

The Honorable Rod J. Rosenstein  
Deputy Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, Northwest  
Washington, DC 20530

The Honorable Jessie K. Liu  
United States Attorney for the District of Columbia  
United States Attorney's Office  
555 4th Street, NW  
Washington, DC 20530

November 9, 2018

RE: Urgent request for quo warranto proceeding against Matthew Whitaker

Dear Deputy General Rosenstein and U.S. Attorney Liu,

We hereby request that you institute a quo warranto proceeding against Matthew Whitaker for unlawfully usurping and exercising the office of Attorney General of the United States. *See* D.C. Code § 16-350 (“A quo warranto may be issued from the United States District Court for the District of Columbia in the name of the United States against a person who within the District of Columbia usurps, intrudes into, or unlawfully holds or exercises . . . a public office of the United States, civil or military.”).

On Wednesday, November 7, 2018, at the request of President Donald J. Trump, the former Attorney General, Jefferson Sessions, submitted his resignation effective immediately. That same day, President Trump purported to appoint Mr. Whitaker as acting Attorney General under the Federal Vacancies Reform Act. However, as explained below, this appointment was unlawful.

Mr. Whitaker's appointment violates the United States Constitution. Under the Appointments Clause, the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. Const. art. II, § 2, cl. 2. The Constitution thus requires that principal officers such as the Attorney General be confirmed by the Senate. Consequently, any person *acting* as Attorney General and exercising the powers of that office must have been confirmed by the Senate. As Justice Thomas recently noted, “the Appointments Clause is not an empty formality.” *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948 (2017) (Thomas, J., concurring). The Framers “recognized the serious risk for abuse and corruption posed by

permitting one person to fill every office in the Government,” and “they knew that liberty could be preserved only by ensuring that the powers of Government would never be consolidated in one body.” *Id.*

Besides the constitutional problems with Mr. Whitaker’s appointment, the president lacked statutory authority to appoint him as acting Attorney General under the Federal Vacancies Reform Act. Even under its own terms, the acting officer provisions of the Vacancies Reform Act apply when an officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. § 3345(a). But for all intents and purposes, under the doctrine of constructive discharge, Mr. Sessions did not “resign” so much as he was *fired*: indeed, his letter to the president begins: “At your request, I am submitting my resignation.” Congress’s reference to death, resignation, and inability, but not involuntary termination, suggest that Congress did not intend to authorize the president to fire Senate-confirmed officials and then replace them with unconfirmed (and perhaps unconfirmable) temporary officials. Indeed, allowing such a scheme could enable a president to bypass Senate confirmation altogether by simply appointing “acting” officials.

Finally, the Vacancies Reform Act does not even apply to the Attorney General. By its own terms, the Act does not apply when a more specific statute expressly designates, or authorizes the head of an executive department to designate, an officer in an acting capacity. *See* 5 U.S.C. § 3347(a)(1). In the case of the Attorney General, a more specific statute does just that, providing: “In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office,” and furthermore that “[w]hen by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General.” 28 U.S.C. §§ 508(a)-(b). This more specific statute controls over the more general Vacancies Reform Act.

All these concerns—the Appointments Clause, the inapplicability of the Vacancies Reform Act to forced resignations, and the inapplicability of the Vacancies Reform Act to the Attorney General—are magnified here, for two reasons. First, there are no exigent circumstances, such as multiple officers simultaneously dying or resigning; to the contrary, there are multiple available Senate-confirmed officials in the line of succession at the Department of Justice, including the Deputy Attorney General, the Associate Attorney General, the Solicitor General, and numerous Assistant Attorneys General. Second, there is compelling evidence that the president’s forced removal of the Attorney General, and purported appointment of Whitaker, is an effort by the president to obstruct an ongoing criminal investigation currently under the supervision of the Senate-confirmed Deputy Attorney General. Any residual presidential authority to appoint acting officials “under special and temporary conditions,” *United States v. Eaton*, 169 U.S. 331, 343 (1898), does not apply here.

For these reasons, Mr. Whitaker’s ostensible appointment to the office of acting Attorney General was illegal and unconstitutional, and thus he “usurps, intrudes into, or

unlawfully holds or exercises . . . a public office of the United States.” D.C. Code § 16-3501. We therefore request that you institute a quo warranto proceeding pursuant to D.C. Code § 16-3502. If you decline to do so, then, pursuant to D.C. Code § 16-3503, we reserve the right to petition the court for the writ of quo warranto in the name of the United States.

Sincerely,

Ronald A. Fein, Legal Director  
Shanna M. Cleveland, Senior Counsel  
John C. Bonifaz, President  
Ben T. Clements, Chair, Board of Directors  
Free Speech For People