

December 21, 2018

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Suite 4706
Washington, D.C. 20530-0001

Re: Request for Immediate Investigation of Acting Attorney General Matthew G. Whitaker

Dear Inspector General Horowitz:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that you immediately open an investigation into whether Acting Attorney General Matthew G. Whitaker violated the Standards of Ethical Conduct for Employees of the Executive Branch (“Standards of Conduct”) by refusing to recuse from the investigation being conducted by Special Counsel Robert Mueller of links or coordination between the Russian government and individuals associated with the campaign of President Trump. Department of Justice (“DOJ”) ethics officials determined that a reasonable person would likely question Acting Attorney General Whitaker’s impartiality if he participated in Special Counsel Mueller’s investigation and concluded he should recuse from supervising it.¹ Making this independent determination triggered a mandatory requirement that Acting Attorney General Whitaker recuse from the investigation. By refusing to do so, Acting Attorney General Whitaker violated the Standards of Conduct.

Section 2635.502 of the Standards of Conduct establishes the process for addressing concerns about the appearance of loss of impartiality by executive branch employees.² Section 2635.502(a) provides that when an employee determines that his participation in a matter would cause a reasonable person with knowledge of the relevant facts to question his impartiality in that matter, the employee should not participate in that matter without authorization from an agency ethics official addressing “the appearance problem.”³ Separate from this self-regulation, section 2635.502(c) provides that an agency ethics official, “on his own initiative,” may make an “independent determination” that a reasonable person would question the employee’s impartiality.⁴ When the agency ethics official makes that determination, “the employee will be disqualified from participation in the matter,” unless the agency authorizes the employee to participate pursuant to section 2635.502(d).⁵ In short, if an agency ethics official independently

¹ Letter from Assistant Attorney General Stephen E. Boyd to Senate Majority Leader Mitch McConnell and Senate Minority Leader Charles E. Schumer, Dec. 20, 2018 (“Boyd Letter”), <https://bit.ly/2Riexdj>.

² See 5 C.F.R. § 2635.502.

³ 5 C.F.R. § 2635.502(a).

⁴ 5 C.F.R. § 2635.502(c). These determinations can be based on the financial interests of the employee or a member of his household or the role in the matter of a person with whom the employee has a covered relationship, *id.*, or they can be based on other circumstances that would raise a question regarding the employee’s impartiality, 5 C.F.R. § 2635.502(a)(2). See also Boyd Letter at 2.

⁵ *Id.*

determines that an employee's participation would raise questions about his impartiality and should not participate in it, the Standards of Conduct compel the employee to recuse.

That is what happened here. As CREW described in two letters urging Acting Attorney General Whitaker's recusal, Mr. Whitaker has made numerous statements about the Russia investigation that reflect personal bias and prejudice, and he has a personal relationship with one of the key witnesses in the investigation.⁶ To address these and potentially other ethics concerns, Acting Attorney General Whitaker met with and provided relevant information to DOJ's senior ethics official in the Office of the Deputy Attorney General.⁷ Based on this information, DOJ's ethics officials determined "that a reasonable person with knowledge of the relevant facts likely would question the impartiality of the Acting Attorney General" and "concluded" that Acting Attorney General Whitaker "should recuse himself from supervision of the Special Counsel investigation," according to Assistant Attorney General Boyd.⁸

Acting Attorney General Whitaker, however, ignored this determination by career ethics officials and, based on his own evaluation, decided to not recuse from the Special Counsel investigation.⁹ This attempt to circumvent the process is unsupported by the regulations. According to Assistant Attorney General Boyd, "[t]he ultimate decision about whether or not to recuse from a matter in a case such as this rests with the Acting Attorney General."¹⁰ This is simply incorrect. The regulation provides that *either* the employee or the designated agency ethics official acting on his own initiative may determine there is an appearance of loss of impartiality requiring recusal.¹¹ Once an agency ethics official makes that determination, the employee must recuse and cannot simply override them based on his own evaluation.

Acting Attorney General Whitaker also appears to rely on an invented distinction between a determination by ethics officials and a nonexistent "formal" type of determination. Assistant Attorney General Boyd asserts in his letter that "the ethics rules do not require a formal recommendation from the ethics officials," but admits the agency ethics officials "concluded" that "if a recommendation were sought, they would advise that the Acting Attorney General should recuse."¹² By this assertion, Assistant Attorney General Boyd appears to be claiming that because no "formal" recommendation was sought or provided, the agency ethics official did not make a determination. The regulation, however, makes no such distinction and does not provide for a "formal" determination. The agency ethics officials' conclusion was itself the determination, and Assistant Attorney General Boyd acknowledges that the officials notified

⁶ Letter from Noah Bookbinder and Norman L. Eisen to Assistant Attorney General Lee J. Lofthus, Nov. 8, 2018, <https://bit.ly/2Dt577e>; Letter from Noah Bookbinder and Norman L. Eisen to Assistant Attorney General Lee J. Lofthus, Nov. 14, 2018, <https://bit.ly/2OQEs6m>.

⁷ Boyd Letter at 1.

⁸ *Id.* at 2.

⁹ *Id.* at 2-3; *see also* Devlin Barrett and Matt Zapotosky, Ethics official said Whitaker should recuse from the Mueller probe, but his advisors told him not to, officials say, *Washington Post*, Dec. 20, 2018, <https://wapo.st/2rYgldb>; Laura Jarrett, Whitaker rejected ethics official's advice he should recuse from Russia probe, *CNN*, Dec. 21, 2018, <http://cnn.it/2Cqay5W>.

¹⁰ Boyd Letter at 2.

¹¹ 5 C.F.R. § 2635.502(c).

¹² *Id.*

Hon. Michael E. Horowitz

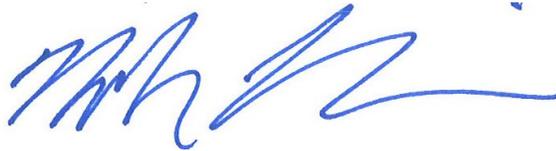
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Acting Attorney General Whitaker of it. Accordingly, Acting Attorney General Whitaker's refusal to abide by the determination and recuse from the Special Counsel investigation violates the regulation.

As Acting Attorney General, Mr. Whitaker is held to the highest standards of ethical conduct, and his decision to ignore career ethics officials and decline to recuse warrants an immediate investigation. Prior to appointing Mr. Whitaker, President Trump engaged in an 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. The extraordinary importance of the matters being investigated, which include potential criminal offenses by the president, his political campaign, and his associates, demand your attention to this matter without delay. The stakes could not be higher.

Sincerely,



Noah Bookbinder
Executive Director



Ambassador (Ret.) Norman L. Eisen
Chair