

**Congress of the United States**  
Washington, DC 20515

February 17, 2023

The Honorable Merrick B. Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Attorney General Garland:

Over the last two years, the Biden Administration has targeted political opponents and undermined the lawful actions of the Trump Administration. This type of lawfare has become commonplace during the Biden Administration, and it should concern all Americans. The latest of these unprecedented actions is the Justice Department's decision to re-prosecute a case in which President Trump already granted clemency.<sup>1</sup>

In 2016, the Obama Administration's Justice Department charged Philip Esformes with healthcare fraud, money laundering, and bribery in a multi-count indictment.<sup>2</sup> During litigation, a federal magistrate found that the Justice Department prosecutors committed misconduct and made a bad faith effort to cover it up by reviewing over 70 boxes containing information covered by attorney-client-privilege.<sup>3</sup> Former Attorney-General John Ashcroft described the Justice Department's behavior as "amongst the most abusive" he had ever seen.<sup>4</sup> The privileged information included Esformes' legal defense strategy. The privileged information could not be used to directly support the health care fraud charges. However, the trial court permitted the government attorneys who had seen the privileged information to remain on the case, thereby allowing the insider knowledge to inform their strategy in prosecuting Esformes. Ultimately, the jury convicted Esformes of a majority of the charges, with the prosecution undeniably benefitting from its insights into Esformes' defense strategy.

Esformes was sentenced to 20 years in prison, and the trial judge cited conduct about which the jury acquitted or could not reach a verdict to justify the sentence. The Justice Department also argued that Esformes' actions cost the government \$1.4 billion, yet the jury found that the actual

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<sup>1</sup> *Executive Grant of Clemency*, <https://www.justice.gov/pardon/page/file/1349136/download>.

<sup>2</sup> *Three Charged in \$1 Billion Medicare Fraud Scheme*, FBI (July 22, 2016), <https://www.fbi.gov/news/stories/three-charged-in-1-billion-medicare-fraud-scheme>.

<sup>3</sup> Jay Weaver, *Miami judge tosses key evidence, accuses feds of 'misconduct' in Medicare fraud case*, Miami Herald (Aug. 13, 2018), <https://www.miamiherald.com/news/local/article216589740.html>.

<sup>4</sup> Charlie McCarthy, *Former AG Blasts Planned Retrial of Trump Clemency Recipient*, NEWSMAX (Jan. 20, 2023), <https://www.newsmax.com/newsfront/attorney-general-ashcroft-trump/2023/01/20/id/1105242/>.

losses totaled less than \$200,000.<sup>5</sup> To rectify the role of the prosecutorial misconduct in using the privileged material against Esformes, President Trump commuted his sentence to time served, based in part on the recommendations of former U.S. Attorneys-General Edwin Meese and Michael Mukasey, and former Deputy Attorney General Larry Thompson.<sup>6</sup>

Now, the Biden Administration has refocused its sights on Esformes, announcing its intentions to prosecute him for the charges on which the jury did not reach final decisions. Professor Jonathon Turley, a constitutional lawyer and scholar, has objected to this strategy by the Justice Department, calling it “deeply concerning” because the “the clear intent [of President Trump’s grant of clemency] was to grant relief from the prosecution as a whole,” not just the guilty charges.<sup>7</sup>

Despite all this proven misconduct and minimal damages, the Justice Department has reopened the case and a three-judge panel for 11<sup>th</sup> U.S. Circuit Court of Appeals rejected Esformes’ appeal, allowing the government to seize more than \$44 million in assets as restitution and asset forfeiture.<sup>8</sup>

The Esformes case raises serious issues of double-jeopardy, vindictive prosecution and the fairness of using conduct for which a defendant has been acquitted by a jury in the sentencing phase of a criminal case. Equally important, by re-opening the case after President Trump commuted the sentence, the Justice Department undermines the constitutional authority of presidents who exercise their authority to grant clemencies and/or pardons.

The Esformes case is just the latest in a string of decisions that highlight the politicization and overreach of the Justice Department. Indeed, the record is littered with partisan actions, ranging from targeting concerned parents and Catholics as “potential terrorists,” to dismissing threats of violence against pro-life pregnancy centers, to abusing FISA authorities by targeting President Trump and a Member of Congress, all while steadfastly refusing to investigate credible allegations of criminal activity by the Biden family.<sup>9</sup>

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<sup>5</sup> John Ashcroft, *The troubling case of Philip Esformes and the erosion of fundamental rights*, The Washington Times (Oct. 13, 2022), <https://www.washingtontimes.com/news/2022/oct/13/prosecutorial-misconduct-and-the-erosion-of-fundam/>.

<sup>6</sup> *Statement from the Press Secretary Regarding Executive Grants of Clemency* (Dec. 22, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-122220/>.

<sup>7</sup> Jonathon Turley (@JonathonTurley), Twitter (Aug. 13, 2022, 4:14 PM) <https://twitter.com/JonathanTurley/status/1558547644208877571>.

<sup>8</sup> Dan Mangan, *Philip Esformes, whose prison sentence Trump commuted, loses appeal and faces retrial on health-care fraud charges*, CNBC (Jan. 20, 2023), <https://www.cnbc.com/2023/01/20/philip-esformes-whose-prison-sentence-trump-commuted-loses-appeal.html>.

<sup>9</sup> Laura Meckler, *National School Boards Association stumbles into politics and is blasted apart*, The Washington Post (Jan. 13, 2022), <https://www.washingtonpost.com/education/2022/01/13/school-board-association-domestic-terrorism/>; Brianna Herlihy, Kelly Laco, *DOJ, FBI targeting Catholics as 'violent extremists' under scrutiny by state AGs: 'Bigotry' is 'festering'*, Fox News (Feb. 10, 2023), <https://www.foxnews.com/politics/doj-fbi-targeting-catholics-violent-extremists-under-scrutiny-state-ags-bigotry-festering>; Dell Cameron, *The FBI's Most*

Your efforts to nullify President Trump’s commutation of Philip Esformes is unprecedented and threatens the constitutional authority of the President “to grant Reprieves and Pardons for Offenses against the United States.” Not only does it raise questions about the finality of clemencies granted in the past, it sets a dangerous precedent for future chief executives with respect to their ability to exercise their constitutional authorities.<sup>10</sup>

Given these concerns and what we view as a troubling pattern of weaponization of prosecutorial powers, please provide answers to the following questions by February 23, 2023.

1. When did the Justice Department decide to reopen the prosecution of Philip Esformes?
2. Who made the decision to re-open the prosecution of Philip Esformes? Did that decisionmaker do any type of constitutional analysis as to the propriety of re-opening the case?
3. How does the Justice Department justify the use of privileged information uncovered through prosecutorial misconduct to pursue charges against Philip Esformes?
4. Why is the Justice Department seeking more than \$44 million when the jury found actual damages resulting from Esformes’ conduct totaled less than \$200,000?
5. Is the Justice Department currently prosecuting, or planning to prosecute, additional individuals who received grants of clemency from previous presidents, including pardons and commutations?
6. Are the prosecutors who committed misconduct in the prosecution of Philip Esformes currently employed by the Justice Department?
7. Are the prosecutors who committed misconduct in the prosecution of Philip Esformes currently involved in this new prosecution of Philip Esformes? If so, are they the same government employees who spoke to the New York Times, describing Trump’s clemency decisions as a “kick in the teeth”?<sup>11</sup>
8. In what account is the \$44 million that Philip Esformes has forfeited as a result of his renewed prosecution?
9. From what source is the Department of Justice funding the renewed prosecution of Philip Esformes?
10. If the Justice Department renews additional prosecutions against individuals who received presidential grants of clemency, including pardons and commutations, from what source will these prosecutions be funded?
11. Who makes the decisions regarding whether the Justice Department will renew prosecutions into individuals who previously received presidential grants of clemency, including pardons and commutations?

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*Controversial Surveillance Tool Is Under Threat*, Wired (Feb. 10, 2023), <https://www.wired.com/story/fbi-section-702/>.

<sup>10</sup> U.S. CONST. art. 2, § 2

<sup>11</sup> Eric Lipton, *For Prosecutors, Trump’s Clemency Decisions Were a ‘Kick in the Teeth,’* The New York Times (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/us/politics/trump-pardons-medicare-fraud.html>.

Sincerely,

A handwritten signature in blue ink, appearing to read "Andy Biggs". The signature is fluid and cursive, with the first name "Andy" written in a slightly larger, more prominent script than the last name "Biggs".

Andy Biggs  
Member of Congress