

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division**

STATE OF MARYLAND,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civil Action No. 1:18-cv-2849-ELH

**BRIEF OF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND
FORMER GOVERNMENT ETHICS OFFICIALS AS *AMICI CURIAE*
SUPPORTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

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INTEREST OF THE *AMICI*

Amici include former government ethics officials with decades of experience applying ethics laws and regulations under administrations of both parties.¹ Throughout their service, these officials have advised agencies about ethical considerations generally, and provided specific advice concerning compliance with federal ethics statutes, the Standards of Conduct for Employees of the Executive Branch, and agency-specific ethics regulations. They have also provided such advice to Presidential nominees undergoing Senate confirmation.

Amicus Citizens for Responsibility and Ethics in Washington (“CREW”) is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials.

Amici submit this brief to highlight significant ethical concerns posed by Matthew Whitaker’s purported appointment as Acting Attorney General, which vividly demonstrate the need for compliance with the Attorney General Succession Act (“AG Succession Act”), 28 U.S.C. § 508, and the Appointments Clause of the Constitution, art. II § 3, cl. 2.²

PRELIMINARY STATEMENT

If ever there were a case demonstrating the need for our nation’s top law enforcement officer to have undergone the scrutiny of Senate confirmation, and the potential for abuse if the President is allowed excessive leeway to subvert that check, this is it. The President is currently facing at least two DOJ investigations: one by Special Counsel Robert Mueller and another by

¹ A full list of the *amici* and their qualifications is attached to this brief.

² No party’s counsel authored this brief in whole or in part, and no person other than *amici* contributed money that was intended to fund the preparation or submission of this brief.

the U.S. Attorney's Office for the Southern District of New York. He has made clear that he views the Special Counsel's investigation as an illegitimate "witch hunt," that he fired former Federal Bureau of Investigation ("FBI") Director James Comey at least in part for investigating similar matters, and that he strongly disapproved of former Attorney General Jefferson B. Sessions's decision to recuse from the Special Counsel's investigation. Against this backdrop, President Trump demanded and received the resignation of Attorney General Sessions and replaced him with Acting Attorney General Whitaker, a non-Senate confirmed employee, who fell far outside the statutory line of succession. Mr. Whitaker has made public statements criticizing the Special Counsel's investigation in incendiary terms and vigorously disputing the President's own potential criminal liability. In addition to his public statements demonstrating extreme bias and prejudgment as to the Special Counsel's investigation, Mr. Whitaker has a close personal and political relationship with a key witness in the investigation, Sam Clovis.

Each of these issues, to be sure, would have been thoroughly examined had Mr. Whitaker gone through Senate confirmation. But the President bypassed that process altogether by naming Mr. Whitaker *Acting* Attorney General, commencing what some have called a "slow-motion Saturday Night massacre" that could lead to curtailment of the Special Counsel's investigation.³

Fortunately, as Plaintiff Maryland correctly argues in this case, both the AG Succession Act and the Constitution forbid such maneuvering by the President, requiring instead that even an Acting Attorney General be a Senate-confirmed official, absent exigent circumstances not presented here. A contrary conclusion would have unconscionable results: a President facing a criminal investigation could fire the head of the agency investigating him, and unilaterally

³ See Todd Purdum, The Latest Drama in Trump's Slow-Motion Saturday Night Massacre, *The Atlantic*, Nov. 7, 2018, available at <https://bit.ly/2OAc7ky>; Walter Shaub Jr., This Is The Saturday Night Massacre, *Slate*, Nov. 14, 2018, available at <https://bit.ly/2PsM97U>.

replace him with a political loyalist who has not faced the scrutiny of Senate confirmation, who is hopelessly conflicted under Federal ethics law and policies, and who could subvert the investigation. This is a situation that the AG Succession Act and the Appointments Clause are designed to prevent.

ARGUMENT

Plaintiff has shown that each of the preliminary injunction factors weigh in its favor. *See* Pl.’s Mot. at 7-33; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Amici’s* analysis below reinforces that Plaintiff is likely to succeed on its claim that Mr. Whitaker’s purported appointment is contrary to both the AG Succession Act and the Constitution’s Appointments Clause, as well as its alternative request to substitute Deputy Attorney General Rod Rosenstein as Acting Attorney General, insofar as *amici* demonstrate that a contrary interpretation would have results directly at odds with the AG Succession Act and the Constitution. The below analysis also reinforces that the “public interest” and “balance of equities” prongs of the preliminary injunction test—which “merge” when “the [g]overnment is the opposing party,” *Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh heavily in Plaintiff’s favor.

I. The Attorney General Succession Act and the Appointments Clause Create Essential Checks on Abuses of the President’s Appointment Power.

Both the AG Succession Act and the Constitution’s Appointments Clause require that the Acting Attorney General be, at minimum, a sitting Senate-confirmed officer, absent exigent circumstances not presented here. *See* Pl.’s Mot. at 8-27. The AG Succession Act further requires that a vacancy in the Office of the Attorney General be filled by not just any Senate-confirmed officer, but by one of the specific DOJ officers enumerated in the statute. *Id.* at 8-13. This reflects Congress’s judgment that, at all times, there should be a line of DOJ officers ready to serve as Acting Attorney General who have already faced the rigors of Senate confirmation.

Requiring that the Acting Attorney General be a Senate-confirmed officer is a critical institutional check on the President. Senate confirmation serves to “curb Executive abuses of the appointment power,” and “promote a judicious choice of [persons] for filling the offices of the union.” *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *The Federalist No. 76*, at 386-387 (A. Hamilton) (M. Beloff ed., 1986)). In *The Federalist No. 76*, which “contain[s] the most thorough contemporary justification for the method of appointing principal officers that the Framers adopted,” *Weiss v. United States*, 510 U.S. 163, 185 n.1 (1994), Alexander Hamilton wrote that “the necessity of [the Senate’s] concurrence . . . would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.” *The Federalist No. 76* (A. Hamilton).

If the President could unilaterally appoint principal officers, Hamilton observed, he “would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature.” *Id.* Requiring Senate confirmation leads to “[t]he possibility of rejection,” which, in turn, provides a “strong motive to [take] care in proposing” nominees. *Id.* The President “would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than . . . of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.” *Id.*

In practice, the Senate confirmation process has proven to be the “excellent check” that the Framers intended. It entails vetting by the White House; a background investigation by the FBI; completion of several reports, including the White House Personal Data Statement, the

Public Financial Disclosure Report (OGE 278e), the Questionnaire for National Security Positions (SF-86), and Senate committee questionnaires; a review of financial disclosure reports by the U.S. Office of Government Ethics or other designated ethics official; interviews with Senate staff; and, ultimately, a public Senate hearing.⁴ The pressures of this process are more than theoretical: there are numerous historical examples of cabinet nominees, including for Attorney General, whose nominations were withdrawn due to revelations made during the confirmation process.⁵

Senate confirmation is essential when it comes to the Attorney General. As the nation's chief law enforcement officer, the Attorney General has broad authority over federal criminal matters. *See* 28 U.S.C. §§ 509, 515. This includes the power, absent recusal, to oversee a criminal investigation of the President himself. *See* 28 C.F.R. § 600. Without the institutional check of Senate confirmation, the President would be free to fire an Attorney General who is investigating him and unilaterally appoint an Acting Attorney General who will shut down the investigation or otherwise do the President's bidding. It is therefore essential that whoever serves as Attorney General, however temporarily, is a person of "[f]it character[]" who is not merely a "plian[t] . . . personal[] all[y]" or "obsequious instrument[]" of the President. *See The*

⁴ *See* Partnership for Public Service, Center for Presidential Transition, *Presidential Transition Guide*, at 81-89 (Jan. 2018, 3d ed.), available at <https://bit.ly/2zcAznk>.

⁵ Examples include President Clinton's nomination of Zoe Baird as Attorney General, *see* Michael Kelly, Settling In: The President's Day; Clinton Cancels Baird Nomination for Justice Dept., *N.Y. Times*, Jan. 22, 1993, available at <https://nyti.ms/2FocIXn>; President George W. Bush's nomination of Bernard Kerik as Secretary of Homeland Security, *see* Mike Allen and Jim VandeHei, Homeland Security Nominee Kerik Pulls Out, *Washington Post*, Dec. 11, 2004, available at <https://wapo.st/2zVWL4I>; and President Trump's nomination of Ronny Jackson as Secretary of Veterans Affairs, *see* Clare Foran, Juana Summers, and Jeremy Diamond, Ronny Jackson Withdraws as VA secretary nominee, *CNN*, Apr. 26, 2018, available at <https://cnn.it/2r2okWg>.

Federalist No. 76 (A. Hamilton). The process for making this evaluation, of course, is Senate confirmation.

II. The President’s Unilateral Appointment of Mr. Whitaker Is a Worst-Case Scenario That the Attorney General Succession Act and Appointments Clause Are Designed to Prevent.

Here, there is no need to resort to a hypothetical parade of horrors—real events are as ominous as any scenario that could be imagined. The President and his associates are currently facing at least two DOJ investigations. In Mr. Whitaker, President Trump has appointed as acting head of DOJ a non-Senate confirmed political loyalist who has prejudged the merits of those investigations, and publicly advocated that they be shut down.⁶ Mr. Whitaker’s purported appointment is also the latest in a series of concerning acts by the President potentially calculated to interfere with those investigations—a so-called Saturday Night Massacre in slow motion. It is a scenario that the AG Succession Act and Appointments Clause are designed to prevent.

A. President Trump Faces Ongoing DOJ Investigations That Implicate Him, His Associates, and His Presidential Campaign.

Of the two ongoing DOJ investigations implicating the President, the most prominent is the one by Special Counsel Mueller into “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump,”⁷ matters “that arose or may arise directly from that investigation,”⁸ and crimes “committed in the course of, and with intent to interfere with, the Special Counsel’s investigation, such as perjury,

⁶ While Mr. Whitaker previously held a Senate-confirmed position as U.S. Attorney for the Southern District of Iowa beginning in 2004, he resigned from that office in 2009, well before his appointment as Acting Attorney General. Not even DOJ takes the position that Mr. Whitaker’s prior appointment satisfies the Appointments Clause. See DOJ Office of Legal Counsel Memorandum, Nov. 14, 2018, available at <https://bit.ly/2qS6bdm>.

⁷ Deputy Attorney General Rod Rosenstein, *Order No 3915-2017, Dep’t of Justice*, May 17, 2017, available at <https://bit.ly/2qupOcy>.

⁸ *Id.*

obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted.”⁹

So far, the Special Counsel’s investigation has yielded numerous guilty pleas, including by President Trump’s former National Security Advisor Michael Flynn, Trump Campaign chairman Paul Manafort, deputy campaign chairman Rick Gates, and campaign foreign policy advisor George Papadopoulos.¹⁰ The investigation has also produced detailed indictments of thirteen Russian nationals and related corporate entities that engaged in a social media disinformation campaign,¹¹ as well as twelve Russian military officers who hacked email accounts, computers, and networks of Democratic Party entities and the Clinton campaign, stole documents and other materials from those accounts, and released them using aliases.¹² President Trump has reportedly been identified as a subject of the investigation.¹³

In addition, the U.S. Attorney’s Office for the Southern District of New York is investigating payments made to two women who claim that they had affairs with Mr. Trump and who were allegedly paid for their silence during the campaign.¹⁴ This investigation has already yielded a guilty plea from former Trump Organization Executive Vice-President Michael Cohen

⁹ 28 C.F.R. § 600.4(a); *see* Rosenstein, Order No 3915-2017 (incorporating “matters within the scope of 28 CFR § 600.4(a)”).

¹⁰ Plea Agreement, United States v. Flynn, No. 17-cr-232 (D.D.C. Dec. 1, 2017); Plea Agreement, United States v. Manafort, No. 17-cr-201 (D.D.C. Sept. 13, 2018); Plea Agreement, United States v. Gates, No. 17-cr-201 (D.D.C. Feb. 23, 2018); Plea Agreement, United States v. Papadopoulos, No. 17-cr-182 (D.D.C. Oct. 5, 2017). These and other key filings in cases involving the special counsel are available at <https://www.justice.gov/sco>.

¹¹ Indictment, United States v. Internet Research Agency, No.18-cr-32 (D.D.C. Feb. 16, 2018).

¹² Indictment, United States v. Netyksho, No. 18-cr-215 (D.D.C. Jul. 13, 2018).

¹³ Carol D. Leonnig and Robert Costa, Mueller told Trump’s attorneys the president remains under investigation but is not currently a criminal target, *Washington Post*, Apr. 3, 2018, available at <https://wapo.st/2ItgBXt>.

¹⁴ Michael D. Shear, Matt Apuzzo and Sharon LaFraniere, Raids on Trump’s Lawyer Sought Records of Payments to Women, *N.Y. Times*, Apr. 10, 2018, available at <https://nyti.ms/2qksrMk>.

to an eight-count information that includes two campaign finance violations relating to payments made to “deal with negative stories about” President Trump’s relationships with women.¹⁵ Mr. Cohen has acknowledged under penalty of perjury that these payments were illegal and that then-candidate Trump directed him to arrange them.¹⁶ Mr. Cohen is reportedly cooperating with the U.S. Attorney for the Southern District of New York and Special Counsel Mueller.¹⁷

These investigations involve matters of extraordinary public importance and should be permitted to run their course without interference by an individual who has not been confirmed by the Senate. Both investigations have already uncovered criminal wrongdoing by individuals who worked for or were associated with the president’s political campaign. If these investigations were curtailed by Mr. Whitaker, the interests of the American people in uncovering the truth about what happened in the 2016 election and punishing those who committed criminal or impeachable offenses would be placed in great jeopardy.

B. Mr. Whitaker Has Demonstrated Bias and Conflicts with Respect to DOJ Investigations Involving the President.

We do not need to guess about Mr. Whitaker’s views on the Special Counsel’s investigation because he has already told us. Prior to his purported appointment as Acting Attorney General, Mr. Whitaker, while a private citizen, made numerous public statements clearly demonstrating bias and prejudgment concerning the investigation. For example:

¹⁵ Plea Agreement, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018).

¹⁶ William K. Rashbaum, Maggie Haberman, Ben Protess and Jim Rutenberg, Michael Cohen Says He Arranged Payments to Women at Trump’s Direction, *N.Y. Times*, Aug. 21, 2018, available at <https://nyti.ms/2S37xh8>.

¹⁷ Rebecca Ballhaus, Nicole Hong, and Joe Palazzolo, Michael Cohen Has Talked With Mueller About Trump In Recent Weeks, *Wall Street Journal*, Sept. 20, 2018, available at <https://on.wsj.com/2xvn8OF>; Dan Mangan, Former Trump lawyer Michael Cohen takes the train to Washington to talk to special counsel Robert Mueller’s team, *CNBC*, Nov. 12, 2018, available at <https://cnb.cx/2qTulV2>.

- In a May 10, 2017 op-ed, Mr. Whitaker defended the President’s firing of then-FBI Director Comey, who at the time he was fired was investigating possible cooperation between the Trump Campaign and Russia.¹⁸ Mr. Whitaker also opposed the appointment of a special counsel to take over the investigation.¹⁹
- In three separate media appearances in June 2017, Mr. Whitaker argued that there was no “criminal case to be made on an obstruction of justice” against the President.²⁰
- In two separate appearances on CNN on July 10, 2017, Mr. Whitaker defended the decision of members of the Trump Campaign to meet with Russian operatives in Trump Tower, arguing that there was no evidence that the meeting violated any laws.²¹
- In a July 26, 2017 appearance on CNN, Mr. Whitaker said, “I could see a scenario where Jeff Sessions is replaced with a recess appointment and that attorney general doesn’t fire Bob Mueller but he just reduces his budget to so low that his investigations grinds to almost a halt.”²² In the same appearance, Mr. Whitaker discussed other ways to undermine the special counsel investigation, including by putting pressure on Mr. Rosenstein to “cut the budget of Bob Mueller and do something a little more stage crafty than the blunt instrument of firing the attorney general and trying to replace him.”²³

¹⁸ Matthew Whitaker, Comey served faithfully, but the president made the right decision, *The Hill*, May 10, 2017, available at <https://bit.ly/2KBa0fU>.

¹⁹ *Id.*

²⁰ Wolf, Transcript, *CNN*, June 8, 2017, available at <https://cnn.it/2BhjdY1>; Mornings on the Mall, Former U.S. Attorney MATTHEW WHITAKER gives us an overview on Comey’s testimony, *WMAL*, June 9, 2017, available at <https://bit.ly/2KcAG6L>; CNN Tonight, Transcript, *CNN*, June 13, 2017, available at <https://cnn.it/2BfYzXW>.

²¹ CNN Newsroom, Transcript, *CNN*, July 10, 2017, available at <https://cnn.it/2PCH3pX>; Anderson Cooper 360 Degrees, Transcript, *CNN*, July 10, 2017, available at <https://cnn.it/2PXvUQw>.

²² CNN Tonight, Transcript, *CNN*, July 26, 2017, available at <https://cnn.it/2DcxUg4>.

²³ *Id.*

- In an August 6, 2017 CNN article, Mr. Whitaker defended President Trump’s position that the Special Counsel would be crossing a “red line” if he began investigating the President’s personal finances or businesses.²⁴
- On August 6, 2017, Mr. Whitaker retweeted an article entitled, “Note to Trump’s lawyer: Do not cooperate with Mueller lynch mob.”²⁵

In sum, Mr. Whitaker has publicly decried the legitimacy of the Special Counsel’s investigation, repeatedly disputed that the President is guilty of crimes, urged the President’s legal team not to cooperate with the investigation, and laid out a roadmap for covertly sabotaging the investigation.

In addition, Mr. Whitaker has a personal and political relationship with Sam Clovis, the former chief policy adviser and national co-chairman of the 2016 Trump Campaign, and a key witness in the Special Counsel’s investigation.²⁶ That relationship arises from Mr. Whitaker having previously served as the chairman of Mr. Clovis’ unsuccessful 2014 campaign for Iowa State Treasurer.²⁷ Mr. Whitaker also appears to have served as an informal adviser to Mr. Clovis about issues relating to the Trump Campaign.²⁸ Mr. Clovis told *Reuters* that Mr. Whitaker is a “dear friend” who served as a “sounding board” for Mr. Clovis while Mr. Clovis was working on

²⁴ Matthew Whitaker, Mueller's investigation of Trump is going too far, *CNN*, Nov. 7, 2018, available at <https://cnn.it/2PjWljj>.

²⁵ Emily Gillespie, What Does Trump's Replacement for Sessions Think About the Russia Investigation? Just Ask His Twitter Account, *Fortune*, Nov. 7, 2018, available at <https://bit.ly/2ByDrfP>.

²⁶ Ken Dilanian and Mike Memoli, Top Trump Campaign Aide Clovis Spoke to Mueller Team, Grand Jury, *NBC News*, Oct. 31, 2017, available at <https://nbcnews.to/2zUkAZ6>.

²⁷ Matt Whitaker to Chair Sam Clovis' Campaign for State Treasurer, *Caffeinated Thoughts*, Jul. 1, 2014, available at <https://bit.ly/2yXNCZD>.

²⁸ See Ryan Goodman, Whitaker's Unofficial Role as Adviser to Trump Campaign is a Clear Red Line, *Just Security*, Nov. 12, 2018, available at <https://bit.ly/2OKLIX2>.

the campaign.²⁹ Mr. Clovis also reportedly has “kept up” with Mr. Whitaker and said that they still “regularly text” one another, as recently as within the last few weeks.³⁰ In early November, Mr. Clovis reiterated that he and Mr. Whitaker are “currently friends” and that he had texted Whitaker congratulations when he became Acting Attorney General.³¹ Mr. Clovis is a witness to key events being examined by the Special Counsel. For example, court documents identify him as the Trump “campaign supervisor” who responded “great work” to George Papadopoulos when briefed about his meeting with a Russian official and a woman who was introduced as “Putin’s niece.”³²

As *amicus* CREW has explained elsewhere, Mr. Whitaker’s public statements and ties to Mr. Clovis demonstrate that he should recuse from overseeing the Special Counsel’s investigation.³³ Specifically, the facts outlined above raise serious questions about Mr. Whitaker’s compliance with the Standards of Conduct for Employees of the Executive Branch, which requires officials to “act impartially and not give preferential treatment to any private organization or individual” and to avoid even “the appearance” of a violation. 5 C.F.R. § 2635.101(b)(8), (14). Mr. Whitaker’s ties to Mr. Clovis also implicate a DOJ regulation mandating a DOJ official to recuse from a criminal investigation if that official has a personal or

²⁹ Ginger Gibson and Julia Harte, Whitaker’s friendship with Trump aide reignites recusal debate, *Reuters*, Nov. 8, 2018, available at <https://reut.rs/2Q0Zzrt>.

³⁰ Cameron Joseph, Incoming AG Whitaker Has Close Ties With Former Trump Adviser Sam Clovis, *TPM*, Nov. 7, 2018, available at <https://bit.ly/2PEig4y>.

³¹ Rosalind S. Helderman, Matt Zaptosky, and Carol D. Leonnig, Sessions’s ouster throws future of special counsel probe into question, *Washington Post*, Nov. 7, 2018, available at <https://wapo.st/2ORphdg>.

³² See Rosalind S. Helderman, Who’s who in the George Papadopoulos court documents, *Washington Post*, Nov. 2, 2017, available at <https://wapo.st/2QVC8N9>.

³³ See Letter from CREW to L. Lofthus, Nov. 8, 2018, available at <https://bit.ly/2Dt577e>; Letter from CREW to L. Lofthus, Nov. 14, 2018, available at <https://bit.ly/2OQEs6m>.

political relationship with someone who is “substantially involved” or has a “specific and substantial interest” in the investigation. 28 C.F.R. § 45.2. Despite these concerns, Mr. Whitaker has no plans to recuse, recently telling Senator Lindsey Graham that “he did not have a reason to recuse himself legally or factually” from overseeing the investigation.³⁴

C. President Trump’s Purported Appointment of Mr. Whitaker Raises Concerns of Potential Interference with the Special Counsel’s Investigation.

The President did not view Mr. Whitaker’s bias and prejudgment with respect to the Special Counsel’s investigation as disqualifying; to the contrary, it appears to be *why* he was selected as Acting Attorney General. According to the *New York Times*, “[p]eople close to the President said Mr. Whitaker first came to the attention of Mr. Trump because he liked watching Mr. Whitaker express skepticism about aspects of Mr. Mueller’s investigation on television.”³⁵

President Trump has made no secret of his view that the investigation is an illegitimate “witch hunt.”³⁶ Equally well documented are his efforts to control it,³⁷ including by:

- Directing White House Counsel Donald McGahn to prevent Attorney General Sessions from recusing himself in the Russia investigation in early 2017;
- Requesting that Attorney General Sessions undo his recusal in March 2017;
- Firing FBI Director Comey in May 2017, which the President admitted on national television was motivated partly by “the Russia thing”;

³⁴ Gregg Re, Acting AG Whitaker doesn’t see need to recuse himself ‘legally or factually,’ Graham says, *Fox News*, Nov. 15, 2018, available at <https://fxn.ws/2RXoolj>.

³⁵ Adam Goldman and Edward Wong, Trump Installs a Critic of the Mueller Investigation to Oversee It, *N.Y. Times*, Nov. 7, 2018, available at <https://nyti.ms/2PPxy5K>.

³⁶ President Donald J. Trump (@realDonaldTrump), *Twitter*, Aug. 22, 2018, available at <https://twitter.com/realdonaldtrump/status/1032495180530835456?lang=en>

³⁷ See Barry H. Berke, Noah Bookbinder, and Norman Eisen, Presidential obstruction of justice: The case of Donald J. Trump, 2nd ed., *Brookings*, Aug. 22, 2018, available at <https://brook.gs/2QTuu69>.

- Demanding that Attorney General Sessions resign in the immediate wake of Special Counsel Mueller’s appointment in May 2017;
- Requesting that the White House Counsel fire the Special Counsel in June 2017; and
- Directing then-Chief of Staff Reince Priebus to seek Attorney General Sessions’s resignation in August 2017.³⁸

There are alarming reports that President Trump and White House aides view Mr. Whitaker as a dependable ally in their efforts to control investigations of the President. In September, when Mr. Whitaker was first floated as a replacement for Deputy Attorney General Rod Rosenstein, the *New York Times* reported that White House Chief of Staff John Kelly had privately described Mr. Whitaker “as the West Wing’s ‘eyes and ears’ in a department the president has long considered at war with him.”³⁹ The *Washington Post* reported in November that President Trump “ha[d] told advisers that Whitaker is loyal and would not have recused himself from the investigation.”⁴⁰ Most alarmingly, Mr. Whitaker reportedly had private conversations with the President’s senior aides at the White House in the months preceding the firing of Attorney General Sessions and the announcement that Mr. Whitaker would serve as acting Attorney General.⁴¹ These conversations reportedly occurred without the knowledge of then-Attorney General Sessions, Deputy Attorney General Rosenstein, and other Senate-confirmed individuals in DOJ’s statutory line of succession.⁴²

³⁸ *See id.*

³⁹ Katie Benner and Maggie Haberman, Matthew Whitaker, a Trump Loyalist, Is Seen as Ascendant Amid Rosenstein Chaos, *N.Y. Times*, Sept. 26, 2018, available at <https://nyti.ms/2qz0vF9>.

⁴⁰ Devlin Barrett, Matt Zapposky, and Josh Dawsey, Jeff Sessions forced out as attorney general, *Washington Post*, Nov. 7, 2018, available at <https://wapo.st/2RHdhg1>.

⁴¹ See Evan Perez, Laura Jarrett, and Ariane de Vogue, Sessions realized too late that Whitaker was auditioning for his job, *CNN*, Nov. 9, 2018, available at <https://cnn.it/2T11quL>.

⁴² *Id.*

Mr. Whitaker's purported appointment is also unprecedented: Since DOJ's creation in 1870, no President has designated an Acting Attorney General who was not currently serving in a Senate-confirmed position.⁴³ Nor has a President appointed an Acting Attorney General who is on record criticizing an ongoing DOJ investigation of the President and laying out a roadmap for how to curtail or terminate it. *See supra* Part II.B.

In sum, Mr. Whitaker's appointment is the living embodiment of the Framers' worry that, without the legislative check of Senate confirmation, a President "would be governed much more by his private inclinations and interests." *The Federalist No. 76* (A. Hamilton). If Mr. Whitaker's appointment is deemed legal and he follows through on his plan not to recuse, he would assume supervisory control over ongoing DOJ investigations implicating the President. Yet, through his statements and actions, Mr. Whitaker has signaled he is a "plian[t] . . . personal[] all[y]" and "obsequious instrument[]" of the President whose publicly stated views are in tension with the investigations. *Id.* This is precisely the sort of "incautious" and "corrupt" appointment that Senate confirmation is meant to prevent. *Weiss*, 510 U.S. at 184. The President's disregard of the AG Succession Act and Appointments Clause thus has significant ramifications for ongoing DOJ investigations, as well as for the rule of law.

CONCLUSION

Plaintiff's motion for a preliminary injunction should be granted.

⁴³ Charlie Savage, Justice Dept. Defends Legality of Trump's Appointment of Acting Attorney General, *N.Y. Times*, Nov. 14, 2018, available at <https://nyti.ms/2PZyh1R>.

Dated: November 26, 2018

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