

February 25, 2019

Mr. Michael E. Horowitz
Inspector General
U.S. Department of Justice Office of the Inspector General
950 Pennsylvania Avenue, NW, Suite 4706
Washington, D.C. 20530

Dear Inspector General Horowitz:

I write to follow up on a letter my Senate Judiciary colleagues and I sent you on January 11, 2019, regarding the procedures by which the Department of Justice (DOJ) assesses conflicts of interest of senior political appointees. As summarized below, Matthew Whitaker's testimony on February 8th before the House Judiciary Committee and recent media reports raise important questions related to the concerns expressed in that letter:

1. Did Mr. Whitaker provide DOJ ethics officials all necessary facts for them to evaluate his recusal obligations?
2. Did DOJ ethics officials conduct a sufficiently thorough review of Mr. Whitaker's background before advising him?
3. Was Mr. Whitaker's decision to disregard the advice of career officials—that he should recuse himself from the Special Counsel's investigation—consistent with federal ethics regulations and DOJ precedent, and was it acceptable as a new Department practice?

While Mr. Whitaker's background and the circumstances of his appointment may be unique, they appear to have exposed weaknesses in the ethics process that underscore the need for a comprehensive review by your office.

In his testimony, Mr. Whitaker was evasive about his work prior to joining DOJ. He flatly refused to answer questions from members of the committee about his work at the Foundation for Accountability and Civic Trust (FACT), an organization that filed at least 14 complaints in recent years against Democratic politicians and spent thousands of dollars on contracts with right-wing political attack groups.¹ He claimed to have no idea whether, during his tenure at DOJ, the Department had open investigations pertaining to any of the more than 40 individuals named in these complaints. He claimed that despite having been paid over a million dollars by FACT, he had no idea who had contributed to the donor-advised foundation, Donor's Trust, that funded FACT, and admitted that he could not rule out the possibility that some of the money may have come from a foreign entity.

¹ Press Release, United States Senator Sheldon Whitehouse, Senators Press Justice Department on Whitaker, Benzckowski Conflicts of Interest (Dec. 4, 2018), available at <https://www.whitehouse.senate.gov/news/release/senators-press-justice-department-on-whitaker-benzckowski-conflicts-of-interest>.

For starters, it seems stunning that the Department would not make the necessary inquiries to determine who funded FACT and Whitaker in all those years. This would be necessary to evaluate potential conflicts of interest, and to assess the credibility and veracity of Whitaker's claims of ignorance.

Next, Mr. Whitaker gave testimony about his interaction with the White House while at FACT that is inconsistent with media reports. At his hearing, he downplayed a meeting he had with representatives of the White House Counsel's Office to discuss representing the President in the Special Counsel's investigation. But one media report claims that

[a]lthough Whitaker did not get the job, he and White House officials discussed how Whitaker might serve the president's interests in a private capacity. They suggested specific arguments Whitaker could make in defense of the president. They encouraged him to attack Mueller relentlessly, and they identified other possible targets for him.²

If the description of that meeting is accurate, it would be consistent both with an article published this week in *The New York Times* that stated Mr. Whitaker believed "part of his role at the Justice Department was to 'jump on a grenade' for the president,"³ and a story published last year that described Mr. Whitaker as the "'eyes and ears' [of the West Wing] in a department the president has long considered at war with him."⁴ Mr. Whitaker's testimony simply does not square with the other available evidence. If his testimony was untruthful, perhaps his untruthfulness is precisely the "jump[ing] on a grenade" he promised.

I view the ethics advice Mr. Whitaker apparently received, and disregarded, with these reports in mind. The implementing regulation for the Ethics in Government Act states that "[a]ny provision that requires a determination, approval, or other action by the agency designee shall, where the conduct in issue is that of the agency head, be deemed to require that such determination, approval or action be made or taken by the agency head *in consultation with the designated agency ethics official*."⁵ Presumably this consultation requirement is premised on a good faith and complete disclosure of relevant facts, as well as on the notion that any decision to disregard advice is made with the best interests of DOJ in mind. On the public record as it currently stands, I am not confident that either condition has been met.

² Murray Waas, *Matthew Whitaker: the Ethical Mire of Trump's Top Law Officer*, NEW YORK REVIEW OF BOOKS, Jan. 14, 2019, available at <https://www.nybooks.com/daily/2019/01/15/matthew-whitaker-the-ethical-mire-of-trumps-top-law-officer/>.

³ Mark Mazzetti et al., *Intimidation, Pressure and Humiliation: Inside Trump's Two-Year War on the Investigations Encircling Him*, THE NEW YORK TIMES, Feb. 19, 2019, available at <https://www.nytimes.com/2019/02/19/us/politics/trump-investigations.html>.

⁴ Katie Benner and Maggie Haberman, *Matthew Whitaker, a Trump Loyalist, Is Seen as Ascendant Amid Rosenstein Chaos*, THE NEW YORK TIMES, Sept. 26, 2018, available at <https://www.nytimes.com/2018/09/26/us/politics/matthew-whitaker-justice-department.html>.

⁵ 5 C.F.R. § 2635.102(b) (emphasis added).

28 C.F.R. § 45.2 disqualifies DOJ employees from criminal matters in which they have a personal or political relationship. DOJ employees are also subject to the rule requiring recusal from a particular matter if it is likely that their impartiality would be questioned.⁶ A senior official like Mr. Whitaker should be expected to provide all relevant information necessary for DOJ ethics officials to make determinations under these regulations. Those officials should also make an independent inquiry into the facts. In this case, the work Mr. Whitaker did immediately before entering DOJ and his White House contacts were plainly relevant and highly politicized. Again, DOJ should have determined who the funder was in order to protect the Department against conflicts of interest, to test the veracity of claims of ignorance, and as a prophylactic measure for officials comfortable in the belief that they may tell the Department whatever they want and their claims will never be tested.

It would be troubling to learn that DOJ ethics officials knew all of these facts and still concluded, as Mr. Whitaker claims, there was no precedent requiring his recusal from the Special Counsel's investigation. More troubling is the precedent that may be set by Mr. Whitaker's decision to disregard the advice he received to recuse himself. The maxim that bad facts make bad law is apt here. An independent assessment of the facts and decisions at issue may help cabin this episode as a unique one not to be repeated. In the event of lies, it would also allow the enforcement of laws regarding false statements.

As a more general proposition, when a political appointee ignores ethics advice from the Department's career officials, it would seem incumbent that the Department obtain a full factual declaration by the official explaining under oath his decision. There should be a record made.

Finally, I encourage you to press through the vague and undefined quasi-assertions of executive privilege Mr. Whitaker deployed before the House Judiciary Committee to avoid discussing any communications with the President. With respect to his time as the Attorney General's chief of staff, executive privilege—were it to apply to him in that role—has no bearing on whether Mr. Whitaker violated DOJ's policy prohibiting someone in that role from communicating with the White House on pending law enforcement matters. Those communications may have significant bearing on whether he should have been recused from the Special Counsel's investigation when appointed Acting Attorney General. With Mr. Whitaker remaining at DOJ as a "senior counselor," any prior violations of this communications policy could portend future improper communications.

As Inspector General, you are uniquely positioned to ascertain, through interviews and documentary evidence, the state of the ethics compliance program at DOJ and compliance with DOJ White House contacts policies. Mr. Whitaker's actions and testimony have, at a minimum, undermined public confidence in the Department. I again ask that you review the relevant processes and protocols and determine whether they require strengthening to protect the

⁶ 5 C.F.R. §§ 2635.501 *et seq.*

independence of the Department and the rule of law. Hypothetically, if someone were a shameless enough scoundrel and liar infiltrating the Department for ulterior political purposes, he or she could skate through these procedures with untested lies, little review, and no explanation.

Sincerely,



Sheldon Whitehouse
United States Senator

Cc: The Honorable Lindsey Graham
The Honorable Dianne Feinstein
The Honorable Jerrold Nadler
The Honorable Doug Collins