, 2021 letter to the OIG responding to our request to interview him in connection with this investigation, Barr described briefing President Trump. He stated:

Because the federal investigation had already been announced by local officials and was already generating press interest, I believed it my responsibility to advise the President of the basic facts prior to further news reports about the incident and the Department's response to it. Accordingly,

when I encountered the President in late afternoon of [September] 23rd at a previously scheduled event, I alerted him that I thought a story was likely to break in the next day or two about discarded ballots in Pennsylvania, and that the facts were that approximately six to nine ballots marked for Trump had been found in a dumpster in Pennsylvania; that the suspect had been quickly identified and the incident appeared isolated; that the U.S. Attorney and FBI were on top of the matter; and that the President should not say anything about it until the Department put something out.

In an email exchange between the Department's OPA Director and a reporter the following week, the OPA Director provided a similar explanation to the reporter for Barr having informed Trump about the Luzerne County ballot investigation. Specifically, in an email to the OPA Director dated September 28, 2020, the reporter noted that the OPA Director had "indicated" to him in an earlier phone conversation that "the information on PA ballots made its way to the president...because of a bubbling up in local media" and asked if the OPA Director could provide any additional background. The OPA Director responded: "On background: Local media in Pennsylvania were chasing the story; the U.S. Attorney was receiving inquiries early that week. The U.S. Attorney was considering responding with a statement."

#### **4. Freed Speaks Again with Donoghue that Evening**

Freed emailed Donoghue at 2:18 p.m. on September 23 stating, "I left it with the AG that we would speak today but did not discuss any specifics. Assuming I should just stand by. If that is inaccurate please advise." At 3:04 p.m., Donoghue responded, "I think that's fine for now. We should touch base at some point this afternoon just so we're on the same page regarding next steps." Freed replied that he would get a case update by the close of business and would then speak with Donoghue.

Freed told us that he recalled speaking with Donoghue by phone that evening but did not recall any details from the conversation and believed "it would have been just a description of what had happened that day." Freed noted that "there was some discussion of a potential call from the AG" on September 23, but he told us that the call did not end up happening until the next morning, September 24. Freed told us that he understood Donoghue's reference to "next steps" in his email to mean "investigatively" and that it was not a reference to issuing a public statement, explaining, "I don't recall any discussion with [Donoghue], at any point, about a public statement."

Donoghue likewise stated that he did not believe that "next steps" had anything to do with the issuance of a public statement, noting that he was surprised the following day (September 24) when Freed issued the statement. Donoghue could not recall anything about his phone conversation with Freed that evening, noting that he and Freed "had a series of conversations" about the Luzerne County investigation, and that "they all blur together" in his memory. Donoghue stated, however, that all of his conversations with

Freed were about investigative issues, and that he and Freed never discussed issuing a public statement. Donoghue emphasized that the Luzerne County investigation had “just popped a day or a day and a half before” and that “it would be very unusual to issue a public statement in the middle of an investigation.”

**5. Freed Emails Herdman that “While It’s Still Looking Like No Criminal Charge,” the Investigation “Remains a Potential Communication Opportunity for the AG”**

At 8:38 p.m. on September 23, Freed emailed Herdman:

I spoke with [Donoghue] this evening. I’m back in Scranton tomorrow to meet with investigators at 10 a.m. While it’s still looking like no criminal charge, there were some additional problems identified in the Luzerne elections dept this afternoon. I do think this remains a potential communication opportunity for the AG. Can we talk for a few minutes Thursday [September 24] at your convenience?

Herdman responded to Freed’s email at 9:08 a.m. the next morning stating that he had “talked to” Donoghue and Barr’s Chief of Staff about Freed’s email the prior night and would call Freed later that morning. Both Herdman and Freed told us that they did not actually connect by phone on the morning of September 24, and we found no evidence indicating that they spoke at any time on September 24.

Herdman told us that he did not recall discussing the MDPA matter with Barr’s Chief of Staff but that it was “possible” that he spoke briefly to Donoghue about it in front of the Chief of Staff at the U.S. Attorneys’ Conference dinner on September 23. Donoghue told us that he arrived at the dinner late, after Barr and his Chief of Staff had already left, and that he did not recall speaking to Herdman about the MDPA matter at any point.

Freed told the OIG that his comment about “a potential communication opportunity” was conveying the same idea as his “vehicle” comment from the previous evening—namely, that a letter to county or state officials identifying issues with Luzerne County’s ballot handling could serve as a springboard “for the Attorney General to communicate” his “concerns about voter fraud.” Freed told us that, at that point, he was still “thinking of the Attorney General talking” about the case, not about issuing his own statement.

Freed told us that the comment in his email to Herdman that “it’s still looking like no criminal charge” was based on the information he had at the time, but that in hindsight it probably was not “a smart thing” to say given how often things can change during investigations. Freed added that he made this point—and had mentioned it previously to both Herdman and Donoghue—in order to emphasize that this case was, at most,

“potentially minor” and “not some huge case.” Freed told us that it was not that he considered the case unimportant, but rather that he wanted to manage expectations.

Both Herdman and Donoghue told the OIG that they understood early in the investigation that the case would likely not result in a criminal charge. As noted above, Herdman stated that his understanding from his initial conversation with Freed was that the suspect “had some serious disability that was going to preclude them from charging him.” Donoghue similarly told us that the initial assessment of the case was that the suspect was “mentally disabled” and his tossing the ballots was “just an innocent mistake” because he did not recognize that they were ballots. Donoghue stated that he was somewhat skeptical of that explanation because the suspect “had worked elections before” and “all of the ballots he threw out were for Trump.” For that reason, Donoghue told us, he asked to view the video of the suspect’s interview himself. Donoghue said that, while the suspect appeared to him in the video to be of “average intelligence” and not “clearly disabled,” there were “definitely questions about his mental state” and “whether this was an innocent mistake.” Donoghue stated that, “even after [he] reviewed the video,” he “never thought there was a good criminal case there.”

MDPA leadership also told us that they knew early on that the investigation would not likely lead to criminal prosecution. The MDPA Criminal Chief stated that those involved in the investigation within MDPA had the “impression” that it “was not really a strong case.” He explained that as a prosecutor, “you always want to keep your mind open until you track down all the different leads,” but that, “in [his] view, [he] didn’t see it becoming a prosecution.” The MDPA Deputy Criminal Chief similarly told us that he and the Criminal Chief had communicated to Freed early in the investigation that it didn’t “look like there’s criminal intent here” in light of the suspect’s “mental disability” and that, although they would have to “close up a couple loose ends,” it “didn’t...look like this was going to be criminally charged.”

Documents confirm that the FBI was aware of the issues with the suspect’s mental capacity as early September 22 when FBI agents interviewed the suspect. The FBI Scranton SSRA’s notes memorializing the agents’ account of that interview described the suspect as “simple,” having “memory problems,” and “100% disabled” due to a “vehicle accident in 20s w[ith] brain injury.” The SSRA’s notes also stated that the suspect invited the FBI agents in, was “friendly” and “remorseful,” “felt horrible,” and “never voted/doesn’t vote/didn’t pay attention to it.” An internal FBI email from September 23 added that a Luzerne County elections office employee told the FBI that the suspect was “not capable of following simple instructions” and was assigned “menial tasks.” The SSRA and the FBI Philadelphia ASAC told the OIG that they regularly updated MDPA about what they learned in these interviews.

## **D. Thursday, September 24, 2020**

### **1. President Trump Mentions the Luzerne County Investigation During a Radio Interview**

On the morning of September 24, President Trump referenced the Luzerne County investigation during a radio interview. Trump stated:

...These ballots are a horror show. They found six ballots in an office yesterday in a garbage can. They were Trump ballots—eight ballots in an office yesterday in—but in a certain state and they were—they had Trump written on it, and they were thrown in a garbage can. This is what's going to happen. This is what's going to happen, and we're investigating that. It's a terrible thing that's going on with these ballots. Who's sending them, where are they sending them, where are they going, what areas are they going to, what areas are they not going to?... When they get there, who's going to take care of them? So, when we find eight ballots, that's emblematic of thousands of locations perhaps.

In his January 5, 2021 letter to the Inspector General, Barr stated that President Trump's "passing reference" to the Luzerne County investigation during the radio interview "increased press attention and added further impetus for the Department to get its [September 24] statement out."

### **2. Barr Calls Freed and They Decide to Issue a Public Statement**

Freed told the OIG that, sometime in the late morning on September 24—Freed estimated it was between "11:00 and 12:30, but probably closer to noon"—he received a phone call from Barr. Freed stated that Barr asked him for an update on the case. Freed recalled telling Barr that he had personally reviewed the discarded ballots, "had seen the candidates circled," and had confirmed that they were general election military ballots. Freed also recalled telling Barr that he was "not sure" that the investigation was "going to result in a criminal charge."

According to Freed, the conversation then turned to a discussion about issuing a public statement. Freed could not recall who suggested the idea of putting out a public statement but stated that it appeared to him to be mutually understood. Freed said it was his understanding that Barr wanted to communicate to the public a message about "the potential for voter fraud and ballot fraud and for people just to be cognizant of the importance of where, when, and how they cast their votes." Freed told the OIG that he and Barr discussed what content the public statement should include and arrived at four factual points: (1) ballots were discarded, (2) they were all military ballots, (3) some could be attributed to specific voters and some could not, and (4) all nine ballots were cast for

Trump.<sup>48</sup> Freed stated that he did not have “an idea of what to include [in the statement] going into the call,” and that his discussion with Barr “generated” the content of the initial statement. Freed recalled that Barr then asked him, “Do you want to do it or should I?” Freed said he responded that he would issue the statement because it was an MDPA matter and asked Barr with whom in the Department he should work on it. According to Freed, Barr instructed him to reach out to the OPA Director. Freed stated that, like his first conversation with Barr, the phone call was “brief” and lasted “5 minutes or so.”

Freed told us that he would not have issued the statement without authorization from either Barr or other officials at Main Justice, but that he agreed with the idea of issuing a statement. Specifically, Freed stated that he thought a public statement was appropriate in this situation because he “was greatly concerned that things would not be done the right way” due to the “history of corruption and patronage in northeastern Pennsylvania” and the “real uncertainty going on around Pennsylvania’s elections”—meaning the implementation of a new statute for elections and mail-in voting in Pennsylvania. Freed told the OIG that, if MDPA had any evidence of voter fraud, then “[g]etting that information out there” was, in his view, the “best way” to keep the public officials running these elections “honest.” Freed said that media coverage of the Luzerne County investigation did not play a role in his thinking about whether to issue a public statement. Instead, Freed said, “It was the idea of—after speaking with the Attorney General—the idea of getting the information out there.”

Freed told the OIG that he was not influenced by any political motivation during the discussion about issuing a public statement, and that his favoring the issuance of a public statement had nothing to do with either keeping his job as the U.S. Attorney or attempting to help reelect President Trump. Freed added, “I know that virtually any decision I make is going to be questioned and, especially in this environment, there's going to be political motives imputed to it. And there's a large percentage of people [who] won't credit or believe what I say. So, I understand that. I just try to make the best decision I can based on what's in front of me.” Freed told us that he “understood the sensitivity” of the matter given the Election Year Sensitivities Memorandum and stated that that is “why [he] had the contact with the AG.”

Freed told the OIG that he included in the statement the fact that the discarded ballots had been cast for President Trump “based on the discussion with the Attorney General” and because “that's the person at the top of the ballot. It was consistent that all the ballots were cast for the President, and they were thrown away. So, I thought that was important to get out.” In response to a reporter’s question the next morning about why he included the content of the ballots in his statement, Freed stated in an email that he

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<sup>48</sup> The MDPA Criminal Chief specifically recalled Freed telling him, while Freed was drafting the MDPA statement, that the officials with whom he was communicating in Washington “wanted...the fact that...the votes were all cast for the President” to “be in the release” and that that fact “was something that was requested to be put in the release.”

included it because “(1) it is a fact and (2) it is vital that voters who have sent in military ballots are informed of the possibility that their ballot was opened and discarded.” On the second point, Freed told the OIG that he did not have “confidence” that Luzerne County would be able to contact the affected voters, and he “was concerned that those people, who could have been overseas, wouldn’t know that their ballot had potentially been discarded.” Asked why he did not also include the results of the other races on the ballot, such as Auditor General or State Treasurer, Freed told us:

Well, I don't know that [Barr and I] had a specific discussion about that. My concern was—the discussion around voter fraud had centered so much around the Presidential election. It was important for those voters to know and without putting out all the information on each and every ballot, that would certainly—number one, it was the truth; and number two, it would tip those voters off. Potentially.

We asked Freed if including the complete content of each ballot would have made it easier for the affected voters to recognize their own ballot. While granting that it “could have,” Freed stated that he “didn’t think of that in the press of business.”

Asked whether he considered stating that the ballots were all for the same candidate without specifying which candidate, given PIN’s advice to “minimize...exposure of or to the substance of the ballots, i.e., who was voted for by whom,” Freed told us, “I think, certainly, I had that thought, but we didn’t discuss it.... I didn’t spend a lot of time thinking about how specifically to get this information out. Especially then. It was, what does the Attorney General want to talk to me about and what are my marching orders afterwards?” Freed admitted to the OIG that including information about the candidate for whom the discarded ballots were cast was not consistent with PIN’s advice. However, Freed said, “my conversations were with the Attorney General, [who] I thought superseded [PIN].”

In his January 5, 2021 letter to the Inspector General, Barr confirmed that he “favored and authorized putting out information along the lines of [Freed’s] September 24 statement.” Barr stated that he was aware at the time that “local officials had already publicly announced that the U.S. Attorney was engaged with them” on the investigation, that his understanding was that this announcement “had resulted in significant public interest,” and that he believed that “further revelations of information about the incident” were likely and could potentially be inaccurate. Barr wrote in his letter:

As best as I can recall my own thinking on the matter, I was concerned that the vagueness of the local officials’ statement, coupled with the Department’s silence, was contributing to undue speculation and potentially unsettling the public more than necessary about the election’s integrity. I considered this was a matter in which the public interest could likely be best served by getting out in front of the story by recounting the basic facts that prompted the investigation. Among other things, doing so would help dispel needless

mystery and speculation by delimiting the nature and scope of the issue being investigated. It would also provide the public with assurance that the matter was being vigorously pursued by federal authorities and enhance public confidence in the election.

Barr also stated in his letter that he believed that issuing a public statement “would have a salutary deterrent effect by demonstrating that the Department was vigilant and responding quickly to credible allegations of unlawful interference in the election.” Barr wrote that “the massive volume of mail-in ballots, the unaccustomed burdens placed on county election personnel, and the extended voting period” created “new risks to election integrity” that were “[u]nique to the 2020 election.”<sup>49</sup> Noting that the Luzerne County issue arose “at a time when the influx of mail-in ballots was building,” Barr wrote in his letter that, in his view, “it provided a timely opportunity to assure the public and election officials around the country that the Department was vigilant in assessing the concrete risks posed to election integrity.”

Barr’s letter to the Inspector General did not specifically address the factual information that was included in the statement or why, as described by Freed, he wanted Freed to include in the statement the fact that the discarded ballots were cast for President Trump. Barr’s letter stated generally that “practical considerations” weighed in favor of “recounting the facts that triggered the investigation.” Barr wrote that, given that local officials had publicly disclosed the investigation, “it was not unrealistic” to expect “further revelations and public speculation.” Barr stated that a revelation that the investigation concerned discarded ballots “would have created massive pressure from the public to address whether the discarded ballots were sealed or unsealed and, if unsealed, whether the ballots were discarded randomly or selectively.” Barr explained in his letter that, in his judgment, remaining silent “would have ended up doing more harm to the public interest than getting out in front with a more forthcoming statement in the first place.” Barr concluded, “In my view, the steps taken in the case of Luzerne County to protect the integrity of election [sic] did not threaten harm to a candidate and were not a partisan matter. They redounded to the benefit of all voters and enhanced public confidence.”

### **3. The OPA Director and a Counselor to the Attorney General Become Involved in the MDPA Matter**

Freed told us that, after he hung up with Barr, he called the OPA Director and told her that he “had spoken with the AG about putting out a statement.” According to Freed,

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<sup>49</sup> Barr had spoken publicly regarding his concerns about mail-in voting in the months before the issuance of MDPA’s statements. On July 28, 2020, Barr testified before the House Judiciary Committee that mail-in voting “substantially increases the risk of fraud.” Barr echoed that statement in a CNN interview on September 2, 2020, urging that mail-in voting “as a matter of logic, is very open to fraud and coercion,” and that shifting to widespread mail-in voting during the pandemic is “reckless and dangerous, and people are playing with fire.”



the OPA Director “communicated that there was urgency” in putting the statement out quickly, which Freed understood to be driven by two factors. First, Freed said that the OPA Director told him that Barr “had briefed the President” on the Luzerne County investigation, and that the President had mentioned it either to a media member or on a radio show that morning. Second, Freed said that the OPA Director “indicated there was going to be a [White House] press briefing” at 1:15 p.m. and that the OPA Director “believed that the President’s spokesperson was going to mention the case.” Freed stated that, because of these factors, the OPA Director “was concerned about timing and getting something out quickly.”<sup>50</sup> Freed told us that the conversation was “very brief” and that, other than communicating urgency, the OPA Director did not give him any guidance or discuss what the statement should or should not say. Freed told us that he began drafting the statement as soon as he hung up with the OPA Director.

According to Freed, while he was drafting the statement, he received a call from a Counselor to the Attorney General (AG Counselor). Freed could not recall whether the AG Counselor said he was with Barr or had just stepped out of a meeting with Barr, but Freed assumed that Barr had directed the AG Counselor to call him. According to Freed, the AG Counselor asked him “what’s going on,” and Freed responded that he was “working on a statement.” At that point, Freed stated, he and the AG Counselor began discussing whether he should write a letter to Luzerne County outlining their findings, instead of a press release. Freed could not recall whether it was he or the AG Counselor who raised the idea of the letter in the call, but he noted that a letter to Luzerne County “had been something that had been discussed, and [they] had thought about, and certainly...was in [his] head.” Freed told us that the idea was to issue the letter publicly “in lieu of the statement to get the information out there and then give the Attorney General something public to talk about.” According to Freed, the AG Counselor said that the letter was “a good idea,” and that they should “go that route.” Freed told us that he (Freed) responded, the OPA Director is “telling me one thing, and you’re telling me the other” and asked what he should do. According to Freed, the AG Counselor directed him to “work on drafting a letter,” so he began to do so.

Freed told us that, while he was drafting the letter, he “got a call back from [the OPA Director] asking what the status was.” Freed stated, “I told her that I was receiving conflicting guidance, and that I was drafting this letter,” to which the OPA Director responded that he should “hold off” and “that she would get back to” him. According to Freed, the OPA Director called him back shortly thereafter and said, “We’re going with the statement. Issue the statement [and] follow up with the letter.” Freed could not recall if the OPA Director said she had spoken to the AG Counselor, but his impression was that she had and that “those two worked it out.” The MDPA Criminal Chief recalled Freed telling him

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<sup>50</sup> The MDPA Criminal Chief, who interacted with Freed between his calls with Main Justice, told us that his “sense” was that the “Department wanted a statement to go out quickly” because “the President was commenting on it.”

at the time that the AG Counselor “wanted to slow it down” and “wait on the news release” until “the letter was sent to...Luzerne County,” but that Freed was told “no, just send the news release out now.”

The AG Counselor told the OIG that he spoke with Freed at least once about the Luzerne County investigation, but he stated that he did not remember how he became involved in this matter. The AG Counselor stated that typically either the Attorney General or the Attorney General’s Chief of Staff would ask him to contact a U.S. Attorney about a particular issue, but he could not be sure that is what happened here.<sup>51</sup> The AG Counselor recalled that Freed provided him with a basic overview of the status of the investigation. The AG Counselor stated that there were two facts that he remembered about the investigation: “that the person who was responsible for this had some sort of mental deficit, and it was a relatively small number of ballots.” The AG Counselor told the OIG that those two facts were “key” in his view because it made the incident appear to be isolated rather than some “pervasive” fraud. The AG Counselor said that he also vaguely recalled a discussion about whether MDPA should issue a statement announcing that it was investigating the Luzerne County matter. The AG Counselor stated that he recalled Freed being concerned about the content of the statement and how it was to be issued. The AG Counselor did not recall talking with Freed about issuing a letter to the county in lieu of a press release but stated that, if he did, he likely would have been relaying guidance from Barr’s Chief of Staff or somebody else, as he did not think he would have “made that call” on what form a public statement should take. The AG Counselor also did not recall speaking to the OPA Director about this matter but stated that it was possible he did.

The OPA Director told us that she first learned about the Luzerne County matter that morning, when the AG Counselor reached out to her by phone to ask whether she was “tracking what’s happening in Pennsylvania.” According to the OPA Director, she told the AG Counselor that she was not, at which point the AG Counselor explained that “there had been ballots found...that had been cast [for] Trump,” that “the U.S. Attorney had been discussing the matter with the Attorney General,” and that “the Attorney General wanted the U.S. Attorney to put out a statement because apparently it was getting a lot of local attention and it was brewing.” According to the OPA Director, the AG Counselor told her that the Attorney General wanted her “to take a look at the press release before it goes out” and that she should “talk to the U.S. Attorney.” The OPA Director told us that this unexpected assignment “frustrated” her because she was slated to speak at the U.S. Attorneys’ Conference in Alexandria, Virginia, that afternoon and had blocked off the morning to prepare her remarks, but now she had “to figure out quickly what the deal was” with the Luzerne County matter “since the AG wanted the statement out.”

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<sup>51</sup> The AG Counselor told us that he “spoke to...[Barr’s] Chief of Staff, probably on average five or six times every day” so “that would be the most normal way” for him to receive an assignment, but he could not specifically recall whether that occurred here.

The OPA Director told the OIG that after hanging up with the AG Counselor, she spoke by phone with Freed. The OPA Director stated that she asked Freed, “what are we thinking here,” and that Freed responded that “he had been considering issuing a statement for a few days,” and that he and the Attorney General “agreed together that that’s what he should do.” The OPA Director told us that she did not “recall exactly” Freed’s reason for wanting to issue a statement but that Freed had indicated to her that local media attention to the ballot investigation was “becoming a problem,” and her “takeaway was that this is why he felt—and the Attorney General felt—it was important to acknowledge that, yes, in fact, the Department of Justice was looking at it to just ease the concerns.” The OPA Director told us that she “was aware of at least one...national [media] inquiry” that had come to her that morning about the Luzerne County investigation. Documents show that, at 9:17 a.m. that morning, the OPA Director and her deputy received an email from a CNN reporter asking whether there was “any truth” to a “local report from Wilkes-Barre, Pennsylvania, that the DOJ is investigating mail-in voting in their area.”

Asked whether she recalled any discussion about whether to issue a press release versus a letter, the OPA Director stated that she “vaguely remember[ed]” that either Freed or the AG Counselor mentioned “that there was talk about” sending a separate “letter to the authorities,” but that she “wasn’t entirely sure what the letter was” and “was focused on” what the AG Counselor told her that the Attorney General directed her to do, which was reviewing and approving the press release. The OPA Director stated that she “probably” had “several conversations” with Freed and the AG Counselor that morning about the Luzerne County matter and “what [her] role was,” but that she never communicated directly with the Attorney General about it.

#### **4. White House Press Office Reaches Out to the OPA Director**

At 12:14 p.m., the OPA Director received an email from Chad Gilmartin, then Principal Assistant Press Secretary at the White House, in advance of then White House Press Secretary Kayleigh McEnany’s press briefing that afternoon. Gilmartin’s email stated, in full:

Hey []! Prepping Kayleigh’s briefing materials and going off of what [the President] said today on Fox Radio...Kayleigh said the AG told [the President] yesterday about some Trump ballots thrown in trash cans? Could I get a couple details on that for her briefing at 1pm? Much appreciated!

(Ellipses in original.) The OPA Director responded at 12:24 p.m., “Waiting for a statement from our [U.S. Attorney]—standby,” to which Gilmartin replied, “Perfect—thank you!”

The OPA Director told the OIG that, earlier that morning, she had received a call from “someone on the White House press team”—the OPA Director could not recall whom—asking what was going on with the Luzerne County matter. The OPA Director told us that her memory of the conversation was “blurry,” but that she recalled the White House

press person stating that the President had gone on a radio program “and said something about this issue,” and that they believed “the Attorney General told him [about it] yesterday.” According to the OPA Director, the press person asked whether DOJ was “doing anything,” and she responded that she was “just learning about” the matter herself and would “have to circle back to” them.

The OPA Director “guess[ed]” that Gilmartin followed up with an email because the White House press team had not heard back from her. The OPA Director did not recall whether she spoke with Gilmartin or McEnany by phone after responding to Gilmartin’s email but stated that “generally” the DOJ writes its statements independently and then provides them to the White House “after the fact.”

We asked the OPA Director whether she was aware, before her communications with the White House press team, that Barr had briefed President Trump on the Luzerne County investigation. The OPA Director told us that either the AG Counselor or Freed had told her that morning “that there had been some conversation between the Attorney General and the President” in which Barr “informed the President that this was happening.” The OPA Director stated that her understanding was that Freed had informed the Attorney General that the Luzerne County investigation “was becoming a big...local issue,” and that Barr’s conversation with Trump “happened at some point after that.”

## **5. The OPA Director Approves the Statement**

At 12:51 p.m., Freed emailed the OPA Director a draft of the statement. The text of the statement read, in full:

On Monday, September 21, 2020, at the request of Luzerne County District Attorney Stefanie Salavantis, the Office of the United States Attorney along with the Federal Bureau of Investigation, Scranton Resident Office, began an inquiry into reports of potential issues with a small number of mail-in ballots at the Luzerne County Board of Elections.

Since Monday, FBI personnel working together with the Pennsylvania State Police have conducted numerous interviews and recovered and reviewed certain physical evidence. Election officials in Luzerne County have been cooperative. At this point we can confirm that a small number of military ballots were discarded. Investigators have recovered nine ballots at this time. Some of those ballots can be attributed to specific voters and some cannot. All nine ballots were cast for presidential candidate Donald Trump.

Our inquiry remains ongoing and we expect later today to share our up to date findings with officials in Luzerne County. It is the vital duty of government to ensure that every properly cast vote is counted.

Three minutes later, at 12:54 p.m., the OPA Director responded, "Excellent." Freed replied a minute later, "So you want us to push it out." Freed then forwarded the statement to the MDPA PAO with the message, "Statement needs to issue immediately." At 1:00 p.m., the OPA Director responded to Freed, "Yes please—in next 5 mins," to which Freed replied that his "PAO is on it." Freed told us that the OPA Director did not give him any substantive comments about the statement before she approved it.

The OPA Director told the OIG that she took 20 or 30 seconds to skim Freed's draft statement, then called Freed and told him that "if these are the facts" and they are "accurate," then it "looks fine" to her and Freed should "put it out." The OPA Director told us that she responded quickly both because she was leaving Main Justice to speak at the U.S. Attorneys' Conference and "had to get in the car," and also because she "was aware that the White House was doing their press briefing" around 1:00 p.m. and believed "it would be in the best interest of everyone if, when the White House" received questions about the Luzerne County investigation, they could refer to the MDPA statement rather than offer comments "about Department of Justice matters."

The OPA Director said she found the statement's content "very basic," "straightforward," and "bare-bones," and that "nothing in it struck [her] as inappropriate or atypical from something [DOJ] would have done with a different situation." The OPA Director stated that it was not "unusual" for the Department to issue public statements in high-profile matters, even before an indictment, and "say something upfront" to prevent "wild speculation or conspiracy theories" from brewing. The OPA Director further stated that, in her understanding—which she attributed to her conversation with Freed that morning—the Luzerne investigation was "a matter of high public interest" that was "already receiving publicity," and that "people [were] becoming angry that the Department of Justice doesn't appear to be looking at" it. The OPA Director also stated that she was "generally aware" that "there was a high concern among many, many Americans that their vote was not going to be counted properly," and that "people were very concerned" about the "protection...of their vote." The OPA Director told us that, given these factors, she felt that the Department had "a responsibility to assure the public" that it was, in fact, investigating the Luzerne County ballot matter, and that "that's what [the MDPA statement] was."

On the subject of whether the OPA Director had any reaction to the fact that the MDPA statement identified that the discarded ballots had been cast for Trump, the OPA Director stated that she "did not because it was accurate." The OIG asked the OPA Director whether the identity of the candidate for whom the ballots were cast was relevant to the purpose of assuring the public that DOJ was investigating. The OPA Director responded, "I'm not sure I understand what you mean. If it's accurate, I don't understand. It was an accurate statement..." The OPA Director told us that, in her view, when a matter is starting to garner media attention, "it's often best to provide basic facts" to "take down the temperature" and "tamp down any conspiracy theories." The OPA Director explained: "It was a factually correct statement on a matter of high public interest that had already

received high publicity at a time in our country where millions of Americans were very concerned about the validity and protection of their vote. It would have caused a frenzy for weeks if the very bare-bones facts had not been stated.”

The OPA Director told us that she was “generally aware” of the Attorney General’s Election Year Sensitivities Memorandum but that it “never even crossed [her] mind” when she reviewed Freed’s statement. Instead, the OPA Director stated, her “mindset” was the Department’s media contacts policy, which was “always in [her] mind” when she “would make any decision or approval of a statement or a press release.” The OPA Director told us that her job, as the head of OPA, was to “balance” the various interests at stake and “make the call as to what was most important,” and that, in this case, she felt that Freed’s statement “fell squarely within” the exception to the prohibition on commenting about ongoing investigations for situations where the Department needs to “assure the public that the appropriate law enforcement agency is in fact taking a look at it.” The OPA Director also told us that it was “not [her] responsibility” to make sure that PIN was consulted; rather, according to the OPA Director, that responsibility fell to the AG Counselor and Freed. Similarly, the OPA Director told us that it was the AG Counselor and Freed’s responsibility to consult with the FBI to ensure the content of the statement was accurate; her job was “to just make sure it is effectively communicated and executed.”

The OPA Director noted that she was “brought in at the very tail end of” issuing the statement, after Barr, the AG Counselor, and Freed had already “made a decision that a statement should go out.” She stated:

It had been determined by the Attorney General and the U.S. Attorney and the [AG] Counselor who handles this portfolio that a statement should go out. The only thing I was told was, just have [the OPA Director], quote, take a look at it before it goes out. That was my job. I said to the U.S. Attorney when he showed it to me—if this is accurate, fine, looks fine, put it out.

Nevertheless, the OPA Director told us that if something in the statement had “struck [her] as inappropriate,” she would have “halted the process” and “had a conversation with [the AG Counselor] and Freed” before approving it.

The OPA Director denied that the MDPA statement was issued for the purpose of giving President Trump an advantage in the November 2020 election. Asked whether she thought the MDPA statement could have nevertheless given the appearance of having been issued for that purpose, the OPA Director responded, “No. I do not.”

## **6. MDPA Issues the Statement; McEnany References It at the White House Press Briefing; and the Trump Campaign Highlights It**

At 1:14 p.m., MDPA publicly issued Freed’s finalized statement, and both Freed and MDPA’s PAO forwarded a copy to the OPA Director. At 1:30 p.m., the OPA Director forwarded Freed’s statement to Gilmartin and McEnany at the White House Press Office.

She included Barr's Chief of Staff as a blind copy on her email. Gilmartin responded at 1:33 p.m., "Thank you—much appreciated!"

McEnany began her White House press briefing at 1:23 p.m., shortly before the OPA Director sent the statement to the White House Press Office. Approximately 5 minutes into the briefing, McEnany referenced the Luzerne County investigation—and the fact that a public statement was forthcoming—in discussing President Trump's desire to "get rid of mass mail-out voting...because it's a system that's subject to fraud." She stated: "In fact, in the last 24 hours, police in Greenville, Wisconsin, found mail in a ditch, and it included absentee ballots. And also, I can confirm for you that Trump ballots—ballots for the President—were found in Pennsylvania. And I believe you should be getting more information on that shortly. Here, in the last 24 hours, they were found cast aside." Later that day, McEnany tweeted a link to the MDPA statement with the comment, "Nine military mail-in ballots—ALL cast for President @realDonaldTrump—were found discarded in Pennsylvania! DOJ confirms."<sup>52</sup>

In addition to McEnany's reference to the MDPA statement at the White House press briefing and on Twitter, within 30 minutes of the statement's release, a Trump Reelection Campaign spokesperson tweeted a link to the statement with the comment, "BREAKING: FBI finds that military mail-in ballots discarded in Pennsylvania. 100% of them were cast for President Trump. Democrats are trying to steal the election."<sup>53</sup> President Trump also publicly mentioned the Luzerne County investigation at least twice the next day—once in a tweet at 7:23 a.m. and again during a rally in Newport News, Virginia, that evening. In addition, President Trump indirectly referenced the investigation the following Tuesday at the first Presidential debate, stating: "As far as the ballots is [sic] concerned, it's a disaster.... There's fraud. They found them in creeks. They found some with the name Trump, just happen to have the name Trump, just the other day. In wastepaper baskets."

## **7. Herdman and Donoghue Receive the MDPA Statement and are "Surprised" By It**

Freed emailed the text of the statement to the AG Counselor at 1:16 p.m. with the comment, "Thanks for the discussion. Please see attached." A half hour later, Freed emailed the AG Counselor, "Can you let me know any AG reaction to the statement?" Freed

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<sup>52</sup> Kayleigh McEnany (@PressSec45), [Twitter](#) (September 24, 2020, 3:58 p.m.), <https://twitter.com/PressSec45/status/1309220567988318209> (accessed May 17, 2024).

<sup>53</sup> Matt Wolking (@MattWolking), [Twitter](#), (September 24, 2020, 1:41 p.m.). Wolking subsequently removed the tweet, but the media reported on it, and CNN captured it in a screenshot. See "[White House, Trump campaign push unusual DOJ announcement about 7 'discarded' military votes](#)," *NBC News*, September 24, 2020, <https://www.nbcnews.com/politics/2020-election/white-house-trump-campaign-push-unusual-doj-announcement-about-7-n1241020> (accessed May 17, 2024); [screenshot of Wolking's tweet](#) captured at <http://cdn.cnn.com/cnn/2020/images/09/25/trump.campaign.tweet.about.pennsylvania.ballots.pdf> (accessed May 17, 2024).

told us that he was seeking “feedback” about “whether the AG had said anything” about the statement, but he said that he did not receive any such feedback from either the AG Counselor or the OPA Director. The AG Counselor likewise stated that he did not report back to Freed about the AG’s reaction, and that he was “not at all certain that the AG did react to it,” noting that he did not recall hearing about any reaction from Barr’s Chief of Staff, who was “basically with [Barr] most of the time” and thus the AG Counselor’s primary conduit to Barr.

Freed also forwarded a copy of the initial statement to Herdman after it was publicly released. Herdman described himself as “surprised” upon receiving Freed’s email. Herdman said that he had “no idea” that a public statement was being issued and that, had he known, he would have told Freed “to think twice about doing something like that” and make sure he had all the boxes checked “from everybody up and down the Department.” Herdman told us that he “specifically remember[ed]” thinking that the statement’s inclusion of the information that “all nine ballots were cast for presidential candidate Donald Trump” was “not something that should have been in the press release,” explaining, “It’s just not necessary, and I think the downside is obvious, and it’s the reason why we have the policies in place that we have.” Herdman forwarded Freed’s email to Donoghue, writing that he wanted to make sure Donoghue was “in the loop.”

Donoghue recalled “being a little bit surprised at the statement” because the Department does not “typically issue statements in the middle of an investigation.” Donoghue explained that DOJ might issue a statement at the end of an investigation saying, “we have looked at this and determined that there’s no misconduct,” or potentially even “at the outset of a case” if there was already a lot of media attention and it was known the federal government was involved, “to assure people” that the Department was looking into it. Donoghue continued: “But this thing looks like it was sort of in the middle, right?... Again, this is the most vague of recollections, but I just thought that that was a little odd.” Donoghue stated, however, that the MDPA statement “wasn’t something that alarmed” him, “especially once [he] heard that” the Attorney General had authorized it. Donoghue forwarded Herdman’s email and the statement to then DAG Jeffrey Rosen and Rosen’s Chief of Staff, stating, “FYI. This went out w/ the prior approval of OPA.” Donoghue told the OIG that he was unsure how he learned that OPA had approved the statement.

#### **8. Lack of FBI Consultation Prior to the MDPA Statement’s Release; FBI Reaction to It; and MDPA’s Release of a Corrected Statement**

The FBI was given no advance notice of the MDPA statement and was not asked to review its contents or provide input on it. Instead, the FBI learned of the statement when the MDPA PAO called the FBI Philadelphia PAO to alert her that MDPA had just issued it and emailed the FBI Philadelphia PAO a copy of the statement minutes later. The FBI Philadelphia PAO told us that she would normally expect “some discussion” and a “two-way communication” if a U.S. Attorney’s Office planned to mention the FBI in a statement,



particularly on a “sensitive matter,” but that MDPA’s decision to issue this statement was “unilateral.”

Both the FBI Scranton SSRA and the FBI Philadelphia ASAC told us that the MDPA statement “surprised” them because the FBI was not consulted about it. The ASAC also stated that she was “not happy” when she saw the statement because it mentioned “FBI personnel” and only a day or two earlier PIN had instructed the FBI to neither confirm nor deny their involvement in the investigation. The ASAC told us that she and the SSRA were “upset” that the FBI was “so blatantly put into this thing” when they had been “trying really hard” not to disclose the FBI’s involvement.

We asked Freed why he did not reach out to the FBI before issuing the statement. Freed stated, “To my mind, I was dealing with the Attorney General and with [the OPA Director]. You know, the top of the Department.” Asked if he was aware of Justice Manual § 1-7.700, which requires U.S. Attorneys to “coordinate any comments, including written statements, with [an] affected component,” Freed told us that he is “certainly imputed to be aware of it,” but that he did not recall ever reading it, that “it had never been an issue” given his office’s “strong relationships” with the FBI, and that he did not think about Justice Manual § 1-7.700 when he was drafting his statement. We also asked Freed whether he had any concerns about mentioning the FBI in his statement given his knowledge that PIN had instructed the FBI to ask the Luzerne County DA not to mention FBI involvement. Freed responded, “I did not think about that.”

After the statement was publicly released, FBI agents working on the Luzerne County investigation almost immediately identified a factual inaccuracy in it—namely, that contrary to the statement’s claim that “all nine ballots” had been cast for Trump, only seven of the nine ballots were actually known to be for Trump, as the contents of two ballots were unknown because Luzerne County Bureau of Elections staff had resealed the envelopes. The FBI relayed this discrepancy to the MDPA Criminal Chief and Deputy Criminal Chief, who immediately made Freed aware of the inaccuracy. According to the Criminal Chief and Deputy Criminal Chief, Freed told them that he would issue a revised statement making the correction.

At 2:15 p.m., Freed emailed the Criminal Chief and Deputy Criminal Chief, “I have a corrected statement that can issue if it is determined that it is 7 rather than 9. Please have FBI run this down ASAP and they can even say it is for accuracy purposes.” Freed informed the MDPA PAO at 3:00 p.m. that the office would “need to issue a slightly revised statement based on info from the FBI.”

Freed forwarded a draft of the corrected statement to the OPA Director at 3:22 p.m., stating, “I need to issue this slight correction ASAP[.] FBI told me all 9 but it’s actually 7 of 9 visible and 2 are sealed.” Freed told us that he also spoke with the OPA Director by phone about the need to correct the statement. Freed stated that the OPA Director was “not happy” that the original statement contained a factual mistake, but that the conversation

was “professional,” and the OPA Director “understood” the need to issue a correction. The OPA Director confirmed to the OIG that Freed had called her about the factual inaccuracy and stated that she told Freed he needed to “fix it immediately”—that is, put out a retraction and inform the reporters to whom MDPA had sent the original statement.

The corrected statement was publicly released at 3:41 p.m.<sup>54</sup> It was identical to the original statement except that the sentence that “all nine ballots were cast for presidential candidate Donald Trump” was deleted and replaced with the following:

Of the nine ballots that were discarded and then recovered, 7 were cast for presidential candidate Donald Trump. Two of the discarded ballots had been resealed inside their appropriate envelopes by Luzerne elections staff prior to recovery by the FBI and the contents of those 2 ballots are unknown.

Immediately upon issuing the corrected statement, the MDPA PAO emailed it to the FBI Philadelphia PAO, who forwarded it to her supervisors shortly thereafter. The FBI Philadelphia ASAC responded to the FBI Philadelphia PAO, “Thanks.... FYI—The District needs to coordinate these statements with DOJ-PIN before issuing them—so far they have not. [The PIN Election Crimes Branch Director] will be contacting them today to remind them of the requirement to coordinate.” The ASAC told us that when she heard that MDPA planned to issue a corrected statement, she called the Election Crimes Branch Director herself. According to the ASAC, she told the Election Crimes Branch Director that the FBI “had nothing to do with” MDPA’s original statement, and that she had “just heard that [MDPA] might be issuing another statement” and suggested that he “might want to give them a call.” The ASAC described the Election Crimes Branch Director as “not happy” and said that he stated that he also did not know about the statement in advance.

#### **9. PIN Contacts MDPA About the Statement; the DOJ Criminal Division Notifies ODAG that it “Did Not Know About, Much Less Authorize,” the MDPA Statement**

PIN Chief Amundson and the Election Crimes Branch Director both told the OIG that PIN was given no advance notice of Freed’s statement and in no way approved of or authorized it. Amundson and the Election Crimes Branch Director told us that they learned about the statement when a PIN Deputy Chief emailed them just before 3:00 p.m. that the statement was “starting to trend on Twitter.” At 3:36 p.m., a Section Chief in the FBI’s Public Corruption Unit forwarded Amundson, the Election Crimes Branch Director, and two other PIN supervisors an FBI press office alert about Freed’s statement, remarking, “Gents, I’m

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<sup>54</sup> Freed emailed the OPA Director a finalized copy of the corrected statement as well as a link to the corrected statement on the MDPA website, which the OPA Director later emailed to McEnany, Gilmartin, and two other White House Press Officers. Freed also forwarded the corrected statement to Herdman with the comment, “Got a little crosswise with the FBI. Had to revise slightly. Quite a day.”

sure you're tracking already." Amundson responded, "Yes. Thank you. Statement not authorized by PIN."

The Election Crimes Branch Director told the OIG that he was "appalled" and "kind of shocked" when he saw the statement. The Election Crimes Branch Director stated that highlighting the investigative steps being taken prior to a charging decision is "just not something we do." In addition, the Election Crimes Branch Director said that the language about the ballots being cast for Trump made it look like the Department was "taking sides" and added that such a statement was exactly the type of thing the Department tries to avoid. The Election Crimes Branch Director remarked, "I mean, if you had to make any statement at all, it didn't have to be so partisan."

Amundson told us that he found the statement "wholly inappropriate" for multiple reasons. First, the Department typically does not issue statements during the course of an investigation absent "exceptional" circumstances. Second, "the fact that it's a statement made in a highly charged political environment involving a highly charged political issue. And that adds to the need to not do that." Third, the "gratuitous[]" inclusion of the fact that the ballots were for a particular candidate further "exacerbated the problem by making it seem as though the Department was interested in taking sides on an issue that is clearly a partisan issue and is clearly being put forth by one candidate."

Amundson told us that although the PIN supervisors "were all collectively outraged" by Freed's statement and "never would have authorized it," neither he nor anyone in PIN knew how or why the statement was released, so his "immediate concern[]" was making it clear to the U.S. Attorney that these kind of statements" require consultation with PIN. Amundson stated that he therefore decided to email Freed to ensure that this message was clear.

#### **a. PIN Chief Amundson Emails Freed**

At 4:17 p.m., Amundson emailed Freed, noting that the Election Year Sensitivities Policy "requires consultation with [PIN] about any public statements concerning election crimes." Amundson continued, "Though we were consulted about the investigation (and concurred in your going forward), we did not know about the statement and had advised FBI against issuing a statement." Amundson stated in the email that he viewed MDPA's lack of consultation as "an oversight" but "thought it best to raise given that similar issues may come up down the road." Freed responded to Amundson at 4:20 p.m., stating, "I discussed the statement with the Attorney General himself...as well as [the AG Counselor] and [the OPA Director]. In the crush of the hectic business today we neglected to consult and it was an oversight." Amundson replied a few minutes later thanking Freed for the quick response and adding that he had not been aware that Freed had consulted with the Attorney General about the statement.

Amundson told us that he had assumed that Freed had acted on his own and wanted to remind him of the PIN consultation requirement. Amundson described himself as “shock[ed]” when Freed informed him that he had discussed the statement with Barr, the AG Counselor, and the OPA Director. Amundson explained:

I found it very odd that all of these people [who] have a lot on their plate and [who] are in senior leadership positions would be involved in the issuance of a press release in the Middle District of Pennsylvania on a matter that is not only not under indictment, but it doesn't involve particularly significant issues apart of course from being election related.

Amundson told us that, immediately after this email exchange, he relayed Freed’s response to his supervisor, Criminal Division (CRM) Deputy Assistant Attorney General (DAAG) Kevin Driscoll.<sup>55</sup>

Amundson also told us that, at the time of his email exchange with Freed, he was “unfamiliar with the underlying facts” of the investigation—specifically, the fact that the “case was going to go absolutely nowhere” because “the subject suffered from some mental defects.” Amundson stated that, when he eventually learned that fact, his “disappointment increased to tenfold.” Asked why, Amundson explained:

To me, if you have that kind of information and knew it was a declination—and not only that, you knew why, mainly, that your subject had mental defects—the notion of putting out a statement under those circumstances would be outrageous.... Because it would tell you that there was—you're putting out a statement during the course of an investigation that you know is not going to result in criminal charges, and to me there's no good reason for that, and you're leaving open the mistaken impression with the public that there has been criminal wrongdoing when, in fact, you know there has not been criminal wrongdoing. And that to me—particularly in the charged environment we're in, which is all the reasons behind the different policies we have and the reasons for these consultations—is dangerous and it is not what we're about at the Department.

Freed told us that he understood that the Election Year Sensitivities policy required U.S. Attorney’s Offices to consult with PIN prior to making any public statement, and that he should have instructed someone in MDPA to reach out to PIN. Asked whether, in retrospect, he would have handled anything differently, Freed stated that he “certainly would have looped PIN into the discussions about the statement.” Freed added, “I was still going to take my direction from the Attorney General, but we should have consulted.”

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<sup>55</sup> We discuss DAAG Driscoll’s reaction to Amundson’s communication about Freed’s statement, and the actions he took in response to it, in Sections IV.D.9.c and IV.F below.

We asked Freed about Amundson’s concern—namely, that the MDPA statement could have given the public a mistaken impression that the case involved criminal wrongdoing. Freed stated that he “understand[s]” the concern but that he made the “quick judgment” that “it was more important for the information to be out there” so people could determine for themselves the best method to cast their ballots—whether in the mail, dropping it off, or in person. Freed also stated that the fact that the case was unlikely to be criminal did not, in his view, weigh against speaking publicly about it because it was “still important...that the public have a window into what’s going on” and “for that information to be out there.” Asked whether the fact that the case did not appear to involve serious criminal behavior was a “vital fact for the public to know,” Freed stated, “At that point, I didn’t know for sure, so I didn’t think that was important to include.” Freed told us that he believed there was “very little likelihood” that the public statement would prejudice any criminal proceeding because even if the investigation resulted in a criminal case “it would have been a relatively minor charge.” Freed said that this fact gave him “less pause in putting a statement out.”

MDPA First Assistant Brandler, the MDPA Criminal Chief, and the MDPA Deputy Criminal Chief each told us that, although Freed’s statement was “unusual” and not “typical,” they were not concerned that it would prejudice a possible future defendant given the low likelihood that the case would be prosecuted criminally.

**b. The PIN Election Crimes Branch Director Communicates with the MDPA Criminal Chief and Deputy Criminal Chief**

Around the same time that Amundson contacted Freed, the PIN Election Crimes Branch Director emailed the MDPA Criminal Chief and Deputy Criminal Chief requesting that they please call him “ASAP” regarding the public statement. The Election Crimes Branch Director told us that he started the phone conversation by asking, “[W]hat the heck happened?” According to the Election Crimes Branch Director, the Criminal Chief and Deputy Criminal Chief told him that Freed had been working on the statement all day with the Attorney General. The Election Crimes Branch Director stated that he put the Criminal Chief and Deputy Criminal Chief on a brief hold at one point when he received a call from Amundson. According to the Election Crimes Branch Director, Amundson told him that Freed had also just informed Amundson that the Office of the Attorney General authorized the statement.

The Election Crimes Branch Director said he then rejoined the call with the MDPA Criminal Chief and Deputy Criminal Chief, who informed him that MDPA would be issuing a revised statement shortly correcting the number of ballots. The Election Crimes Branch Director stated that he “just deferred to whatever they were doing with the Attorney General.” The Election Crimes Branch Director told us that, at the conclusion of their call, the Criminal Chief and Deputy Criminal Chief told him that MDPA “already knew” that the subject would not be criminally charged. According to the Election Crimes Branch Director, the Criminal Chief and Deputy Criminal Chief explained that the subject was “a hundred

percent mentally impaired” and had “just made a mistake.” The Election Crimes Branch Director stated that the Criminal Chief and Deputy Criminal Chief told him that they, along with Freed, had reviewed the recording of the subject’s interview and “agreed that this was not a criminal case [and] that the [subject] was not capable of forming criminal intent.” The Election Crimes Branch Director told us that he was “stunned” to hear this fact and that, in his view, that fact made the statement even more problematic because it gave the impression of criminal wrongdoing. Both the Criminal Chief and Deputy Criminal Chief confirmed that they had a phone call with the Election Crimes Branch Director shortly after the MDPA statement was issued, and their recollection of the conversation was consistent with the Election Crimes Branch Director’s.

The Election Crimes Branch Director said that, although he was “relieved” to learn that MDPA personnel had not acted on their own, he also was “disturbed” and “thought it was awful” that the Attorney General had reached out to MDPA without informing PIN and also had taken over the function assigned to PIN. The Election Crimes Branch Director stated that both he and Amundson were “flummoxed” because they did not know how to respond to a situation where the Attorney General “is running his own show in this lane.” The Election Crimes Branch Director continued, “So the immediate prospect of like trying to assert our Justice Manual and Election Year Sensitivities authority over the issue, it kind of got mooted at that point because the Election Year Sensitivities memo comes from the AG and if the AG is overruling himself, it’s not like we could order them to do [something differently].”

### **c. CRM DAAG Driscoll Reaches Out to Donoghue About the Statement**

Before emailing Freed, Amundson informed his supervisor, CRM DAAG Driscoll, that MDPA had issued a public statement about the Luzerne County ballot investigation. Driscoll told the OIG that he found that news concerning for two reasons. First, the Department typically does not issue public statements about ongoing investigations. Second, the standard Election Year Sensitivities Memorandum had been specifically amended in 2020 so that it “basically instructed” U.S. Attorney’s Offices to “check with PIN before issuing any public statement,” and that consultation did not occur here. Driscoll told us that, when he actually saw the statement itself, he was “blown away” that it specified which presidential candidate the ballots had been cast for, stating, “I just, I couldn’t believe it. It has no bearing on the investigation.... Who they were cast for is irrelevant.”

At 3:54 p.m., DAAG Driscoll sent an email about the statement to Donoghue and the Deputy Attorney General’s Chief of Staff, copying then CRM Acting Assistant Attorney General (AAG) Brian Rabbitt and another CRM supervisor. Driscoll sent a link to Freed’s initial statement and stated:

Just wanted to make you aware of this, as it seems to be getting some press attention. MDPA reached out to PIN regarding the news reports about potentially discarded mail in ballots in Pennsylvania. PIN concurred with FBI/[MDPA] taking limited steps on this matter as an exception to the non-interference policy based on its limited and discrete scope. However, we did not know about—much less authorize—the statement made by U.S. Attorney Freed. Apparently it is trending on Twitter. Unlike [MDPA], the FBI did ask about issuing a statement—we said no.

Driscoll told the OIG that he sent this email because he was “alarmed that the statement had gone out” and was concerned that ODAG might think that PIN had authorized it. Driscoll told us that he wanted to make sure ODAG was aware of the situation because he “knew the minute [he] heard about [the statement] that it was going to attract attention.”

Donoghue replied to Driscoll’s email at 4:27 p.m., noting that he had heard the night before that there were “press inquiries so they may have been trying to get ahead of a story.”<sup>56</sup> Driscoll then reported to the group that Amundson had contacted Freed and learned that Freed “apparently...discussed the statement personally with the AG and OPA.” Driscoll told us that he found it “noteworthy” that Freed had spoken directly with the Attorney General about his statements, explaining, “I was kind of, frankly, taken aback that...a relatively routine, small scale election matter was being discussed with the Attorney General of the United States. It was, that was unusual, in my experience.” Driscoll told us that, in his understanding, “this was an unprecedented level of ODAG and [Office of the Attorney General] involvement in these matters.”

## **10. Freed Sends and Publicly Releases a Letter to the Luzerne County Bureau of Elections**

### **a. Freed Drafts the Letter and Sends it to the OPA Director**

On the afternoon of September 24, Freed prepared a letter to send to the Luzerne County Bureau of Elections—which Freed intended to release publicly—that provided further details about the FBI’s ongoing criminal investigation. At 3:20 p.m. that day, shortly before MDPA issued the corrected statement, Freed informed the MDPA PAO that he was “working on a letter to Luzerne that may or may not go out today.” About an hour later, at 4:29 p.m., Freed emailed a draft of the letter to the MDPA Criminal Chief and Deputy Criminal Chief, asking them to “please review.” Freed did not tell the Criminal Chief and Deputy Criminal Chief that he intended to release the letter publicly. The Criminal Chief and Deputy Criminal Chief told us that they reviewed the draft for things like spelling and accuracy but did not provide any substantive input.

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<sup>56</sup> Donoghue told us that he believed that he learned that there had been press inquiries in a conversation with Freed.

Freed also sent a draft of the letter to DA Salavantis for “review and comment.” Freed told us that he did not typically send Salavantis draft documents he intended to release, but that he did so here because he “wanted to make sure that [he] didn’t put her in a bind.” Freed did not inform Salavantis that he intended to release the letter publicly. Salavantis emailed Freed a minor suggested edit, which he incorporated into his draft letter. Freed did not consult with or share the draft letter with the FBI or PIN prior to its release. Freed stated that no one at Main Justice reviewed the letter before he released it.

At 4:51 p.m., Freed emailed the OPA Director, stating: “In my discussions with the AG and [the AG Counselor] today we discussed issuing the press release as a prelude to a letter to Luzerne County authorities. I am putting the finishing touches on the letter. Once it is sent I would like to release publicly. Thoughts?” The OPA Director responded at 5:42 p.m., “Yes put out.” Freed then emailed the MDPA PAO, “Ok I got clearance to release the letter.” Freed told us that the OPA Director did not ask him to provide a draft of the letter before authorizing him to release it publicly, and that the above email exchange was the extent of his communication with the OPA Director about the letter.

Despite his representation to the OPA Director, Freed told the OIG that he did not recall specifically discussing the idea of the letter with Barr, and Barr’s letter to the Inspector General makes no mention of discussing the letter with Freed.<sup>57</sup> Freed stated that issuing a letter to Luzerne County authorities was “what [he] had been thinking about initially,” and that the idea “came back up when [he] talked to” the AG Counselor that morning. Freed told us that, because the OPA Director and the AG Counselor both “worked directly with the AG,” he believed that any direction he received from them constituted “direction...from the AG.” As detailed above, in describing his call with the AG Counselor earlier that day, Freed told the OIG that they had discussed sending a letter in lieu of a press statement, not issuing “the press release as a prelude to a letter,” but that the OPA Director subsequently told him to “issue the statement [and] follow up with the letter.” We found no evidence that Freed alerted anyone at Main Justice, other than the OPA Director, of his intention to issue a public letter after the press release had gone out.

The OPA Director told us that, although she vaguely recalled the AG Counselor or Freed telling her that morning that they planned to “send some letter to the authorities,” she “wasn’t focused on the letter” because she did not understand it to be her responsibility—the AG Counselor told her only that Barr wanted her to review and approve Freed’s press release. The OPA Director initially told us that she did not know “whose idea

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<sup>57</sup> In comments submitted after reviewing a draft of this report, Barr stated that he and Freed “were in full agreement that, as part of responding to this incident, it was imperative that Freed promptly engage with the local government to explain how their processes had failed and what had happened as a result.” Barr continued by stating that he did not recall whether he and Freed “discussed [Freed’s] letter to Luzerne County or whether [they] discussed whether [Freed’s] communications with Luzerne County should be public.” Barr further stated that “Freed’s actions were in line with [his] expectation that he would forcefully raise these issues with the relevant county officials and get them immediately addressed.”



putting the letter out [publicly] was” because she was “not part of that conversation,” and that she did not know whether issuing it publicly was something the Attorney General wanted. Later in the interview, however, the OPA Director told us that she had a “vague recollection” that the AG Counselor had told her, in one of their phone calls that morning, “something to the effect of—the AG wants to put this letter out this afternoon as well.” The OPA Director told us that she told Freed to “put it out” because her understanding was that “it was something the Attorney General wanted” and “had interest in putting out.” The OPA Director stated that she did not go back to the AG Counselor or Barr after receiving Freed’s email to confirm that Barr wanted to issue the letter, and that the delay in her responding to Freed was due to her being out of the office on a personal matter. The OPA Director told us that the idea of issuing a letter publicly did not strike her as “inappropriate or unusual” because, she claimed, the Department routinely publicizes “letters on all kinds of issues” in the “interest of transparency.” The OPA Director did not recall reading or even seeing the letter but stated that she assumed that either the AG Counselor or “somebody at Main [Justice]” had reviewed it before it was released.

#### **b. MDPA Releases the Letter Publicly**

At 6:06 p.m., Freed’s office emailed the letter to Luzerne County officials; the letter was publicly released at 6:20 p.m. Addressed to the Director of Elections at the Luzerne County Bureau of Elections, the letter began similarly to the earlier press release, noting that MDPA and the FBI had taken over the Luzerne County ballot investigation. It then provided additional details about the FBI’s ongoing criminal investigation:

Since Monday, FBI personnel have conducted numerous interviews and recovered and reviewed certain physical evidence. While at this point the inquiry remains active, based on the limited amount of time before the general election and the vital public importance of these issues, I will detail the investigators’ initial findings.

The FBI has recovered a number of documents relating to military ballots that had been improperly opened by your elections staff, and had the ballots removed and discarded, or removed and placed separately from the envelope containing confidential voter information and attestation. Specifically, a total of nine (9) military ballots were discovered to have been discarded. Seven (7) of those ballots when discovered by investigators were outside of any envelope. Those ballots were all cast for presidential candidate Donald Trump. One (1) of those seven (7) ballots was able to be identified to an envelope that was recovered, and thereby potentially tied to a specific voter. Two (2) military ballots that had been discarded were previously recovered by elections staff, reinserted into what appeared to be their appropriate envelopes, and then resealed. Therefore, the votes cast on those two (2) ballots are unknown. Thus, it appears that three (3) of the nine (9) recovered ballots can be potentially attributed to specific voters. Six (6) of

the ballots were simply removed and discarded, and cannot be attributed to a specific voter at this time.

In addition to the military ballots and envelopes that were discarded and recovered as detailed above, investigators recovered four (4) apparently official, bar-coded, absentee ballot envelopes that were empty. Two (2) of those envelopes had the completed attestations and signatures on the reverse side. One (1) envelope with a handwritten return address was blank on the reverse side. The fourth empty envelope contains basic location information and the words "affirmation enclosed" on the reverse side. The majority of the recovered materials were found in an outside dumpster.

The letter then discussed "the appropriate method for processing received military ballots" in Pennsylvania and stated that the investigation had revealed that there may be a systemic problem with how Luzerne County handles ballots. The letter described "the preliminary findings" of the federal inquiry as "troubling" and stated that "it is imperative that the issues identified be corrected." To that end, the letter offered that DA Salavantis and Freed "would be happy to meet with you at a mutually convenient time to discuss this matter." Freed told us that he wanted to issue his letter the same day as his press release "to get the process started in order to get that meeting with Luzerne County as quickly as possible."<sup>58</sup> The full letter is attached as Appendix C to this report.

Freed emailed a copy of the letter to the OPA Director and the AG Counselor at 6:16 p.m., with the comment, "Letter FYI." At 6:28 p.m., the MDPA PAO emailed the letter to MDPA leadership and the FBI Philadelphia PAO stating that the attached letter "was issued this evening." The FBI Philadelphia PAO forwarded the letter to her supervisors with the comment, "the latest."

MDPA First Assistant Brandler, who was not in the office that week, responded at 6:42 p.m., "Was this publicly disseminated or just to the named individuals?" The MDPA PAO replied that it was public, and Freed also responded, "Public at Washington's direction." Brandler told us that he was "a bit surprised" that the letter had been made public, and that his "initial reaction" was that "it would have maybe made sense to send it to the named recipients of the letter more than...to issue it publicly," but that he "assumed that all of this was being vetted in Washington."

Donoghue told us that he did not know about the letter prior to its public issuance and did not believe he saw it until we showed it to him during his OIG interview. Herdman likewise stated that he was unaware until his OIG interview that Freed had issued a public letter to Luzerne County. Herdman told the OIG that while he was surprised that he did

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<sup>58</sup> Freed told us, and documents confirm, that a meeting with Luzerne County officials did take place the following week, at which, according to Freed, county officials addressed the systemic concerns Freed's letter identified and laid out a process to ensure that the discarded ballots would be counted.

not know about the letter, he was “not surprised to find out that” Freed had issued it given that Freed had already released two press releases on the Luzerne County matter.

The FBI Philadelphia ASAC told us that she did not know about the letter before the FBI Philadelphia PAO sent it to her, but that it “wasn’t as surprising as” Freed’s initial statement because “at this point” she assumed Freed “is going to do whatever he wants” and was “probably...getting directives from his boss to do stuff like this.” The FBI Philadelphia Special Agent in Charge similarly told us that he did not have advance knowledge of the letter and was “probably...surprised by” it but “assumed that they were dealing with DOJ” and “coordinating as necessary.”

Despite Freed’s exchange with PIN Chief Amundson a few hours earlier about coordination with PIN, Freed did not consult or otherwise notify PIN that he would be issuing a public letter to Luzerne County officials. When we asked the PIN Election Crimes Branch Director about the letter during his OIG interview, the Election Crimes Branch Director told us that it was his “first time hearing about it.” Reading the letter for the first time during his interview, the Election Crimes Branch Director reacted: “It’s appalling. We don’t do this. There wasn’t even a charging document. I mean, they ended up declining it. There’s no—I’ve never seen anything like this.... I’m appalled. This is crazy.” The Election Crimes Branch Director told us that, although the MDPA Criminal Chief and Deputy Criminal Chief did tell him MDPA was issuing a revised statement to correct the inaccurate ballot count, and that he “deferred [to] whatever they were doing with the AG” on that, he had “zero notice” that Freed planned to issue the public letter to Luzerne County and, to his knowledge, “no one in Public Integrity had any knowledge of this” letter either.

Amundson told us that he “didn’t know about” Freed’s public letter at the time it was issued, but that he saw it “at some point” later and found it “deeply troubling, in part because it’s at a point in time when [Freed] now appears to be clearly on notice of the [PIN consultation] policy and yet chose again not to comply with it.” Amundson stated that the Election Year Sensitivities policy made it “clear” that Freed “would still need to consult with PIN” even if OPA had approved the letter, and that it was “very disappointing” that Freed put out another public statement without consulting PIN even after Amundson had flagged the consultation requirement for him.

Freed told us that he released the letter publicly because he wanted “to get more information out there about what the concerns were in Luzerne County.” Asked what releasing the letter publicly accomplished that had not already been accomplished by the earlier statement, Freed replied, “It specified the concerns that were going on, and, you know, further amplified my thoughts about, you know, making sure people were thinking about this when they were preparing to cast their votes.” Asked why he included so much detail in a public letter, Freed stated that he “thought that that information was very important for folks to have because they needed to know the detail with which we were looking at this” and that “the more information that we could put out there, the better” so

“people would know exactly what was going on, and ultimately, could make their choice, and then, we could get these ballots counted.”

We asked Freed why he did not consult with PIN before issuing the letter publicly, especially given his exchange with Amundson a few hours earlier. Freed replied, “Again, I just wasn’t focused on that because I was dealing with the AG, the AG’s Office.” We asked Freed if he thought about the PIN consultation requirement at the time. Freed responded, “When I thought about it, it was, I’m consulting with the AG on this.” However, as noted above, Freed told us that he did not recall speaking with Barr about the public issuance of a letter in addition to the press release, Barr’s letter to the Inspector General makes no mention of a public letter, Freed did not share a draft of his letter with anyone at Main Justice prior to its issuance, and the only person at Main Justice whom we found that Freed had contacted regarding the public issuance of his letter was the OPA Director.

#### **E. Friday, September 25, 2020**

The next day, Freed and PIN continued to deal with the fallout from Freed’s public statements. Documents show that an Associated Press reporter contacted Freed the morning of September 25 seeking comment about the MDPA statement. At 9:05 a.m., Freed emailed the OPA Director, “Do you have 5 minutes for a brief chat please?” Freed told the OIG that members of the media had started reaching out to him personally about the statement, so he “was just looking for a little feedback from [the OPA Director] about how to handle some of this stuff.” Freed told us that the OPA Director did not respond to this email, and that he never spoke with her again about the Luzerne County matter. The OPA Director likewise told us that she did not recall ever communicating with Freed after their exchanges on September 24. Freed emailed the OPA Director again later that afternoon, to share a press release that Luzerne County issued in response to Freed’s public statements, and again the following Thursday, October 1, asking if she had “any thoughts” about another reporter’s questions regarding his statements.<sup>59</sup> The OPA Director did not respond to either email.

Meanwhile, at 11:01 a.m. on September 25, PIN Chief Amundson emailed the entire PIN Section, stating: “PIN—You may be aware of national media reports concerning a statement issued by the U.S. Attorney in the Middle District of Pennsylvania concerning an investigation into allegations of mail-in ballot fraud. PIN was not consulted about the statement.” Just before noon, the PIN Election Crimes Branch Director emailed Amundson and another PIN supervisor that he had notified officials in the DOJ Civil Rights Division who handle voting issues that MDPA “did not consult PIN” before issuing the public statements the previous day. Amundson and the Election Crimes Branch Director told us that they sent these emails because they were concerned that PIN employees and PIN’s DOJ

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<sup>59</sup> On September 25, Luzerne County issued a “Response to the Requested Investigation of [Uniformed Military and Overseas Voters Act] Ballots.” The two-page statement described how county officials became aware of the discarded ballots and the actions county officials took in light of that discovery.

counterparts may question PIN's trustworthiness as a nonpartisan entity within the Department if they mistakenly believed that PIN played any role in authorizing Freed's statements.

**F. Tuesday, September 29, 2020—Meeting Among Barr, Barr's Chief of Staff, Donoghue, and Rabbitt**

CRM DAAG Driscoll told us that, on either the evening of September 24 or the morning of September 25, he called Barr's Chief of Staff to convey his—and PIN's—concerns about “how bad [MDPA's] statement was” and that it was “a pretty significant departure” from the Department's typical policy and practice. According to Driscoll and PIN Chief Amundson, the Chief of Staff tentatively scheduled a meeting for Monday, September 28, at which Driscoll, Amundson, the PIN Election Crimes Branch Director, and CRM Acting AAG Rabbitt could brief Barr, DAG Rosen, and PADAG Donoghue about the rationale for the Department's existing election-related policies and express “what [CRM's] concerns were about the [MDPA] press release.” However, the meeting was subsequently moved to September 29 and modified to include only Rabbitt from CRM.<sup>60</sup>

Rabbitt told the OIG that he was “surprised” by MDPA's statement and thought it was “unusual that they were issuing public statements about” the Luzerne County investigation. Rabbitt told us that he spoke to Barr's Chief of Staff on Sunday, September 27 about his concerns about the MDPA statement and how the statement seemed “inconsistent” with DOJ policies, procedures, and precedents. Rabbitt said that he and the Chief of Staff agreed that a meeting between the Attorney General and PIN leadership was unnecessary and that Rabbitt would instead provide the relevant policies for Department leadership to review. Rabbitt said that the Chief of Staff canceled the scheduled meeting at that point but later requested that Rabbitt brief the Attorney General on these issues. Rabbitt stated that although “the genesis of the meeting” was the MDPA situation, the purpose of the meeting was not a discussion of what had occurred in MDPA but a broader overview of the relevant election-related policies and how they were applied.

On September 29, Barr, his Chief of Staff, Donoghue, and Rabbitt attended the meeting, which lasted approximately 20 to 30 minutes. According to Rabbitt, the group discussed the relevant policies and procedures and “how PIN typically approached these issues.” Rabbitt stated that Barr “essentially expressed his view that this election season was very different from any others given the pandemic [and] given the increased prevalence of mail-in voting, and that he was thinking about whether changes needed to be made to the [election non-interference] policy or exceptions [made] as a result.”<sup>61</sup> Rabbitt

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<sup>60</sup> Before being appointed as Acting AAG of CRM, Rabbitt had served as Barr's Chief of Staff.

<sup>61</sup> Attorney General Barr ultimately did issue a change to DOJ's election non-interference policy on November 9, 2020, in a memorandum titled “Post-Voting Election Irregularity Inquiries.” That memorandum authorized the FBI and federal prosecutors to “pursue substantial allegations of voting and vote tabulation

(Cont'd.)

told us that he did not have a specific recollection of discussing the MDPA matter during this meeting.

Donoghue told the OIG that this meeting may have been part of a “larger conversation” between the Attorney General and PIN in which the Attorney General repeatedly said that the Department had “to make sure people can have confidence in the outcome of the election,” while PIN emphasized the Department’s traditional approach of typically waiting until after the election to act. According to Donoghue, Barr had frequently articulated in meetings his view that ensuring public confidence in the election required the Department to address allegations of election fraud “as quickly and effectively as possible, so as to deter similar conduct during the election cycle.” Donoghue told the OIG that he did not specially recall if the MDPA matter was discussed at this meeting. Donoghue provided the OIG with his notes from the meeting, which did not include any reference to the MDPA matter.

Although Amundson did not attend the September 29 meeting, and witnesses told us that the MDPA matter was not discussed at the meeting, Amundson told us that he understood the bottom-line message from leadership to be that authorizing the MDPA statement was “certainly something we can do” and “was not a...mistake,” but that Barr’s Chief of Staff promised to “make a better effort” to loop PIN in “to the extent there are proposed statements in the future.”

**G. October 26, 2020—MDPA Declination and PIN’s Suggestion that MDPA Issue a Second Press Release Announcing that the Investigation Was Closed**

On October 26, 2020, the MDPA Deputy Criminal Chief emailed the PIN Election Crimes Branch Director to alert him that MDPA had determined—with concurrence from the FBI—that there was “insufficient evidence to prove criminal intent on the part of” the Luzerne County subject and that prosecution therefore should be declined. The Deputy Criminal Chief’s email noted that Freed had “updated the Deputy Attorney General’s Office on the investigation’s progress and developments” throughout. The Deputy Criminal Chief asked the Election Crimes Branch Director to let MDPA “know if there [was] anything else that [MDPA] should do” before formally declining and closing the investigation.

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irregularities prior to the certification of elections...if there are clear and apparently-credible allegations of irregularities that, if true, could potentially impact the outcome of a federal election in an individual State.” The memorandum acknowledged that such a policy change was inconsistent with PIN’s “general practice” of counseling against overt investigative steps until after an election has been certified, but it stated that PIN’s non-interference policy “has never been a hard and fast rule,” that it “can result in situations in which election misconduct cannot realistically be rectified,” and that the concerns motivating PIN’s approach “are greatly minimized, if they exist at all, once voting has concluded, even if election certification has not yet been completed.” On February 3, 2021, then Acting Attorney General Monty Wilkinson rescinded Barr’s November 9, 2020 memorandum.

After consulting with his supervisors at PIN, the Election Crimes Branch Director replied to the MDPA Deputy Criminal Chief later that day, stating, “[I]n the unique circumstances of this matter and its public statement history, PIN concludes that you should consider an appropriate press release as soon as possible reassuring the public that there was no intentional misconduct involved.” The Election Crimes Branch Director requested that MDPA provide a draft of the proposed statement to PIN “for vetting” pursuant to the Election Year Sensitivities Memorandum.

We asked the Election Crimes Branch Director why he proposed that MDPA issue such a statement. The Election Crimes Branch Director stated that he wanted MDPA to “try and undo the damage they had done to the neutrality of the Department—to the appearance that [the Department was] taking a partisan position and try[ing] to play into a narrative of one political party over another.”

PIN Chief Amundson and CRM DAAG Driscoll told us that they agreed with the Election Crimes Branch Director’s suggestion to issue a statement about the declination. Amundson told the OIG that Freed’s initial statements “unfortunately misinformed the public” by giving the impression that criminal conduct had occurred, and that he believed another statement was warranted here to correct that “misimpression.” Amundson cautioned that he felt that a new statement was appropriate only because of the prior statements and added that these events presented a good example of the unforeseen complications that can arise when public statements are issued about ongoing investigations. DAAG Driscoll similarly told us that, while CRM would not “normally...advocate for” such a statement, they felt it was “incumbent” on MDPA to issue one here because MDPA had “gone out there and made these very public statements” about an investigation that “end[ed] up being closed with no charges.” As Driscoll put it, CRM’s view was “you shouldn’t issue these statements, but if you issue a statement that turns out to be...way forward-leaning on an investigation that ends up not going anywhere, you have the duty to correct.”

The Deputy Criminal Chief immediately forwarded the Election Crimes Branch Director’s email to Freed. Fifteen minutes later, Freed emailed Donoghue asking Donoghue to call Freed at his convenience; 2 hours later, Freed forwarded to Donoghue the email from the Deputy Criminal Chief and the Election Crimes Branch Director’s response.

Freed told us that he found the Election Crimes Branch Director’s suggestion “interesting,” so he spoke with Donoghue “about the matter of a further press release.” Freed stated that Donoghue told him, “Hold off, I’m not sure you want to do that.” Freed continued, “[Donoghue] didn’t think it was such a great idea, and it was kind of left there. I didn’t really follow up too much on it.” Freed told us that, although his “inclination” would have been to put out a statement announcing that the investigation was closed, in light of Donoghue’s response, he did not ultimately issue the statement that the Election Crimes Branch Director recommended.

Donoghue told us that he did not recall either discussing the issue of a declination statement with Freed or seeing a draft of a proposed declination statement. However, Donoghue did recall the Election Crimes Branch Director's proposal and called it "a classic disconnect between PIN and the field," explaining, "The field is saying, we have done the investigation, and we have concluded that we can't prove criminal intent. [The Election Crimes Branch Director] then turns that into a very different conclusion, which is the federal government has concluded that there is no intentional misconduct. There's a chasm between those two things." Donoghue stated, however, that he was not sure if this chasm "played at all into a decision to issue something or not issue something here." We asked Donoghue if there would have been value in issuing some sort of statement announcing the declination decision, even if it did not include the Election Crimes Branch Director's suggested language that there was no intentional misconduct involved. Donoghue responded, "If there was going to be a public statement at that point, I certainly would have looked for something more in the middle," such as an announcement stating simply that MDPA had looked into the matter and determined that "no criminal charges were appropriate." Donoghue noted that such an announcement "would sort of be in keeping with the AG's desire to reassure the public that we're doing our job, and that [this situation is not one] where election fraud is being ignored if there is some sort of election fraud at all."

The MDPA Criminal Chief and Deputy Criminal Chief told the OIG that, in response to the Election Crimes Branch Director's suggestion, a press release announcing the declination was drafted in late October and sent up the chain to Freed, but that they did not know what happened with it and did not know why it was not issued. The Election Crimes Branch Director told us that MDPA never sent him a draft statement to review. The OPA Director told us that she did not remember "having any conversations" about issuing a subsequent press release in October.

#### **H. January 15, 2021—Acting U.S. Attorney Brandler Issues a Public Statement Announcing that the Luzerne County Investigation Was Closed**

Freed resigned as the U.S. Attorney for MDPA on January 1, 2021, and Brandler took over as the Acting U.S. Attorney.

On January 11, 2021, MDPA received an email from a reporter asking about the status of the Luzerne County investigation. Brandler told the OIG that, as a result of that email, he began asking his staff and various Department officials in the Executive Office for U.S. Attorneys, OPA, and PIN about the propriety of announcing the conclusion of the investigation. Brandler stated that he also directed the MDPA PAO to reach out to the FBI about releasing a statement, and that the MDPA PAO reported back that the FBI "did not



have any objections.”<sup>62</sup> Brandler stated that during this process he discovered that a draft press release announcing the conclusion of the investigation already existed.<sup>63</sup> Brandler told the OIG that MDPA transmitted this draft press release to PIN and other Criminal Division officials, who, after “a few edits...authorized [MDPA] to issue the release.”<sup>64</sup>

On January 15, 2021, MDPA issued a press release entitled “Investigation Concluded In Luzerne County Ballot Case.” It stated in full:

Acting U.S. Attorney Bruce D. Brandler today announced that the investigation into nine ballots that were discarded by a former temporary employee of the Luzerne County Elections Bureau has been concluded.

“After a thorough investigation conducted by the FBI and prosecutors from my office, we have determined that there is insufficient evidence to prove criminal intent on the part of the person who discarded the ballots,” said Brandler. “Therefore, no criminal charges will be filed and the matter is closed.”

The federal investigation resulted from a request by the Luzerne County District Attorney’s Office after it learned that nine completed general election ballots had been received and discarded by the former employee. The investigation revealed that the nine completed military ballots were discarded and subsequently retrieved from a dumpster.

Acting U.S. Attorney Brandler thanked the FBI for devoting the necessary resources to conduct a thorough and complete investigation. He also thanked the staff of the Elections Bureau and other Luzerne County officials for cooperating with investigators and prosecutors.<sup>65</sup>

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<sup>62</sup> The FBI Scranton SSRA confirmed that the MDPA PAO reached out to the FBI about issuing the statement and stated that he responded that the FBI approved doing so as long as PIN signed off on it.

<sup>63</sup> Brandler told us that he recalled Freed mentioning at a meeting in the fall that he was considering issuing a press release announcing a conclusion, but that he (Brandler) did not see an actual copy of the draft press release until January.

<sup>64</sup> The documents we reviewed are consistent with Brandler’s recollection. On January 12, 2021, in response to an email from OPA asking how PIN would like to proceed, PIN Chief Amundson wrote: “The district has two options. First: stand-by original press release (and, by extension, its inaccurate narrative) by declining to issue a new release. Second: clarify situation through new press release. While the situation may be challenging for the district in many ways, this decision should not be.”

<sup>65</sup> DOJ MDPA, Press Release, “Investigation Concluded In Luzerne County Ballot Case,” January 15, 2021. A copy of MDPA’s January 15, 2021 press release is attached to this report at Appendix D.

## V. Analysis

In this section, we analyze whether certain actions by then Attorney General Barr and then U.S. Attorney Freed violated DOJ policies. Specifically, we assess whether (1) MDPA's September 24, 2020 public statement violated Department policies that prohibit, with limited exception, commenting on an ongoing criminal investigation and require advance consultation with PIN and any affected DOJ component and, if so, who was responsible for those violations; (2) MDPA's public release of its September 24, 2020 letter to the Director of the Luzerne County Bureau of Elections similarly violated those DOJ policies and, if so, who was responsible for those violations; and (3) Barr's September 23, 2020 disclosure to President Trump of details concerning a pending criminal investigation violated the Department's White House communications policy.

The Department's policies generally prohibiting public comment on an ongoing criminal investigation before charges are publicly filed reflect a strong institutional norm, which is rooted in the Department's mission to pursue justice based on evidence presented in courts of law, not the court of public opinion. The policies also reflect the Department's obligation to protect the constitutional and statutory privacy and fair trial rights of investigative subjects and accused persons.<sup>66</sup>

This norm is not only unambiguously set forth in DOJ policies but is also deeply ingrained in DOJ prosecutors. Other than Freed and the OPA Director, nearly every DOJ lawyer we interviewed—both career employees and Trump Administration political appointees—emphasized how “unusual” it would be for the Department to issue a public statement containing details about an ongoing criminal investigation, particularly before any charges are filed. For example, then U.S. Attorney Justin Herdman put it succinctly: “If [we] don't have a charge, we don't say anything about an investigation; we just don't do that.” Similarly, then PADAG Richard Donoghue told the OIG that “it would be very unusual to issue a public statement in the middle of an investigation” and that DOJ prosecutors “don't typically” do so. At most, Donoghue stated, “if there was a lot of coverage already and if people are already reporting that the federal government was involved,” the Department might issue a statement saying “hey, we're looking at this, just to assure people that we're looking at it.” But issuing a statement containing details about the investigation before indictment would be, Donoghue told us, “very unusual.”

PIN Chief Corey Amundson echoed this view, stating: “Any statement during the course of an investigation, unless there are exceptional reasons [for it]..., is inappropriate. There's no reason to do it.” Amundson explained that this policy is grounded in several rationales, including “the presumption of innocence and not wanting to disparage people

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<sup>66</sup> See Justice Manual §§ 1-7.001 (outlining the purpose of the DOJ's Confidentiality and Media Contacts Policy) & 1-7.100 (describing the general need for confidentiality in DOJ matters).

publicly unless they're charged—and then it's through charging documents—and wanting to get the truth before you make conclusions about things.”

The Department also has long been particularly cognizant of, and alert to, the sensitivities of making public statements about election-related investigations during an election season. Indeed, it has become regular practice for Attorneys General to issue to all DOJ employees during major election cycles an “Election Year Sensitivities” Memorandum highlighting these concerns. Barr issued his own Election Year Sensitivities Memorandum on May 15, 2020, which admonished Department employees to “be particularly sensitive to safeguarding the Department’s reputation for fairness, neutrality, and non-partisanship” near an election. The memorandum went on to state, among other things, that “law enforcement officers and prosecutors may never select the timing of public statements (attributed or not)...in any matter or case for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.” Barr’s memorandum required employees who “face an issue, or the appearance of an issue, regarding the timing of statements, investigative steps, charges, or other actions near the time of a primary or general election” to “contact the Public Integrity Section of the Criminal Division for further guidance.”<sup>67</sup>

Due to similar concerns about protecting the Department’s reputation for fairness, neutrality, and non-partisanship, the Department has a longstanding policy limiting DOJ communications with White House officials, including the President. First articulated in a 1978 speech by then Attorney General Griffin Bell, in the wake of the Watergate scandal, the Department’s policy regulating communications with the White House has been maintained through every subsequent Administration via Attorney General memoranda.<sup>68</sup> As the Justice Manual chapter incorporating the policy elaborates, the goal of constraining White House communications is not only to prevent *actual* political interference but to “ensure that the Department’s actions are free from the *appearance* of political influence.”<sup>69</sup> And as both the Attorney General memoranda and the Justice Manual make

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<sup>67</sup> Barr Election Year Sensitivities Memorandum, p. 1.

<sup>68</sup> Address by Attorney General Griffin B. Bell to Department of Justice Lawyers, September 6, 1978; *see also* Benjamin R. Civiletti, Attorney General, Communication from the White House and Congress, Memorandum to Heads of Offices, Boards, Bureaus, and Divisions, October 18, 1979; Michael B. Mukasey, Attorney General, Communications with the White House, Memorandum for Heads of Department Components and U.S. Attorneys, December 19, 2007; Eric Holder, Attorney General, Memorandum for Heads of Department Components and United States Attorneys, Communications with the White House and Congress, May 11, 2009; Merrick Garland, Attorney General, Department of Justice Communications with the White House, Memorandum for All Department Personnel, July 21, 2021.

<sup>69</sup> Justice Manual § 1-8.100 (emphasis added).

clear, “ensur[ing] that these principles are upheld in all of the Department’s legal endeavors” is a “fundamental duty of *every employee of the Department.*”<sup>70</sup>

In undertaking our analysis of the actions of Department officials in issuing public comments about this investigative matter, we recognize that the exception in the DOJ Confidentiality and Media Contacts Policy for reassuring the public that an appropriate law enforcement agency is investigating a matter is intended to provide Department leadership with some flexibility from the policy’s general prohibition on commenting about an ongoing investigation. Indeed, the Department’s ability to reassure the public in appropriate ways in certain, limited circumstances about its involvement in an investigation is often critically important. However, even considering the exception through the broadest possible lens, we concluded that the MDPA statement did not comply with the Justice Manual provision prohibiting comment about ongoing criminal investigations before charges are filed because it included selective, non-public details about an ongoing election fraud investigation just weeks before the election—including, most notably and inaccurately, that all nine recovered ballots were cast for President Trump—and misled the public about the nature and seriousness of the matter being investigated. We further concluded that, based on its plain language, the Justice Manual provision applies to all DOJ employees, including the Attorney General, and that the provision does not include an exception for the Attorney General. However, we also noted that the DOJ’s decades old policy statement that limits public commentary by DOJ employees about an ongoing criminal investigation, 28 C.F.R. § 50.2, includes a provision recognizing the Attorney General’s discretion to publicly disclose information about an ongoing criminal investigation that the Attorney General believes is “in the interest of the fair administration of justice,” an exception that is not included in Justice Manual § 1-7.400. As explained below, because of the Attorney General’s discretion recognized in 28 C.F.R. § 50.2, and the ambiguity as to its intersection with Justice Manual § 1-7.400, we did not find that either Barr or Freed committed misconduct in issuing the MDPA statement. We make recommendations below regarding 28 C.F.R. § 50.2 and Justice Manual § 1-7.400.

We found that Freed violated the Justice Manual § 1-7.400, prohibiting comment about ongoing criminal investigations before charges are filed, when he, without Attorney General approval, publicly released the letter to Luzerne County officials containing additional selective details about the investigation. We also found that Freed violated DOJ policies requiring employees to consult with PIN before issuing a public statement in an election-related matter and requiring U.S. Attorneys to coordinate comments on pending investigations with any affected Department component.

Lastly, we considered whether Barr’s briefing to President Trump about the Luzerne County investigation violated DOJ’s White House communications policy. Although we were troubled by the particular investigative facts that Barr chose to relay to President Trump in

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<sup>70</sup> White House Communications Memorandum, p. 1 (emphasis added); Justice Manual § 1-8.100.

the briefing, we concluded that the policy appears to leave to the Attorney General's discretion the determination of precisely what information can be shared with the President where a communication is permissible under the policy, as we found was the case with Barr's briefing. Accordingly, we did not find that Barr violated that policy. We recommend that the Department consider updating its White House communications policy to clarify what information can be disclosed to the White House in situations where the policy permits communication about a contemplated or pending civil or criminal investigation.

**A. The MDPA Statement Did Not Comply with Justice Manual § 1-7.400; However, Barr May Have Had Authority to Approve the Release of the Statement Under 28 C.F.R. § 50.2(b)(9)**

For the reasons we describe below, we determined that the MDPA statement did not comply with Justice Manual § 1-7.400. However, we did not find that either Barr or Freed committed misconduct because Barr may have had authority to approve the release of the statement pursuant to 28 C.F.R. § 50.2(b)(9).

**1. Although Barr and Freed's Decision to Issue a Statement Pursuant to Justice Manual § 1-7.400(C) was Within Their Discretion, the Statement Issued Did Not Comply with 1-7.400(C)**

Justice Manual § 1-7.400, entitled "Disclosure of Information Concerning Ongoing Criminal, Civil, or Administrative Investigations," states that Department personnel "generally will not confirm the existence of or otherwise comment about ongoing investigations" prior to charges being publicly filed. Section 1-7.400(B) by its terms applies to all "DOJ personnel."<sup>71</sup> Moreover, the prohibition set forth in § 1-7.400(B) is mandatory: unless one of the two exceptions provided in § 1-7.400(C) applies, "DOJ personnel *shall not*" comment on the "nature or progress" of an ongoing investigation before charges are publicly filed. (Emphasis added). Section 1-7.400(C) defines the two exceptions to that general rule, stating that "comments about or confirmation of an ongoing investigation may be necessary" when "the community needs to be reassured that the appropriate law enforcement agency is investigating a matter" or when "release of information is necessary to protect the public safety."

In his letter to the Inspector General, Barr stated that the MDPA statement satisfied § 1-7.400(C)'s first exception: that commenting on the Luzerne County investigation was necessary because "the community need[ed] to be reassured that the appropriate law enforcement agency" was investigating the matter. Specifically, Barr stated that "recounting the basic facts that prompted the investigation" would "provide the public with

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<sup>71</sup> See also Justice Manual § 1-7.001, which states that the DOJ Confidentiality and Media Contacts Policy, which encompasses § 1-7.400, "applies to all DOJ personnel."

assurance that the matter was being vigorously pursued by federal authorities” and that the Department “was vigilant in assessing the concrete risks posed to election integrity.”

As described in Section IV.B.4 of this report, Luzerne County DA Salavantis issued a press release on September 22, 2 days prior to the issuance of the MDPA statement, stating that the DA’s Office had learned of “issues with a small number of mail-in ballots which were received by the Luzerne County Bureau of Elections,” that her office had “consulted with the United States Attorney’s Office,” and that “federal authorities [had] assumed lead investigative authority of this incident.” Other than noting that a “small number” of ballots were involved, the DA’s statement did not include any substantive details regarding the investigation. Under § 1-7.400(C), Barr and Freed had discretionary authority to determine whether the Department, in order to reassure the community that the Department was in fact investigating the matter, should issue its own statement confirming or acknowledging that DOJ had taken over the Luzerne County ballot investigation. We therefore found that Barr and Freed’s decision to issue a statement for this purpose was permissible under § 1-7.400(C). However, for the reasons we describe below, we determined that the statement Barr and Freed ultimately issued did not comply with § 1-7.400(C) because, by including selective details about the investigation that went well beyond the limited purpose of the exception on which its issuance relied, the statement misled the public about the nature and seriousness of the matter being investigated.

Section 1-7.400(C) does not address what information is appropriate to include in a public statement that officials have determined is necessary to reassure the public that the appropriate law enforcement agency is investigating a matter. The policy simply provides that “comments about or confirmation of an ongoing investigation may be necessary” in this circumstance. Thus, § 1-7.400(C) affords DOJ officials with greater discretionary authority, and flexibility, to determine what information to include in a statement to reassure the public that the Department is handling an investigation. That discretion, however, is not boundless given the limited nature and purpose of this exception to DOJ’s long and well-established “stay silent” principle for ongoing criminal investigations, a principle that is ingrained in federal prosecutors and that underlies numerous Department policies, practices, and norms. As we described in our report of *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, the “stay silent” principle “exists to protect the privacy and reputational interests of the subjects of the investigation, the right to a fair trial for those subsequently accused of crimes, the integrity of an ongoing investigation or pending litigation, and the Department’s ability to effectively administer justice without political or other undue outside influences.”<sup>72</sup> These important protections are the foundation for the numerous

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<sup>72</sup> DOJ OIG, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, Oversight and Review Division Report 18-04 (June 2018),

(Cont’d.)

provisions in the Department's Justice Manual that govern and limit information that may be released in ongoing matters, such as § 1-7.100 ("General Need for Confidentiality"), § 1-7.500 ("Release of Information in Criminal, Civil, and Administrative Matters—Disclosable Information"), and § 1-7.610 ("Concerns of Prejudice"); its Election Year Sensitivities Memorandum; and its long-observed norm against taking public actions during the run-up to an election that could impact the election. Additionally, the Department has policies prohibiting its prosecutors from insinuating or alleging in public filings during an ongoing investigation or prosecution that an individual who has not been charged with a crime is nevertheless guilty of some wrongdoing.<sup>73</sup>

Nearly every witness we spoke to in this case, including Trump Administration officials and career prosecutors, expressed concerns about the breadth and scope of the investigative details included in the MDPA statement given the narrow purpose of the exception in § 1-7.400(C). We share these concerns and believe that whatever the precise boundaries of the discretion provided for in § 1-7.400(C), any DOJ statement that is issued to reassure the public that the appropriate law enforcement agency is investigating a matter must, at a minimum, not mislead the public about the nature and seriousness of the matter being investigated and must be factually accurate. That was not the case here.

As described in this report, the MDPA statement included selective substantive details about information then known to the Department, including that nine ballots had been recovered "at this time," the recovered ballots were from military members, that some could be attributed to specific voters, and (incorrectly) that all of the recovered ballots "were cast for presidential candidate Donald Trump," an injection of partisan considerations that multiple career prosecutors told us was not relevant to and had "no bearing on" the criminal investigation. In contrast, the MDPA statement omitted certain critical details also known by Department leadership at the time—namely, that a federal criminal case was unlikely given the questions that had been raised about the subject's mental capacity and whether the subject had discarded the ballots by mistake. Further, Department leadership knew that the incident was isolated and that there was no evidence of more widespread election fraud. Indeed, the Luzerne County DA's press release noted that the issues identified involved "a small number of mail-in ballots." We concluded that by selectively referencing only the votes for the presidential election and highlighting that all nine recovered ballots were marked for President Trump, while omitting any reference to the fact that a federal criminal case was unlikely and the limited nature of the potential wrongdoing, the MDPA statement provided inaccurate information to the public, unnecessarily inserted partisanship into the investigation, and created a false impression that the conduct under investigation was much more serious than Department leadership knew it to be. Indeed, the Department determined just weeks later—before the election—

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<https://oig.justice.gov/reports/review-various-actions-federal-bureau-investigation-and-department-justice-advance-2016>, 365.

<sup>73</sup> See, e.g., Justice Manual § 9-27.760, "Limitation on Identifying Uncharged Third Parties Publicly."

that no charges would be brought in the matter, although it did not inform the public of that fact until months after the election.

Predictably, rather than reassuring the public, the MDPA statement had the opposite effect. Its issuance resulted in news stories raising questions about the election process in Luzerne County, the appropriateness of using mail-in voting generally (reinforcing a concern Barr himself had publicly raised just weeks earlier), and the possibility of widespread fraud directed at President Trump. Separately, other news stories raised questions as to why the Department was publicly discussing any evidence in an ongoing election-related criminal investigation in a key battleground state given its long-standing policies prohibiting such public comments and why, in doing so, Department leaders chose to emphasize that the votes were cast on behalf of President Trump, thereby opening the Department to criticism that improper political considerations may have been influencing its investigative decisions.<sup>74</sup> Thus, the MDPA statement not only raised questions about the decision to include certain politically sensitive information (e.g., identifying the candidate for whom ballots were cast), but also why certain critical facts (e.g., that criminal charges were not likely to be brought) were omitted from it and why the decision to close the investigation was not announced until well after the election.<sup>75</sup> We also note that the misleading MDPA statement failed to heed Barr's own admonishment—contained in his Election Year Sensitivities Memorandum—that Department employees “be particularly sensitive to safeguarding the Department’s reputation for fairness, neutrality, and non-partisanship” near an election.

Barr told the OIG in his letter to the Inspector General that he “favored and authorized putting out information along the lines of [MDPA’s] September 24 statement,” and Freed told the OIG that Barr specifically approved inclusion of investigative details in the statement, including the fact that “all nine ballots were cast for presidential candidate Donald Trump.” Barr stated in his letter that he favored including “the basic facts that prompted the investigation” in the MDPA statement as a way to quell public concerns about election integrity. Specifically, Barr stated: “Due to the involvement of local officials

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<sup>74</sup> In comments submitted after reviewing a draft of this report, Barr’s counsel maintained that Barr’s decision to authorize release of the MDPA statement was not motivated by political considerations. Barr’s counsel stated that “the notion that Attorney General Barr chose the language of the [MDPA statement] in order to advantage his preferred Presidential candidate at the expense of his Democratic rival is, to understate the point, not easy to reconcile with his December 1, 2020 statement to the Associated Press concerning the absence of outcome-affecting, election-fraud evidence.” Barr’s counsel continued: “Both statements were, in some sense, unusual, even exceptional. Both disclosed facts relating to ongoing investigations. And both involved the exercise of Barr’s discretion to disclose facts that, in his judgment, were necessary to reassure the public about the course of an investigation and to reinforce the critical importance of election integrity.” We note that this report does not examine or attempt to assess Barr’s motivations for authorizing the MDPA statement, and that our findings are not based on his motivations.

<sup>75</sup> As referenced later in this report, given the potential Hatch Act implications, the OIG is referring the matter to the Office of Special Counsel.



and county witnesses, I thought that further revelations of information about the incident were likely, potentially could come at any time, and could be mistaken.” Barr further wrote:

...I was concerned that the vagueness of the local officials’ statement, coupled with the Department’s silence, was contributing to undue speculation and potentially unsettling the public more than necessary about the election’s integrity. I considered this was a matter in which the public interest could likely be best served by getting out in front of the story by recounting the basic facts that prompted the investigation. Among other things, doing so would help dispel needless mystery and speculation by delimiting the nature and scope of the issue being investigated.

Barr’s letter went on to assert that a public statement would “have a salutary deterrent effect” and serve as “a reminder to election administrators” of their responsibility to safeguard election integrity. Barr ultimately stated that he had determined, in his judgment, that “a strategy of remaining silent” about details of the Luzerne County ballot investigation “would have ended up doing more harm to the public interest than getting out in front with a more forthcoming statement in the first place.”<sup>76</sup> Freed, for his part, told us that he believed releasing details about the investigation was important because it was the “best way” to keep the public officials running these elections “honest,” and because it would alert military voters that their ballots may have been discarded.<sup>77</sup>

In comments submitted to the OIG after reviewing a draft of this report, Barr stated that it was important at the outset to reassure the public “that there was a legitimate basis for the federal government to take over the investigation.” Barr continued: “The key fact that justified the federal government taking over the investigation was that only Trump ballots—no Biden ballots—had been found discarded.” Barr added that this fact was a “red flag” for investigators and “suggested that the discarding of ballots was not random or accidental, but potentially intentional.” In comments submitted after reviewing a draft of this report, Freed’s counsel echoed this sentiment, stating: “Had the statement not

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<sup>76</sup> We were struck by the similarity between the justifications presented here and the explanation former FBI Director James Comey gave during our review of his conduct in advance of the 2016 election. In explaining why he announced to Congress that the FBI had resumed its investigation of then presidential candidate Hillary Clinton less than 2 weeks before the 2016 election, Comey told the OIG that he had determined, in his own judgment, that “there was a powerful public interest” in commenting on the Clinton email investigation, and that it would have been “catastrophic” to the Department and the FBI to not do so. DOJ OIG, [A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election](https://oig.justice.gov/reports/review-various-actions-federal-bureau-investigation-and-department-justice-advance-2016), Oversight and Review Division Report 18-04 (June 2018), <https://oig.justice.gov/reports/review-various-actions-federal-bureau-investigation-and-department-justice-advance-2016>, 365.

<sup>77</sup> Neither Barr nor Freed, nor any witness we spoke to, suggested that § 1-7.400(C)’s second exception—permitting comment on investigations when “release of information is necessary to protect the public safety”—applied here.

included [that the discarded ballots were all for President Trump], it would have omitted the operative fact that provided the predicate for federal involvement and would have left the public completely confused.” We found that this concern expressed by both Barr and Freed about federal involvement could just as easily have been satisfied by stating that all of the ballots were for the same presidential candidate, rather than identifying a particular candidate, which would have avoided injecting partisan considerations into a public statement by the Department. Moreover, the MDPA statement includes no information about the choices of the voters in the district’s congressional race, which would have been equally relevant to establish federal jurisdiction in the matter.

As we stated above, we found that Barr’s and Freed’s determination that a public statement was needed to reassure the public about the Department’s role in investigating the alleged election-related violations was permissible under § 1-7.400(C). Such a statement can also importantly serve a deterrence purpose, for the reasons Barr noted. However, a statement that includes selective investigative information that misleads the public about the nature and seriousness of the conduct being investigated does not comply with § 1-7.400(C), regardless of the claimed justification. We note that the Department’s “stay silent” approach to ongoing investigations is not a mere “strategy”; it is a long-standing principle that finds expression throughout Department policy and, as nearly all of the witnesses we spoke to indicated, is an ingrained feature of ongoing investigations. We also note, with respect to the additional purposes for which Barr asserted a “more forthcoming” statement was needed, the MDPA statement actually had the opposite effect. Rather than quell undue speculation and public concern about election integrity, the MDPA statement caused news stories to raise questions about the election process in Luzerne County; rather than prevent further revelations of mistaken information, the MDPA statement itself provided the public with inaccurate information; and rather than dispel speculation by providing the nature and scope of the issues under investigation, the MDPA statement misled the public about the nature and scope of the investigation, resulting in news stories speculating about the possibility of widespread fraud directed at President Trump.<sup>78</sup> We believe these negative consequences of the MDPA statement reinforce the importance of the Department’s policy generally prohibiting public comment on an ongoing criminal investigation before charges are publicly filed and illustrate why public statements made under exceptions to this policy should hew closely to the limited purposes for which they are permitted.

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<sup>78</sup> In comments submitted after reviewing a draft of this report, Barr described the OIG’s finding that the statement was misleading as “nonsense.” Barr stated that “nothing in the MDPA statement gives the impression that we expected to find appreciably more widespread ballot-tampering than had already been found” and added that “the MDPA statement inarguably provides a narrower and more contained description of the anticipated scope of the problem” than the prior statement from DA Salavantis. Barr also stated that the “overall content and tenor” of the MDPA statement emphasized the limited nature of the wrongdoing uncovered. Barr concluded by stating that, from his point of view, “the MDPA statement had its intended effect” and “public concern over the dimensions of the tampering in Luzerne substantially abated” in its aftermath.

## 2. The Justice Manual's Confidentiality and Media Contacts Policy Applies to the Attorney General

As noted above, Section 1-7.400(B) plainly states that it applies to all "DOJ personnel," which includes the Attorney General. Similarly, Justice Manual § 1-7.001 states that the DOJ Confidentiality and Media Contacts Policy, which encompasses § 1-7.400, "applies to all DOJ personnel." Neither of these Justice Manual provisions include any language suggesting that they were not intended to apply to the Attorney General. By contrast, for example, 28 C.F.R. § 50.2 contains language specific to the Attorney General and the Attorney General's authority to grant an exception to the policy's general prohibition on disclosure. We further noted that the Department's predecessor to the Justice Manual, the U.S. Attorneys' Manual, contained a provision similar to § 1-7.400 that referenced 28 C.F.R. § 50.2, which Justice Manual § 1-7.400 does not.

Despite the plain language of these Justice Manual provisions, in his letter to the Inspector General, Barr contended that he "[did] not think there can be any legitimate claim of violating policy" because the Attorney General "has wide discretion and ultimate authority to make judgments about public disclosure of information." Also, in comments provided to the OIG after reviewing a draft of this report, Barr stated that § 1-7.400 applies only to the Attorney General's subordinates and, moreover, even if that provision applied to the Attorney General, "a mere statement of policy by the Attorney General does not preclude the Attorney General himself from modifying that policy in applying it in a particular case."

To be sure, the Attorney General has the ultimate authority to both *set* and *change* Department policy; Barr's November 9, 2020 memorandum modifying DOJ's election non-interference policy is an example of Barr exercising such discretion. The Attorney General also has the authority to include language in a DOJ policy that exempts, or is specific to the actions of, the Attorney General; the White House communications policy is an example of such a policy, as is 28 C.F.R. § 50.2. But the general authority of the Attorney General to *change* Department policy or include an *exemption* for the Attorney General in a Department policy does not imply a commensurate discretion to ignore, on an *ad hoc* basis, an existing Department policy that expressly states that it applies to all DOJ personnel. Such a rule would render all such Department policies meaningless when applied to the Attorney General (as well as component policies when applied to a component head such as the FBI Director)—and in doing so, threaten to erode public confidence in the fairness and objectivity of the Department. The very purpose of having Department-wide policies applicable to all DOJ employees is to ensure that the Department's administration of justice both is—and appears to be—evenhanded and insulated from political influence. We therefore do not believe that Barr is immune from a finding that he violated a DOJ policy that on its face applies to the Attorney General.

### 3. We Did Not Find that Barr or Freed Violated Justice Manual § 1-7.400 Due to Ambiguity as to the Applicability of 28 C.F.R. § 50.2(b)(9)

Despite our findings that the MDPA statement did not comply with § 1-7.400(C) and the Confidentiality and Media Contacts Policy applies to the Attorney General, we did not find that either Barr or Freed violated DOJ policy due to the ambiguity of the intersection between 28 C.F.R. § 50.2(b)(9) and Justice Manual § 1-7.400. As noted above, Section 50.2 is a policy statement that was promulgated by then Attorney General Nicholas Katzenbach without notice and comment in 1965 and was later amended by Attorney General John Mitchell in 1971.<sup>79</sup> Section 50.2(a)(1) states that the purpose of the policy statement “is to formulate specific guidelines for the release of” information relating to criminal and civil proceedings. Section 50.2(b)(9) states:

Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

However, in 2018, the Department created the Justice Manual, which contains the Confidentiality and Media Contacts Policy of which § 1-7.400 is a part. Portions, but not all, of § 50.2 have been incorporated into the Justice Manual.<sup>80</sup> For example, while Justice Manual § 1-7.400 allows exceptions when “the community needs to be reassured that the appropriate law enforcement agency is investigating a matter, or where release of information is necessary to protect the public safety,” it does not reference § 50.2 and does not include a provision that allows DOJ personnel to seek an exception from the Attorney General in the broader circumstance of “the fair administration of justice and the law enforcement process.” By contrast, the prior version of this Justice Manual provision, found in what was the U.S. Attorneys’ Manual, incorporated § 50.2 by reference and included broader exception language (authorizing disclosure where “necessary to protect the public interest, safety, or welfare,” in addition to reassuring the public).

We analyzed the MDPA statement under the relevant Justice Manual provisions and not the standards set forth in § 50.2 because Justice Manual § 1-1.200 states, in part: “When the Justice Manual conflicts with earlier DOJ statements, the Justice Manual

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<sup>79</sup> See 30 Fed. Reg. 5510-02 (Apr. 17, 1965); 36 Fed. Reg. 21028 (Nov. 3, 1971). In comments submitted after reviewing a draft of this report, Barr inaccurately asserted that 28 C.F.R. § 50.2 has the force of law and cannot be supplanted by the Justice Manual policy statement.

<sup>80</sup> See, e.g., Justice Manual §§ 1-7.400 & 1-7.610.

controls.”<sup>81</sup> The question therefore is whether Justice Manual § 1-7.400 conflicts with the earlier policy statement in § 50.2(b)(9), allowing the Attorney General and the Deputy Attorney General to authorize the release of information that is otherwise prohibited from release, such that § 50.2(b)(9) is no longer operative, or whether § 1-7.400 does not conflict with the earlier policy statement and therefore § 50.2(b)(9) remains applicable.

Section 1-7.400 is silent as to whether the Attorney General and Deputy Attorney General have the authority to authorize the release of information that § 1-7.400 prohibits from release. Moreover, no other provision of the Confidentiality and Media Contacts Policy addresses such authority. As a result, there is not an overt, direct conflict between the Justice Manual and § 50.2(b)(9). However, the decision not to include the Attorney General and Deputy Attorney General authorization provision, or a reference to § 50.2(b)(9), in Justice Manual § 1-7.400 could be read as a conflict between the two policies. We ultimately concluded that it is not clear whether the Department intended the Confidentiality and Media Contacts Policy in the Justice Manual to supersede § 50.2. Accordingly, we did not find that Barr exceeded his authority in approving the release of the MDPA statement, despite the fact that the statement did not comply with the Justice Manual provision.

We therefore recommend that the Department clarify its policies to address whether any of the provisions of 28 C.F.R. § 50.2 remain Department policy in light of the existence of the Confidentiality and Media Contacts Policy contained in the Justice Manual. Moreover, if § 50.2(b)(9) remains valid Department policy, we recommend that the Department require that requests to the Attorney General or Deputy Attorney General for approval to release information otherwise prohibited from disclosure and any approval to release such information pursuant to § 50.2(b)(9) be documented. We further recommend that the Department make clear whether Justice Manual § 1-7.400 applies to the Attorney General. We also note that Justice Manual § 1-7.400(C) does not address what information Department personnel may include in a statement that is determined to be necessary to reassure the public that the appropriate law enforcement agency is investigating a matter or to protect public safety. Given that these statements are a departure from such a fundamental Department principle of not commenting on ongoing investigations, we believe that § 1-7.400 should include a standard to guide Department personnel regarding what information can and cannot be included in statements issued under § 1-7.400(C). We therefore also recommend that the Department revise this section of the Justice Manual to include such a standard.

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<sup>81</sup> Justice Manual § 1-1.200 (April 2018). The current version of Justice Manual § 1-1.200 states: “When the Justice Manual conflicts with earlier DOJ statements of policy or procedure, the Justice Manual controls.”

**B. Freed Violated DOJ Policy Prohibiting Comment about Ongoing Criminal Investigations Before Charges are Filed By Issuing MDPA's Letter to Luzerne County Election Officials Publicly**

We found that Freed's decision to publicly release MDPA's September 24, 2020 letter to the Luzerne County Bureau of Elections violated Justice Manual § 1-7.400(B). As an initial matter, there was no legitimate basis under DOJ policy for Freed to issue any further statement regarding the ongoing criminal investigation. Section 1-7.400(C)'s exception for reassuring the public that the appropriate authority was investigating was no longer applicable, as any need to reassure the community that DOJ was investigating the matter had already been accomplished. Moreover, in issuing the public letter, Freed disclosed even more details about the investigation than were in the original statement, describing the various investigative steps to date and numerous characteristics of the evidence the FBI had uncovered. Further, the letter, like the MDPA statement earlier that day, did not accurately portray the information known to Freed and Department officials at the time about the virtual certainty that no criminal prosecution would result. Lastly, Freed's decision to publicly reveal extensive—but incomplete—details about a nascent ballot fraud investigation not only violated DOJ policy, but it did not demonstrate the “particular[] sensitiv[ity]” to safeguarding the Department's reputation for fairness, neutrality, and non-partisanship that Barr's Election Year Sensitivities Memorandum demanded.

Freed told the OIG that he issued the letter publicly because he wanted “to get more information out there” about “what the concerns were in Luzerne County” so that members of the public could make an informed decision when choosing the manner in which they would vote (i.e., by mail, absentee, or in person). But § 1-7.400(C) provides no exception for helping members of the public make decisions about voting. As the U.S. Attorney for the Middle District of Pennsylvania, Freed's job was to oversee an investigation his office was conducting, not an election that was the responsibility of state and local officials. Freed plainly violated § 1-7.400(B) when he publicly released the letter to Luzerne County election officials.

That Freed sought and received the OPA Director's blessing to issue the letter publicly does not excuse his conduct.<sup>82</sup> Although Freed told First Assistant Brandler in an email that the letter was made “[p]ublic at Washington's direction,” and represented to the OPA Director that he had discussed the letter with Barr, Freed's communications at the time reflected that issuing it publicly was his preference, and Freed made clear in his OIG interview that he favored the letter's release and that he did not specifically recall discussing the letter idea with Barr. Additionally, Barr's letter to the Inspector General

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<sup>82</sup> As noted above, 28 C.F.R. § 50.2(b)(9), assuming it remains DOJ policy, permits subordinate DOJ personnel to release otherwise prohibited information with the permission of the Attorney General or the Deputy Attorney General. As Freed did not receive approval for his release of the letter from the Attorney General or the Deputy Attorney General, the issue we identified in Section V.A.3 is not applicable here, and the Justice Manual controls.

during the course of our investigation did not mention Freed's letter to election officials. We were troubled that Freed's reference to "discussions with the AG" could have potentially misled the OPA Director into believing that the Attorney General had authorized issuance of the letter when we found no evidence that Barr was even aware of the letter, much less that he authorized its public release.

In comments submitted after reviewing a draft of this report, Barr stated that he and Freed "were in full agreement that, as part of responding to this incident, it was imperative that Freed promptly engage with the local government to explain how their processes had failed and what had happened as a result." Barr continued by stating that he did not recall whether he and Freed "discussed [Freed's] letter to Luzerne County or whether [they] discussed whether [Freed's] communications with Luzerne County should be public"; however, Barr stated that "Freed's actions were in line with [Barr's] expectation that he would forcefully raise these issues with the relevant county officials and get them immediately addressed." Despite Barr's statement that Freed's letter to election officials was in line with his expectations, neither Barr nor Freed asserted that Barr authorized its public release or even recalled a discussion on that topic.

### **C. Freed Violated the DOJ Policy Requiring Employees to Consult with PIN Before Issuing Public Statements in Election-Related Matters**

As noted above, Barr's Election Year Sensitivities Memorandum required DOJ employees who "face an issue, or the appearance of an issue, regarding the timing of statements, investigative steps, charges, or other actions near the time of a primary or general election" to consult PIN before taking action. We found that Freed violated this PIN consultation policy twice: first by failing to consult PIN before issuing his September 24 statement, and then again by failing to consult PIN before making public his letter to the Director of the Luzerne County Bureau of Elections.

Although MDPA leadership contacted PIN at the outset of the Luzerne County investigation on September 21, Freed did not consult PIN before issuing the September 24 MDPA statement. Freed acknowledged in his OIG interview that he understood that the Election Year Sensitivities Memorandum required such consultation and that, while he was "still going to take [his] direction from the Attorney General," he should have had someone in MDPA reach out to PIN. In an email to PIN Chief Amundson on September 24, Freed stated that his failure to consult PIN before issuing the statement was an "oversight" due to the "crush of the hectic business today," which, Freed told the OIG, referred to the pressure from the OPA Director to issue the statement quickly.

Yet, a few hours later, Freed again failed to consult PIN, this time before publicly issuing his letter to the Luzerne County Bureau of Elections. We found this failure to be particularly inexcusable given that Amundson had expressly reminded Freed of his obligation to consult PIN on any future public statements only 2 hours earlier, and Freed had essentially apologized to Amundson for having failed to do so before issuing the MDPA

statement. Moreover, at that point, Freed was no longer under any time pressure, from either the OPA Director or Barr, to issue something quickly. When we asked Freed why he failed to consult PIN regarding the letter, Freed told the OIG that he “wasn’t focused on” the PIN consultation requirement because he was “consulting with the AG.” However, we found no evidence that Freed consulted with either Barr or anyone else in the Office of the Attorney General about the draft letter before he asked the OPA Director for permission to issue it publicly.<sup>83</sup>

Freed recognized in his OIG interview that Barr’s involvement in, and authorization of, Freed’s initial statement did not absolve Freed of his obligation to consult PIN—and we agree. The Election Year Sensitivities policy makes no exception for circumstances in which an Attorney General authorizes—or even directs—the issuance of a public statement regarding an election crimes investigation. Although the Attorney General supersedes PIN in the chain of command—and thus can overrule whatever advice PIN may provide— notifying PIN about a potential public statement even when the Attorney General is involved serves an important institutional purpose: it ensures that the career DOJ employees with expertise in the Department’s election policies have, as Amundson put it, “an opportunity to educate and identify pitfalls” and potentially help the Department avoid the problems its policies are designed to prevent.<sup>84</sup> In short, Freed’s failure to consult with PIN as required precluded PIN from having information to raise its concerns to Freed, the Attorney General, and the OPA Director. PIN’s involvement, as envisioned by the Attorney General’s Election Year Sensitivities Memorandum, would have better informed Department decision makers and may have prevented aspects of the MDPA statement that violated DOJ policy from being included in it. Similarly, had Freed notified PIN that he intended to publicly issue his subsequent letter, PIN would undoubtedly have made Freed aware of their concerns with issuing such a letter and may have been able to prevent him from doing so—and, consequently, from violating the various Department policies he did. Freed’s two failures to involve PIN violated DOJ policy and did not evince the sensitivity that policy admonishes Department employees handling election matters to demonstrate.<sup>85</sup>

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<sup>83</sup> Although Freed told us that he had discussed the idea of a letter with the AG Counselor that morning, we found no evidence that Freed shared a draft of his letter with the AG Counselor or otherwise consulted or sought the AG Counselor’s feedback on it before making it public.

<sup>84</sup> In comments submitted after reviewing a draft of this report, Freed’s counsel objected to our findings that Freed violated DOJ policy by not consulting with PIN and the FBI (*see* Section V.D below). Freed’s counsel stated, “If you seek and receive the approval of the boss [the Attorney General], you are not required to seek the approval of his underlings.” This argument of Freed’s counsel misunderstands the requirement at issue—Freed did not violate DOJ policy by failing to obtain *approval* from PIN and the FBI; instead, Freed violated DOJ policy by failing to *consult* with PIN and the FBI.

<sup>85</sup> We note that Freed’s conduct stood in contrast to that of the FBI personnel working on the Luzerne County investigation, who recognized the importance of the PIN consultation requirement and consulted PIN at multiple stages of the investigation.



#### **D. Freed Violated the DOJ Policy Requiring U.S. Attorneys to Coordinate Any Comments on a Pending Investigation with Any Affected Component**

Justice Manual § 1-7.700(A) states, in relevant part, that “[b]efore...making comments on a pending investigation regarding another DOJ component,” a U.S. Attorney “shall coordinate any comments, including written statements, with the affected component.” Freed violated this policy twice—first by failing to coordinate with the FBI before issuing the initial MDPA statement, and then again by failing to coordinate with the FBI before making public his detailed letter to Luzerne County election officials. We found the second failure particularly concerning given that Freed’s lack of coordination with the FBI on the initial statement resulted in it containing a factual inaccuracy. Yet, even after the FBI identified this error in MDPA’s initial statement—requiring Freed to issue a second, corrected statement—Freed again failed to coordinate with the FBI before he issued the far more detailed public letter a few hours later.

Freed told the OIG that he did not think about the policy requiring coordination with the FBI before issuing his initial statement because “to [his] mind, [he] was dealing with the Attorney General and with [the OPA Director]. You know, the top of the Department.” But the involvement of the Attorney General and the OPA Director did not absolve Freed of his obligation under § 1-7.700(A) to coordinate any written statements with the FBI. Indeed, the fact that Freed’s initial failure to coordinate with the FBI resulted in MDPA releasing a factually inaccurate statement demonstrates precisely why coordination with the affected component is crucial even when DOJ leadership has authorized issuing a public statement. Moreover, as noted above, in both their contemporaneous communications and their OIG interviews, FBI personnel consistently emphasized the need to consult PIN before issuing any election-related statements as well as their desire not to be mentioned in any public statement. Had Freed coordinated with the FBI as required, the FBI would have had the opportunity to remind him of the need to consult PIN.

#### **E. Barr’s Communication with President Trump Regarding the Investigation Did Not Violate the DOJ’s White House Communications Policy**

As described in Section III.C above, the Department has a longstanding policy limiting communications between DOJ personnel and the White House. The purpose of the policy is to “promote the rule of law” by insulating the Department’s legal considerations from partisan political influence.<sup>86</sup> The iteration of the policy in effect at the time of the events described here, which had been reissued during Barr’s tenure by ODAG, recognized that there might be circumstances in which it is necessary for the Attorney General to advise the President concerning a pending or contemplated criminal investigation “to ensure the President’s ability to perform his constitutional obligation to ‘take care that the

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<sup>86</sup> White House Communications Memorandum, p. 1; *see also* Justice Manual § 1-8.100 (added Dec. 2019).

laws be faithfully executed.”<sup>87</sup> That policy, however, did not give the Attorney General broad discretion to discuss pending or contemplated criminal investigations with the President without reason. Rather, the policy authorized such communications “when—but only when” two circumstances are met: namely, when such advising is both “important for the performance of the President’s duties and appropriate from a law enforcement perspective.”<sup>88</sup>

As noted above, Barr briefed President Trump about the Luzerne County ballot investigation on the afternoon of September 23, 2020. Barr described the circumstances of that briefing in his January 5, 2021 letter to the Inspector General, stating:

Because the federal investigation had already been announced by local officials and was already generating press interest, I believed it my responsibility to advise the President of the basic facts prior to further news reports about the incident and the Department's response to it. Accordingly, when I encountered the President in late afternoon of [September] 23rd at a previously scheduled event, I alerted him that I thought a story was likely to break in the next day or two about discarded ballots in Pennsylvania, and that the facts were that approximately six to nine ballots marked for Trump had been found in a dumpster in Pennsylvania; that the suspect had been quickly identified and the incident appeared isolated; that the U.S. Attorney and FBI were on top of the matter; and that the President should not say anything about it until the Department put something out.

In short, according to Barr, he advised the President about the Luzerne County investigation for essentially one reason: he believed the investigation, which had already been made public by the local District Attorney, was likely to generate news coverage.

We do not believe the possibility of media coverage alone necessarily satisfies the conditions of the Department’s White House communications policy—Department criminal investigations are routinely the subject of news media stories and in most situations it would be inappropriate from a law enforcement perspective to inform the President of a pending or contemplated investigation because of anticipated media attention about it. Here, however, Luzerne County DA Salavantis had already issued a press release stating

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<sup>87</sup> White House Communications Memorandum, p. 1 (quoting U.S. Const., Art. II, Sec. 3).

<sup>88</sup> White House Communications Memorandum, p. 1. Attorney General Garland’s updated White House Communications Memorandum makes this point even clearer, stating that the Department “*will not* advise the White House concerning pending or contemplated criminal or civil law enforcement investigations or cases *unless* doing so is important for the performance of the President’s duties and appropriate from a law enforcement perspective.” Garland Memorandum, p. 1 (emphases added). Although the prior memorandum’s formulation was different, its import was the same: the Department will advise the White House on pending or contemplated investigations “when—but only when” those two conditions are met. White House Communications Memorandum, p. 1.

that her office had learned of “issues with a small number of mail-in ballots which were received by the Luzerne County Bureau of Elections,” that they had “consulted with the United States Attorney’s Office,” and that “federal authorities [had] assumed lead investigative authority of this incident.” Under these circumstances, where local law enforcement had already publicly commented on the criminal investigation, we concluded that it was not inappropriate under the White House communications policy for the Attorney General to alert the President about the Luzerne County investigation and confirm that the Department was in fact handling it. In light of the fact that the investigation had already been made public through an authorized disclosure by a local prosecutor, we cannot conclude that the fact that Barr informed the President of the investigation violated the White House communications policy.

Although we found the fact of a presidential notification about the investigation not to violate policy under these circumstances, the scope of the investigative facts that Barr relayed to the President in the briefing was concerning, in particular that he disclosed that the ballots recovered from the Pennsylvania dumpster were “marked for Trump.” That highly sensitive detail was not public information at the time and was not contained in DA Salavantis’s statement. Barr did not attempt to justify disclosing this detail to the President in his letter to the Inspector General; he did not explain why (or even if) he believed that knowing that the discarded ballots were “marked for Trump” was “important for the performance of the President’s duties,” nor did he articulate why (or even if) he thought revealing that information to the President was “appropriate from a law enforcement perspective.” Because we were unable to interview Barr, we do not have the benefit of any further explanation of his thinking on this matter.

Several witnesses told the OIG that the Department’s standard practice in election-related criminal matters is to not reveal to anyone the party or candidate affected by the alleged criminal activity—even internally within DOJ. That standard practice was evidenced here by PIN’s admonition to MDPA at the outset of the investigation that the FBI should “minimize[] its exposure of or to the substance of the ballots (ie who was voted for by whom) [sic].” According to the PIN witnesses we interviewed, the Department takes this approach because the identity of the candidate or party affected is generally irrelevant to the criminal case, so “discuss[ing] things in terms of parties or candidates...begs the question as to...why it’s even being brought up and allows people to take away from that that there might be some bias involved.” The Department’s adoption of this practice institutionally makes it difficult for us to envision how alerting an incumbent President facing reelection that ballots recovered in an election fraud investigation were cast for him could be considered “appropriate from a law enforcement perspective.” Doing so was certainly not consistent with Barr’s own Election Year Sensitivities guidance to be “particularly sensitive” to safeguarding the Department’s reputation for fairness, neutrality, and non-partisanship. Providing this information to the President, who was not bound by the Department’s policies prohibiting comment on ongoing investigations and who had a political interest in publicizing the investigation, created the risk that the President would

use the Department’s non-public investigative information to advance his own political aims—a risk that was in fact realized when President Trump referenced the ballots on a national radio show the next morning.

However, the Department’s White House communications policy does not delineate what information the Attorney General may or may not convey to the President when a communication with the White House is permitted. Rather, the policy appears to leave it to the Attorney General’s discretion to determine what information is “important for the performance of the President’s duties” and “appropriate from a law enforcement perspective” to convey. Arguably, other DOJ policies could constrain the Attorney General’s discretion—for example, if another DOJ policy explicitly prohibited employees from sharing, outside of the Department, the information Barr provided to President Trump. But here no such policy exists; the Department’s practice of not disclosing the contents of ballots in an election crimes investigation, longstanding as it is, is just that—a practice. In the absence of a written DOJ policy circumscribing or prohibiting the Attorney General from disclosing certain investigative information during an otherwise permissible communication with the President, we could not conclude that Barr violated the White House communications policy when he shared this information with the President.

We recommend that the Department consider revising its White House communications policy to clarify what information “concerning pending or contemplated criminal or civil investigations or cases” can be communicated to the White House in situations where that communication is permissible under the policy.

## **VI. Conclusion and Recommendations**

We concluded that the MDPA statement did not comply with the DOJ policy generally prohibiting comment about ongoing criminal investigations before charges are filed; however, we did not find that either Barr or Freed committed misconduct because of ambiguity as to the applicability of Barr’s authority to approve the release of the statement pursuant to 28 C.F.R. § 50.2(b)(9). We found that Freed violated the DOJ policy prohibiting comment about ongoing criminal investigations before charges are filed when he publicly released his letter to Luzerne County officials. We found that Freed also violated DOJ policies requiring employees to consult with PIN before issuing a public statement in an election-related matter and requiring U.S. Attorneys to coordinate comments on pending investigations with any affected Department component—in this case, the FBI. Finally, while we were troubled that Barr relayed to President Trump investigative facts about the Luzerne County matter, we concluded that Barr’s decision to provide that information to President Trump did not violate DOJ’s White House communications policy because the policy appears to leave it to the Attorney General’s discretion to determine precisely what information can be shared with the President when a communication is permissible under the policy, as we found was the case here.

We make a number of recommendations in this report. First, as DOJ policy does not address what information Department personnel may include in a statement that is determined to be necessary to reassure the public that the appropriate law enforcement agency is investigating a matter or to protect public safety, we recommend that the Department revise this policy to require that the information contained in a statement released pursuant to JM 1-7.400(C) be reasonably necessary either to reassure the public that the appropriate law enforcement agency is investigating a matter or to protect public safety. Second, we recommend that the Department make clear whether the Justice Manual's Confidentiality and Media Contacts Policy, Justice Manual § 1-7.000, applies to the Attorney General. Third, we recommend that the Department clarify its policies to address whether any of the provisions of 28 C.F.R. § 50.2 remain Department policy in light of the existence of the Confidentiality and Media Contacts Policy contained in the Justice Manual. Fourth, if 28 C.F.R. § 50.2(b)(9) remains valid Department policy, we recommend that the Department require that requests to the Attorney General or Deputy Attorney General for approval to release information otherwise prohibited from disclosure and any approval to release such information pursuant to § 50.2(b)(9) be documented. Lastly, we recommend that the Department consider revising its White House communications policy to clarify what information can be disclosed to the White House in situations where the policy permits communication about a contemplated or pending civil or criminal investigation.

As noted above, the federal Hatch Act prohibits executive branch employees from using their "official authority or influence for the purpose of interfering with or affecting the results of an election."<sup>89</sup> The U.S. Office of Special Counsel has sole jurisdiction to investigate Hatch Act violations.<sup>90</sup> Because the circumstances described in this report raise a question as to whether these former Department officials' actions violated the Hatch Act, we are referring our findings to the Office of Special Counsel for its review and determination of that issue.

We have provided a copy of this report to the Office of the Attorney General, the Office of the Deputy Attorney General, the Executive Office for U.S. Attorneys, and the Professional Misconduct Review Unit for any action they deem appropriate.

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<sup>89</sup> 5 U.S.C. § 7323(a)(1).

<sup>90</sup> 5 C.F.R. § 734.102(a).



# Department of Justice

**United States Attorney David J. Freed  
Middle District of Pennsylvania**

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FOR IMMEDIATE RELEASE  
THURSDAY, SEPTEMBER 24, 2020  
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**STATEMENT OF U.S. ATTORNEY FREED ON INQUIRY INTO REPORTS OF  
POTENTIAL ISSUES WITH MAIL-IN BALLOTS**

HARRISBURG - On Monday, September 21, 2020, at the request of Luzerne County District Attorney Stefanie Salavantis, the Office of the United States Attorney along with the Federal Bureau of Investigation, Scranton Resident Office, began an inquiry into reports of potential issues with a small number of mail-in ballots at the Luzerne County Board of Elections.

Since Monday, FBI personnel working together with the Pennsylvania State Police have conducted numerous interviews and recovered and reviewed certain physical evidence. Election officials in Luzerne County have been cooperative. At this point we can confirm that a small number of military ballots were discarded. Investigators have recovered nine ballots at this time. Some of those ballots can be attributed to specific voters and some cannot. All nine ballots were cast for presidential candidate Donald Trump.

Our inquiry remains ongoing and we expect later today to share our up to date findings with officials in Luzerne County. It is the vital duty of government to ensure that every properly cast vote is counted.

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# Department of Justice

**United States Attorney David J. Freed  
Middle District of Pennsylvania**

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FOR IMMEDIATE RELEASE  
THURSDAY, SEPTEMBER 24, 2020  
[WWW.JUSTICE.GOV/USAO/PAM](http://WWW.JUSTICE.GOV/USAO/PAM)

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## **REVISED STATEMENT OF U.S. ATTORNEY FREED ON INQUIRY INTO REPORTS OF POTENTIAL ISSUES WITH MAIL-IN BALLOTS**

HARRISBURG – On Monday, September 21, 2020, at the request of Luzerne County District Attorney Stefanie Salavantis, the Office of the United States Attorney along with the Federal Bureau of Investigation, Scranton Resident Office, began an inquiry into reports of potential issues with a small number of mail-in ballots at the Luzerne County Board of Elections.

Since Monday, FBI personnel working together with the Pennsylvania State Police have conducted numerous interviews and recovered and reviewed certain physical evidence. Election officials in Luzerne County have been cooperative. At this point we can confirm that a small number of military ballots were discarded. Investigators have recovered nine ballots at this time. Some of those ballots can be attributed to specific voters and some cannot. Of the nine ballots that were discarded and then recovered, 7 were cast for presidential candidate Donald Trump. Two of the discarded ballots had been resealed inside their appropriate envelopes by Luzerne elections staff prior to recovery by the FBI and the contents of those 2 ballots are unknown.

Our inquiry remains ongoing and we expect later today to share our up to date findings with officials in Luzerne County. It is the vital duty of government to ensure that every properly cast vote is counted.

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THE UNITED STATES ATTORNEY'S OFFICE  
MIDDLE DISTRICT *of* PENNSYLVANIA

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**Department of Justice**

U.S. Attorney's Office

Middle District of Pennsylvania

FOR IMMEDIATE RELEASE

Thursday, September 24, 2020

## **Letter to Luzerne County Bureau of Elections**

Shelby Watchilla, Director of Elections of Luzerne County Bureau of Elections

Dear Ms. Watchilla:

On Monday, September 21, 2020, at the request of Luzerne County District Attorney Stefanie Salavantis, the Office of the United States Attorney along with the Federal Bureau of Investigation, Scranton Resident Agency, began an inquiry into reports of potential issues with a small number of mail-in ballots at the Luzerne County Board of Elections.

Since Monday, FBI personnel have conducted numerous interviews and recovered and reviewed certain physical evidence. While at this point the inquiry remains active, based on the limited amount of time before the general election and the vital public importance of these issues, I will detail the investigators' initial findings.

The FBI has recovered a number of documents relating to military ballots that had been improperly opened by your elections staff, and had the ballots removed and discarded, or removed and placed separately from the envelope containing confidential voter information and attestation. Specifically, a total of nine (9) military ballots were discovered to have been discarded. Seven (7) of those ballots when discovered by investigators were outside of any envelope. Those ballots were all cast for presidential candidate Donald Trump. One (1) of those seven (7) ballots was able to be identified to an envelope that was recovered, and thereby potentially tied to a specific voter. Two (2) military ballots that had been discarded were previously recovered by elections staff, reinserted into what appeared to be their appropriate envelopes, and then resealed. Therefore, the votes cast on those two (2) ballots are unknown. Thus, it appears that three (3) of the nine (9) recovered ballots can be potentially attributed to specific voters. Six (6) of the ballots were simply removed and discarded, and cannot be attributed to a specific voter at this time.

In addition to the military ballots and envelopes that were discarded and recovered as detailed above, investigators recovered four (4) apparently official, bar-coded, absentee ballot envelopes that were empty. Two (2) of those envelopes had the completed attestations and signatures on the reverse side. One (1) envelope with a handwritten return address was blank on the reverse side. The fourth empty envelope contains basic location information and the words "affirmation enclosed" on the reverse side. The majority of the recovered materials were found in an outside dumpster.

As you know, the appropriate method for processing received military ballots is to securely store the ballot, unopened, until such time as ballot pre-canvassing can begin, which is in no event earlier than 7:00 a.m. on Election Day. Opening a military or overseas ballot, or an absentee or mail-in ballot for that matter, violates the controlling statutes and is contrary to Pennsylvania Department of State guidance. The preliminary findings of this



inquiry are troubling and the Luzerne County Bureau of Elections must comply with all applicable state and federal election laws and guidance to ensure that all votes—regardless of party—are counted to ensure an accurate election count. Even though your staff has made some attempts to reconstitute certain of the improperly opened ballots, there is no guarantee that any of these votes will be counted in the general election. In addition, our investigation has revealed that all or nearly all envelopes received in the elections office were opened as a matter of course. It was explained to investigators the envelopes used for official overseas, military, absentee and mail-in ballot requests are so similar, that the staff believed that adhering to the protocol of preserving envelopes unopened would cause them to miss such ballot requests. Our interviews further revealed that this issue was a problem in the primary election--therefore a known issue--and that the problem has not been corrected.

While the assigned investigators are continuing their work including reviewing additional discarded materials, it is imperative that the issues identified be corrected. District Attorney Salavantis and I would be happy to meet with you at a mutually convenient time to discuss this matter. Please be assured that the investigators will carefully preserve all documents collected in connection with this investigation. Our goal, that I am sure you share, is to ensure that every properly cast ballot is counted.

Sincerely,

DAVID J. FREED

UNITED STATES ATTORNEY

cc: David Pedri, Luzerne County Manager  
Tim McGinley, Luzerne County Council Chair  
Stefanie Salavantis, Luzerne County District Attorney

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**Component(s):**

USAO - Pennsylvania, Middle

Updated September 24, 2020

PRESS RELEASE

# Investigation Concluded In Luzerne County Ballot Case

Friday, January 15, 2021

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**For Immediate Release**

U.S. Attorney's Office, Middle District of Pennsylvania

HARRISBURG – Acting U.S. Attorney Bruce D. Brandler today announced that the investigation into nine ballots that were discarded by a former temporary employee of the Luzerne County Elections Bureau has been concluded.

“After a thorough investigation conducted by the FBI and prosecutors from my office, we have determined that there is insufficient evidence to prove criminal intent on the part of the person who discarded the ballots,” said Brandler. “Therefore, no criminal charges will be filed and the matter is closed.”

The federal investigation resulted from a request by the Luzerne County District Attorney’s Office after it learned that nine completed general election ballots had been received and discarded by the former employee. The investigation revealed that the nine completed military ballots were discarded and subsequently retrieved from a dumpster.

Acting U.S. Attorney Brandler thanked the FBI for devoting the necessary resources to conduct a thorough and complete investigation. He also thanked the staff of the Elections Bureau and other Luzerne County officials for cooperating with investigators and prosecutors.

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