

November 8, 2018

Assistant Attorney General Lee J. Lofthus  
Justice Management Division and  
Designated Agency Ethics Official  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

Re: Recusal of Acting Attorney General Matthew G. Whitaker

Dear Mr. Lofthus:

To ensure the integrity of the Department of Justice and its continuing commitment to the rule of law, Acting Attorney General Matthew G. Whitaker must promptly recuse from all Department of Justice investigations of President Donald J. Trump as well as the President's current and former associates, businesses, and campaign. Those matters include (but may not be limited to):

- The investigation being conducted by Special Counsel Robert Mueller of any links and/or coordination between the Russian government and individuals associated with the campaign of President Trump, matters that arose or may arise from that investigation, and of obstruction of justice and other attempts to interfere with this investigation;<sup>1</sup> and
- The investigation of personal income, false statement, campaign finance, and other offenses involving Michael Cohen (the president's former personal attorney), the Trump Organization, and the Trump Campaign by the U.S. Attorney for the Southern District of New York, including any attempts to obstruct or interfere with this investigation.<sup>2</sup>

President Trump has been personally implicated in these two matters: he has reportedly been identified as a subject of the special counsel investigation,<sup>3</sup> and in the New York matter,

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<sup>1</sup> See Deputy Attorney General Rod Rosenstein, *Order No. 3915-2017, Office of the Deputy Attorney General*, May 17, 2017, available at <https://www.justice.gov/opa/press-release/file/967231/download>; Devlin Barrett, Adam Entous, Ellen Nakashima, and Sari Horwitz, *Special counsel is investigating Trump for possible obstruction of justice, officials say*, *Washington Post*, Jun. 14, 2017, available at [https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-trump-for-possible-obstruction-of-justice/2017/06/14/9ce02506-5131-11e7-b064-828ba60fbb98\\_story.html](https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-trump-for-possible-obstruction-of-justice/2017/06/14/9ce02506-5131-11e7-b064-828ba60fbb98_story.html).

<sup>2</sup> See *Michael Cohen Pleads Guilty In Manhattan Federal Court To Eight Counts, Including Criminal Tax Evasion And Campaign Finance Violations*, *U.S. Attorney's Office for the Southern District of New York*, Aug. 21, 2018, available at <https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax>.

<sup>3</sup> 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://www.washingtonpost.com/politics/mueller-told-trumps-attorneys-the-president-remains-under-investigation-but-is-not-currently-a-criminal-target/2018/04/03/d7832cf0-36c1-11e8-acd5-35eac230e514\\_story.html](https://www.washingtonpost.com/politics/mueller-told-trumps-attorneys-the-president-remains-under-investigation-but-is-not-currently-a-criminal-target/2018/04/03/d7832cf0-36c1-11e8-acd5-35eac230e514_story.html).

President Trump's former personal attorney, Mr. Cohen, claims that he committed criminal campaign finance offenses at President Trump's instruction.<sup>4</sup>

### **President Trump's Appointment of Whitaker Appears to Be Calculated to Establish Control of Investigations that Could Implicate the President**

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 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."<sup>5</sup> The *Washington Post* reported yesterday that President Trump "has told advisers that Whitaker is loyal and would not have recused himself from the investigation."<sup>6</sup> The President's expectation that Mr. Whitaker will not recuse from these matters regardless of the outcome of his consultation with Department of Justice ethics officials is extremely troubling.

Mr. Whitaker's appointment in these circumstances is also unprecedented: Never before has a President designated an acting attorney general who had not previously been serving in a Senate-confirmed position.<sup>7</sup> Nor has a President ever before appointed an acting attorney general who is on record describing the means by which the President could curtail an ongoing investigation of the President's conduct. In a July 26, 2017 appearance on CNN, Mr. Whitaker discussed 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."<sup>8</sup> Indeed, Mr. Whitaker also imagined the precise scenario that is playing out before our eyes: "I could see a scenario where Jeff Sessions is replaced, it would 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."<sup>9</sup>

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<sup>4</sup> Adam Liptak and Jim Rutenberg, Cohen Implicates President Trump. What Do Prosecutors Do Now?, *New York Times*, Aug. 21, 2018, available at <https://www.nytimes.com/2018/08/21/us/politics/cohen-trump-indicted.html>.

<sup>5</sup> *Id.*

<sup>6</sup> Devlin Barrett, Matt Zapotosky, and Josh Dawsey, Jeff Sessions forced out as attorney general, *Washington Post*, Nov. 7, 2018, available at [https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html).

<sup>7</sup> Katie Benner and Maggie Haberman, Matthew Whitaker, a Trump Loyalist, Is Seen as Ascendant Amid Rosenstein Chaos, *New York Times*, Sept. 26, 2018, available at <https://www.nytimes.com/2018/09/26/us/politics/matthew-whitaker-justice-department.html>.

<sup>8</sup> CNN Tonight, Transcript, *CNN*, July 26, 2017, available at <http://transcripts.cnn.com/TRANSCRIPTS/1707/26/cnnt.01.html>.

<sup>9</sup> *Id.*

## **There Are Serious Questions about Mr. Whitaker's Impartiality with Respect to these Investigations**

The Standards of Conduct for Employees of the Executive Branch (“Standards of Conduct”) impose fundamental duties to “act impartially and not give preferential treatment to any private organization or individual” and to avoid even the appearance of a violation.<sup>10</sup> The Standards also provide that “public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain,”<sup>11</sup> which applies to private gain not only by the employee but also by another individual, in this case arguably the elected official who appointed Mr. Whitaker.<sup>12</sup>

The Standards of Conduct set forth a process to consult with agency ethics officials in circumstances such as these that raise questions about the employee's impartiality to determine whether he should or should not participate in a particular matter.<sup>13</sup> Under that process, Mr. Whitaker should be advised to recuse from the special counsel and Southern District of New York investigations because the statements he has made about the investigation raise significant questions regarding his impartiality.<sup>14</sup> 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.”<sup>15</sup> There are numerous statements that Mr. Whitaker has made about the Russia investigation that reflect personal bias and prejudgment that could undermine the integrity of the Russia investigation if he were permitted to participate:

- In a May 10, 2017 op-ed in *The Hill*, Mr. Whitaker defended the president's firing of then-FBI Director James Comey who at the time of his firing was supervising the investigation of possible cooperation between the Trump campaign and Russia.<sup>16</sup> In the same piece, Mr. Whitaker opposed the appointment of a special counsel to take over the investigation.<sup>17</sup>

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<sup>10</sup> 5 C.F.R. § 2635.101(b)(8).

<sup>11</sup> 5 C.F.R. § 2635.101(b)(1).

<sup>12</sup> See 5 C.F.R. § 2635.702(a).

<sup>13</sup> 5 C.F.R. § 2635.502(a)(2).

<sup>14</sup> Under ABA Prosecutorial Standard 3-1.6, prosecutors are barred from acting based on bias, prejudice or other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. Prosecutors should “strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.” In this case, the only ethical means of mitigating Mr. Whitaker's bias and prejudice is to recuse him from the investigation.

<sup>15</sup> Adam Goldman and Edward Wong, [Trump Installs a Critic of the Mueller Investigation to Oversee It](https://www.nytimes.com/2018/11/07/us/politics/whitaker-mueller-trump.html), *New York Times*, Nov. 7, 2018, available at <https://www.nytimes.com/2018/11/07/us/politics/whitaker-mueller-trump.html>.

<sup>16</sup> Matthew Whitaker, [Comey served faithfully, but the president made the right decision](https://thehill.com/blogs/pundits-blog/the-administration/332812-jim-comey-served-faithfully-but-the-president-made-the), *The Hill*, May 10, 2017, available at <https://thehill.com/blogs/pundits-blog/the-administration/332812-jim-comey-served-faithfully-but-the-president-made-the>.

<sup>17</sup> *Id.*

- During a June 8, 2017 appearance on CNN, Mr. Whitaker argued, “[T]here is no criminal case to be made on an obstruction of justice. I mean, we have -- we have the star witness right now who has testified and then crossed examined a little bit that, you know, quite frankly, his story just doesn't rise to the level of the intent necessary, on behalf of the president, to even substantiate a criminal case.”<sup>18</sup>
- In a June 9, 2017 radio interview, Whitaker stated in reference to the congressional testimony of former FBI Director James Comey that “there is no criminal obstruction of justice charge to be had here.”<sup>19</sup>
- During a June 13, 2017 appearance on CNN, Mr. Whitaker argued, “I don't think that under these facts and circumstances that an obstruction of justice charge, either in the context that we have originally talked about with his discussions with Jim Comey or in this new context of talking about the possibility of Bob Mueller losing his job as special counsel, I think neither one of those would raise to the level of obstruction.”<sup>20</sup>
- In a July 10, 2017 appearance on CNN, Mr. Whitaker defended members of the Trump campaign for a decision that is at the center of the special counsel’s investigation of possible coordination between the Trump campaign and Russia. Referring to the Trump Tower meeting in June 2016 that Donald Trump Jr., Jared Kushner, and Paul Manafort took with Russians who had promised dirt on Hillary Clinton, Mr. Whitaker said, “you would always take the meeting” and that as a political candidate, “you certainly want to have any advantage, any legal advantage you can and one of those main advantages is to know what your opponent is either, you know, I mean all sorts of things that could be happen [*sic*] in Hillary Clinton.”<sup>21</sup>
- In a separate appearance on CNN on July 10, 2017, Mr. Whitaker argued that the evidence he had seen regarding the June 2016 Trump Tower meeting was not “enough to suggest there's some conspiracy or otherwise to, you know, to violate either election laws or espionage laws.”<sup>22</sup>
- In a July 26, 2017 appearance on CNN, Mr. Whitaker said, “I could see a scenario where Jeff Sessions is replaced, it would 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

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<sup>18</sup> Wolf, Transcript, CNN, June 8, 2017, available at

<http://transcripts.cnn.com/TRANSCRIPTS/1706/08/wolf.01.html>.

<sup>19</sup> 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-attorney-matthew-whitaker-gives-us-an-overview-on-comeys-testimony/>.

<sup>20</sup> CNN Tonight, Transcript, CNN, June 13, 2017, available at <http://transcripts.cnn.com/TRANSCRIPTS/1706/13/cnnt.02.html>.

<sup>21</sup> CNN Newsroom, Transcript, CNN, July 10, 2017, available at <http://transcripts.cnn.com/TRANSCRIPTS/1707/10/cnr.08.html>.

<sup>22</sup> Anderson Cooper 360 Degrees, Transcript, CNN, July 10, 2017, available at <http://transcripts.cnn.com/TRANSCRIPTS/1707/10/acd.02.html>.

almost a halt.”<sup>23</sup> 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.”<sup>24</sup>

- In an August 6, 2017 article on CNN, Mr. Whitaker defended President Trump’s position that Special Counsel Mueller would be crossing a “red line in the Russia 2016 election-meddling investigation” if he began investigating Trump’s personal finances or businesses.<sup>25</sup>
- On August 6, 2017, Mr. Whitaker tweeted, "Note to Trump's lawyer: Do not cooperate with Mueller lynch mob".<sup>26</sup>
- On August 25, 2017, Mr. Whitaker suggested in a tweet that the FBI’s raid of Paul Manafort’s home was designed to “intimidate.”<sup>27</sup>

These statements are particularly noteworthy in light of the fact that Mr. Whitaker has personally advocated for the recusal of public officials on the basis of their public statements. Prior to joining the Justice Department, Whitaker was executive director of Foundation for Accountability and Civic Trust (“FACT”), an nonprofit organization that claims to be “dedicated to promoting accountability, ethics, and transparency in government and civic arenas.”<sup>28</sup> In April 2017 Whitaker and FACT called on Representative Joaquin Castro to recuse from the U.S. House Permanent Select Committee on Intelligence Russian Active Measures investigation because of “troubling public comments Congressman Castro made that seemed to indicate a predetermined outcome of the investigation.”<sup>29</sup> Whitaker’s recusal from the special counsel and Southern District of New York investigations would therefore be consistent with the very standards for which he advocated prior to joining the Department of Justice.

In an analogous situation, the Department of Justice’s Office of Legal Counsel identified the “significantly heightened risk” that an employee “will at least appear less than independent in his judgments” if he participates in a matter in which an organization of which he is a director is

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<sup>23</sup> CNN Tonight, Transcript, CNN, July 26, 2017, available at <http://transcripts.cnn.com/TRANSCRIPTS/170726/cnnt.01.html>.

<sup>24</sup> *Id.*

<sup>25</sup> Matthew Whitaker, Mueller's investigation of Trump is going too far, CNN, Nov. 7, 2018, available at <https://www.cnn.com/2017/08/06/opinions/rosenstein-should-curb-mueller-whittaker-opinion/index.html>.

<sup>26</sup> <https://twitter.com/MattWhitaker46/status/894363989962100736>.

<sup>27</sup> <https://twitter.com/MattWhitaker46/status/901175034135420929>.

<sup>28</sup> Foundation for Accountability and Civic Trust, <https://www.factdc.org/> (accessed Nov. 8, 2018).

<sup>29</sup> FACT calls for U.S. Rep. Joaquin Castro to Recuse Himself from Russia Probe, *Foundation for Accountability and Civic Trust*, Apr. 11, 2017, available at <https://www.factdc.org/single-post/2017/04/11/FACT-Calls-for-US-Rep-Joaquin-Castro-to-Recuse-Himself-from-Russia-Probe>. See also Letter from Matthew G. Whitaker to Rep. Joaquin Castro, *Foundation for Accountability and Civil Trust*, Apr. 11, 2017, available at [https://docs.wixstatic.com/ugd/65db76\\_053e2a3abee74741adf973a41ffc4d2f.pdf](https://docs.wixstatic.com/ugd/65db76_053e2a3abee74741adf973a41ffc4d2f.pdf).

“advocating its views directly to the federal government.”<sup>30</sup> Here, Mr. Whitaker has publicly expressed strategies to undermine funding and public support for the investigations in an apparently successful attempt to show his loyalty and win the President’s favor, which clearly creates at least the appearance that he will be less than independent in his judgments.

### **Mr. Whitaker’s Personal Relationship with a Key Witness in the Investigation Also Counsels in Favor of Mr. Whitaker’s Recusal**

In addition, Justice Department regulations at 28 C.F.R § 45.2 mandate recusal from a criminal investigation if a department official has a personal or political relationship with a person or organization that is “substantially involved” or has a “specific and substantial interest” in a criminal investigation.<sup>31</sup> Mr. Whitaker reportedly has a personal and political relationship with Sam Clovis, the former chief policy adviser and national co-chairman of the 2016 Trump campaign as well as a key witness in the Russia investigation.<sup>32</sup> That relationship arises from Mr. Whitaker having previously served as the chairman of Mr. Clovis’ unsuccessful 2014 campaign for Iowa State Treasurer.<sup>33</sup> 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.<sup>34</sup> In an interview with the *Washington Post* yesterday, Clovis said that he and Whitaker were “currently friends” and that he had texted Whitaker congratulations when he became acting Attorney General.<sup>35</sup>

Mr. Clovis played a significant role as a witness to key events under investigation by the Special Counsel. For example, he has been reported in court documents to have been the Trump “campaign supervisor” who responded “great work” to George Papadopoulos when briefed about his meeting with a Russian official and woman who was introduced as “Putin’s niece.”<sup>36</sup>

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<sup>30</sup> Steven G Bradbury, Financial Interests of Nonprofit Organizations for Purposes of 18 U.S.C. § 208, *Office of Legal Counsel, U.S. Department of Justice*, Jan. 11, 2006, available at <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf>

<sup>31</sup> 28 C.F.R § 45.2

<sup>32</sup> Ken Dilanian and Mike Memoli, Top Trump Campaign Aide Clovis Spoke to Mueller Team, Grand Jury, *NBC News*, Oct. 31, 2017, available at <https://www.nbcnews.com/news/us-news/top-trump-campaign-aide-clovis-spoke-mueller-team-grand-jury-n816106>.

<sup>33</sup> Matt Whitaker to Chair Sam Clovis’ Campaign for State Treasurer, *Caffeinated Thoughts*, Jul. 1, 2014, available at <https://caffeinatedthoughts.com/2014/07/matt-whitaker-chair-sam-clovis-campaign-state-treasurer/>.

<sup>34</sup> Cameron Joseph, Incoming AG Whitaker Has Close Ties With Former Trump Adviser Sam Clovis, *TPM*, Nov. 7, 2018, available at <https://talkingpointsmemo.com/dc/incoming-ag-whitaker-faced-fellow-trumper-clovis-joni-ernst-in-iowa-primary>.

<sup>35</sup> Rosalind S. Helderman, Matt Zapposky, and Carol D. Leonnig, Sessions’s ouster throws future of special counsel probe into question, *Washington Post*, Nov. 7, 2018, available at [https://www.washingtonpost.com/politics/with-the-midterms-over-mueller-faces-key-decisions-in-russia-investigation/2018/11/07/7ef2765a-e151-11e8-ab2c-b31dcd53ca6b\\_story.html?utm\\_term=.330ceb17e635](https://www.washingtonpost.com/politics/with-the-midterms-over-mueller-faces-key-decisions-in-russia-investigation/2018/11/07/7ef2765a-e151-11e8-ab2c-b31dcd53ca6b_story.html?utm_term=.330ceb17e635).

<sup>36</sup> See Rosalind S. Helderman, Who’s who in the George Papadopoulos court documents, *Washington Post*, Nov. 2, 2017, available at [https://www.washingtonpost.com/politics/whos-who-in-the-george-papadopoulos-court-documents/2017/10/30/e131158c-bdb3-11e7-97d9-bdab5a0ab381\\_story.html](https://www.washingtonpost.com/politics/whos-who-in-the-george-papadopoulos-court-documents/2017/10/30/e131158c-bdb3-11e7-97d9-bdab5a0ab381_story.html).

Any continuing contacts between Mr. Clovis and Mr. Whitaker and the political nature of their relationship would further support the case for Mr. Whitaker's recusal.

### **Mr. Whitaker's Recusal Is Also Required Because His Appointment Appears to Be the Latest in a Series of Attempts by the President to Interfere with These Investigations**

Mr. Whitaker's recusal from these matters is necessitated by President Trump's alarming pattern of seeking the aid of the Attorney General or other senior Department of Justice officials in interfering with the FBI-turned special counsel investigation. For instance, President Trump reportedly lobbied now-former Attorney General Sessions not to recuse from the investigation of ties between the Trump campaign and Russia. When those efforts failed, President Trump reportedly "erupted in anger," said that he needed his attorney general to protect him, and asked "Where's my Roy Cohn?"—a reference to Senator Joseph McCarthy's top aide and Mr. Trump's former personal lawyer and fixer.<sup>37</sup> Only months after Attorney General Sessions's recusal, President Trump fired FBI Director Comey, who was leading the investigation of links and/or coordination between the Trump campaign and Russia. And when Deputy Attorney General Rod Rosenstein appointed Special Counsel Mueller to take over that investigation, the President reportedly accused Attorney General Sessions of "disloyalty" and requested that he resign.<sup>38</sup> In the summer of 2017, President Trump even reportedly ordered the firing of Special Counsel Mueller, and only backed off when then-White House Counsel Donald F. McGahn II refused to carry out the order and said he would quit.<sup>39</sup> In an episode illustrative of the personal fealty that President Trump expects of senior Department of Justice Officials, President Trump claimed that in Mr. Sessions he didn't "have an attorney general."<sup>40</sup>

President Trump's pressure on Attorney General Sessions to resign and his temporary appointment of Acting Attorney General Whitaker is lamentably consistent with this pattern of obstructive behavior.<sup>41</sup> As a newly appointed officer in the executive branch, Mr. Whitaker has taken an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "faithfully discharge the duties of the office" he occupies.<sup>42</sup> His recusal from the aforementioned matters is a fulfillment of that oath because it will protect

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<sup>37</sup> Michael S. Schmidt, *Obstruction Inquiry Shows Trump's Struggle to Keep Grip on Russia Investigation*, *New York Times*, Jan. 4, 2018, available at <https://www.nytimes.com/2018/01/04/us/politics/trump-sessions-russia-mcgnahn.html>.

<sup>38</sup> Michael S. Schmidt and Maggie Haberman, *Trump Humiliated Jeff Sessions After Mueller Appointment*, *New York Times*, Sept. 14, 2017, available at <https://www.nytimes.com/2017/09/14/us/politics/jeff-sessions-trump.html>.

<sup>39</sup> Michael S. Schmidt and Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, *New York Times*, Jan. 25, 2018, available at <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html>.

<sup>40</sup> John Solomon and Buck Sexton, *Trump eviscerates Sessions: 'I don't have an attorney general'*, *The Hill*, Sept. 19, 2018, available at <https://thehill.com/hilltv/rising/407358-hilltv-interview-exclusive-trump-eviscerates-sessions-i-have-no-attorney>.

<sup>41</sup> 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://www.brookings.edu/research/presidential-obstruction-of-justice-the-case-of-donald-j-trump-2nd-edition/>.

<sup>42</sup> 5 U.S.C. § 3331.

efforts by the Department of Justice to uphold the Constitution from further real or apparent interference by President Trump in matters that could impact the president or his interests.

The recusal of Attorney General John D. Ashcroft in 2003 from a special counsel investigation into the disclosure of Valerie Plame's CIA identity provides precedent for recusal in circumstances such as these. In that case, while Attorney General Ashcroft was not technically required to recuse, he nonetheless did so to avoid the appearance of a conflict because the investigation had the potential to implicate (and ultimately did implicate) senior administration officials.<sup>43</sup> In our view, it is both appropriate and necessary that Mr. Whitaker follow Attorney General Ashcroft's example and recuse. The President's comments and actions call into question the objectivity of anyone in his position by indicating that he expects the Attorney General to look out for his interests rather than defend the constitution and fulfill the duties of office. Attorney General Ashcroft's recusal, with far less extreme precipitating circumstances, demonstrates how to effectively defuse these types of concerns. Indeed, we believe that Acting Attorney General Whitaker is legally required to recuse, but even were you and he to reach a different legal conclusion, he should nonetheless recuse to address appearance concerns like those that motivated Attorney General Ashcroft, but in this case far more profound.

The interim nature of Mr. Whitaker's appointment further counsels against active involvement in any investigation that implicates the president.<sup>44</sup> Since his confirmation by the Senate in the Spring of 2017, Deputy Attorney General Rod Rosenstein has handled supervision of the special counsel and Southern District of New York investigations capably. Wresting supervisory control of either investigation from Deputy Attorney General Rosenstein would upset relationships that have performed well to date and require no course correction.

### **Mr. Whitaker's Recusal Should Be Swift and Public**

Finally, we request that Mr. Whitaker's recusal be swift and public to make clear to the American people and the public servants of the Department of Justice that he will fulfill his oath to serve the Constitution rather than the personal agenda of the President. President Trump's repeated attacks on the integrity of these investigations and requests for the Attorney General to join him in these attacks demands nothing short of a clear, unequivocal statement that Mr. Whitaker will play no part in undermining the rule of law that he is now sworn to uphold.

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<sup>43</sup> Dan Eggen and Mike Allen, *Ashcroft Recuses Self From Leak Case*, *Washington Post*, Dec. 31, 2003, available at <https://www.washingtonpost.com/archive/politics/2003/12/31/ashcroft-recuses-self-from-leak-case/53c7218b-24e6-4b03-8759-0e134d4551fb/>. See also Carol D. Leonnig and Amy Goldstein, *Libby Found Guilty in CIA Leak Case*, *Washington Post*, Mar. 7, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030600648.html>.

<sup>44</sup> The Federal Vacancies Reform Act provides that an acting officer may serve for may serve "for no longer than 210 days beginning on the date the vacancy occurs," or, "once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate." 5 U.S.C. § 3346.



The Honorable Lee J. Lofthus  
November 8, 2018  
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Sincerely,

A handwritten signature in blue ink, appearing to read "Noah Bookbinder". The signature is fluid and cursive, with a long horizontal stroke at the end.

Noah Bookbinder  
Executive Director

A handwritten signature in blue ink, appearing to read "Norman L. Eisen". The signature is cursive and somewhat stylized, with a prominent loop at the end.

Ambassador (Ret.) Norman L. Eisen  
Chair

cc: The Honorable Matt G. Whitaker