December 21, 2018

Corey Amundson
Director and Chief Counsel
Office of Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, DC 20530-0001

Re: Failure of Acting Attorney General Whitaker to recuse himself from Special Counsel investigation

Dear Director Amundson:

It is the "primary mission" of the Office of Professional Responsibility (OPR) "to ensure that DOJ attorneys perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency."[1] The Office has responsibility to investigate allegations of misconduct involving DOJ attorneys "that relate to the exercise of their authority to investigate, litigate or provide legal advice. . . ."[2]

Democracy 21 believes that Acting Attorney General Matt Whitaker has violated his professional and ethical obligations by rejecting the advice he received from the Department's designated ethics officials that he should recuse himself from participating in Special Counsel's Robert Mueller's investigation of potential criminal misconduct relating to the 2016 presidential election.

Democracy 21 is filing this complaint to request the Office of Professional Responsibility promptly investigate this matter, to make a determination that Acting Attorney General Whitaker is disqualified, under executive branch ethics rules and standards, from any participation in the Mueller investigation, and to inform Acting Attorney General Whitaker that he is disqualified.

The basis for Acting Attorney General Whitaker's recusal is that, prior to assuming office, he made repeated public comments demonstrating strong bias against Special Counsel Mueller's investigation and pre-judging key matters under investigation by the Special Counsel. These comments included a statement identifying with the position that the Special Counsel

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1 https://www.justice.gov/opr

2 *Id.*

investigation is a "lynch mob."[3] Further, he explained how the investigation can be crippled without firing the Special Counsel by saying that the Attorney General can "just [reduce] his budget so low that his investigation grinds to almost a halt."[4] He also commented, with regard to the firing of former FBI Director James Comey, that "there is no criminal obstruction of justice charge to be had here,"[5] and that the Trump Tower meeting between Trump campaign officials and Russian agents was not "enough to suggest there's some conspiracy … to violate either election laws or espionage laws."[6]

These comments plainly raise a reasonable question of whether Acting Attorney General Whitaker can act fairly and impartially in supervising the Special Counsel investigation. Applicable executive branch ethics rules require recusal in any instance in which even the appearance of an official's impartiality can be subject to question.

The relevant rule, 5 C.F.R. § 2635.502, principally addresses potential financial conflicts of interest by any executive branch official, but also has broader application to "circumstances other than those specifically described in this section [that] would raise a question regarding his impartiality," and directs that in any such situation, the employee "should use the process described in this section to determine whether he should or should not participate in a particular matter." *Id.* at § 502(a)(2).

The general rule is that in any situation "where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter. . . ," the employee "should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee" in accordance with the rule. *Id.* (emphasis added).

But the requirements of the rule are also triggered when the agency ethics designee "has information concerning a potential appearance problem." In such instances, "the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter." *Id.* at § 502(c). The rule notes that "ordinarily" the ethics review process "will be

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[3] Spinelli, Dan. *Mother Jones*, September 24, 2018, available at https://www.motherjones.com/politics/2018/09/matthew-whitaker-donald-trump-jeff-sessions-witch-hunt-mueller-russia/

[4] CNN Tonight, Transcript, CNN, July 26, 2017, available at http://transcripts.cnn.com/TRANSCRIPTS/1707/26/cnnt.01.html.

[5] Mornings on the Mall, Former U.S. Attorney MATTHEW WHITAKER gives us an overview on Comey's testimony, WMAL, June 9, 2017, available at http://www.wmal.com/2017/06/09/listen-former-u-s-attorneymatthew-whitaker-gives-us-an-overview-on-comeys-testimony/

[6] Anderson Cooper 360 Degrees, Transcript, CNN, July 10, 2017, available at http://transcripts.cnn.com/TRANSCRIPTS/1707/10/acd.02.html.

initiated by information provided by the employee," but it stresses that "at any time," the agency designee may also "make this determination on his own initiative." *Id.*

Further:

> If the agency designee determines that the employee's impartiality is likely to be questioned, he shall determine. . .whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

Id. (emphasis added). Paragraph (e), in turn, states, "Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter [that] is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in a matter." *Id.* at § 502(e) (emphasis added).

Two points about the language of this rule bear emphasis. First, although the general language of the rule is framed around financial conflicts of interest, the rule also states that the same process and same standards apply to all circumstances raising an appearance issue, including those beyond financial conflicts. *Id.* at § 502(a)(2). Second, where there are circumstances that raise an appearance issue, recusal is mandatory, not discretionary, unless the designated agency ethics official affirmatively determines to allow the official to participate in the matter.

In this case, the agency ethics official has made an affirmative determination that Acting Attorney General Whitaker should recuse himself from the Mueller investigation under section 2635.502. The subsequent determination by Acting Attorney General Whitaker to not recuse himself is not only contrary to the requirements of this rule, but is the result of an apparent effort to subvert the process mandated by the rule.

In a letter to the Majority and Minority Senate Leaders dated December 20, 2018,[7] Assistant Attorney General Stephen Boyd attempts a defense of the Acting Attorney General's decision to not recuse himself. In doing so, he exposes an impermissible circumvention of the ethics process.

In his letter, AAG Boyd acknowledges the applicability of section 2635.502, stating, "That regulation governs personal and business relationships or other circumstances that would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." Boyd letter at 2 (emphasis added). He notes that the Department's ethics officials concluded that:

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[7] Letter from Assistant AG Stephen Boyd, December 20, 2018. Available at: https://www.documentcloud.org/documents/5661894-Senate-Letter-Re-Acting-AG-Ethics-Review.html

> Acting Attorney General Whitaker had made public comments prior to his re-joining the Department that could constitute 'circumstances other than those specifically described' and raise an appearance-of-impartiality issue under the catch-all provision, 5 C.F.R. § 2635.502(a)(2).

Id. AAG Boyd further states:

> The ethics officials concluded, however, that <u>if a recommendation were sought, they would advise that the Acting Attorney General should recuse himself from supervision of the Special Counsel investigation because it was their view that a reasonable person with knowledge of the relevant facts likely would question the impartiality of the Acting Attorney General</u>. . . .The Acting Attorney General's senior staff conveyed these views to the Acting Attorney General.

Id. (emphasis added).

But instead of following the determination by senior Departmental ethics officials that he did not like, Acting Attorney General Whitaker decided that he could make his own independent decision as to whether recusal is required. According to a report in *The New York Times,* "Mr. Whitaker separately brought together his own ad hoc advisory council of four political appointees within the department, including an unidentified United States Attorney."[8] Based on his consultation with this ad hoc group of political appointees, Acting Attorney General Whitaker rejected the determination of the Department's career ethics officials and concluded that he need not recuse himself.

The process followed by the Acting Attorney General is contrary to the requirements of the applicable ethics rule. Under that rule, in circumstances like this where there is "a potential appearance problem," the rule directs that the agency ethics designee "may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter." And "[w]here the agency designee determines that the employee's participation should not be authorized, <u>the employee will be disqualified from participation</u>. . . ." 5 U.S.C. § 2635.502(c).

Here, the agency ethics officials did make a determination that the Acting Attorney General should recuse himself. Accordingly, it is <u>mandatory</u> that he do so. But Acting Attorney General Whitaker has attempted to circumvent this process by treating the determination of the Justice Department ethics officials as somehow either preliminary or informal so as not to trigger the requirements of the rule—that the decision of the ethics officials is somehow not an actual determination but only a statement of what their determination would be "if a recommendation were sought" from them. Boyd letter at 2.

This is a distinction without a difference and a subversion of the rule, which contemplates no such procedure. There is no advisory opinion-type process in the rule, whereby an employee can inquire of ethics officials as to whether he would receive an adverse determination if he asks

[8] C. Savage and K. Benner, "A Memo and A Recusal Decision Underscore Potential Threats of the Mueller Inquiry," *The New York Times* (December 21, 2018).

for a ruling and, if informed he would, can then choose not to ask and further choose to ignore the ethics advice. This makes a mockery of the process.

In short, Acting Attorney General Whitaker, when informed that career Departmental ethics officials had determined that he should recuse himself, chose to ignore that recommendation and instead to seek a different and more favorable recommendation from his own hand-picked group of political advisers, and to act on the basis of that latter advice. This process is contrary to law and exacerbates the very appearance of a conflict of interest by the Acting Attorney General that the ethics rules are designed to avoid.

We call on the Office of Professional Responsibility to promptly investigate this matter and to inform Acting Attorney General Whitaker that he is disqualified from any participation in the Special Counsel investigation.

Sincerely,

Fred Wertheimer
President, Democracy 21