AMERICAN OVERSIGHT

November 21, 2018

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street NW
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Washington, DC 20036-4505
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Dear Mr. Kerner:

American Oversight respectfully requests that the Office of Special Counsel ("OSC") immediately open an investigation into whether current Acting Attorney General Matthew Whitaker has violated the Hatch Act by receiving political contributions while serving as Chief of Staff and Senior Counselor in the Office of the Attorney General, and potentially by acting as a candidate for partisan political office while serving as a federal employee. The Hatch Act gives the public confidence that its public officials carry out their duties in the public interest, not out of partisan or other loyalties. These principles are especially important for someone acting as the country's chief law enforcement official and one of the most important constitutional officers.

Recent filings with the Federal Election Commission ("FEC") indicate that Acting Attorney General Whitaker has received political contributions while serving at the Department of Justice ("DOJ") and has maintained an open campaign committee during his tenure in DOJ service.[1] Mr. Whitaker's acceptance of these campaign contributions may constitute a violation of the Hatch Act's prohibition on federal employees' solicitation, acceptance, or receipt of political contributions.[2] Moreover, Mr. Whitaker's maintenance of an active campaign committee may suggest that the Acting Attorney General could also be in violation of the Hatch Act's prohibition on federal employees' running as a candidate for partisan political office.[3]

Mr. Whitaker began his tenure at DOJ on October 4, 2017, serving in a non-career Senior Executive Service appointment as Chief of Staff and Senior Counselor in the Office of the Attorney General.[4] Between January 29, 2018, and February 2, 2018, while he was serving as Chief of Staff and Senior Counselor, Mr. Whitaker's U.S. Senate campaign committee received four political contributions totaling $8,800. Nearly contemporaneous with the receipt of these

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[1] FEDERAL ELECTION COMM'N, *Committee Profiles, Whitaker for Senate Inc., Raising, 2017-2018*, https://www.fec.gov/data/committee/C00544924/?cycle=2018&tab=raising; WHITAKER FOR SENATE INC, FEC FORM 3, Oct. 18, 2018, http://docquery.fec.gov/pdf/108/201810180300239108/201810180300239108.pdf.
[2] 5 U.S.C. § 7323(a)(2).
[3] 5 U.S.C. § 7323(a)(3).
[4] https://www.documentcloud.org/documents/4952366-DOJ-Resumes-of-Political-Appointees.html#p8.

contributions, on February 2, 2018, Mr. Whitaker's campaign committee made a rental payment for office space to Mr. Whitaker's former law firm—Whitaker, Hagenow & Gustoff, LLP—and a payment to Christopher Hagenow—a partner of Mr. Whitaker's former firm.[5] (The campaign committee was open during the 2015-2016 cycle but reported no contributions or expenditures during that period; the only recent activity in the account occurred after Mr. Whitaker joined the senior ranks of DOJ.)

Mr. Whitaker's receipt of these political contributions while serving as a federal employee appears to violate the Hatch Act's requirement that a federal "employee may not ... knowingly solicit, accept, or receive a political contribution from any person" except under limited circumstances,[6] which do not apply here.[7] American Oversight understands that OSC has previously opined that, in limited circumstances, a federal employee who was previously a candidate for partisan office may engage an agent to continue soliciting political contributions on the federal employee's behalf for the purpose of retiring pre-existing campaign debt.[8] However, there is no indication in the FEC filings of Mr. Whitaker's campaign committee that it has retained such an agent for fundraising purposes or that it has used these contributions to retire any campaign debt. Instead, the FEC filings show only that the campaign committee has used a portion of those funds for current operating expenses—none of which included payment for the services of an agent or employee.

Further, the only outstanding debt owed by Mr. Whitaker's campaign committee arises from a personal loan from Mr. Whitaker himself to the campaign.[9] However, Mr. Whitaker did not disclose this four-year old debt from the campaign committee as a current asset in his public financial disclosures as a DOJ employee.[10] This was either a material omission (about which American Oversight has contacted the Office of Government Ethics) or could suggest that he has written off this debt and does not expect to be repaid (thereby excluding Mr. Whitaker from the campaign debt retirement exception to the Hatch Act's prohibition).

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[5] FEDERAL ELECTION COMM'N, *Committee Profiles, Whitaker for Senate Inc., Spending, 2017-2018*, https://www.fec.gov/data/committee/C00544924/?cycle=2018&tab=spending; *see also* http://www.legaldirectories.com/Whitaker-Hagenow-amp-Gustoff-LLP-39546-Frm.aspx.

[6] 5 U.S.C. § 7323(a)(2).

[7] The Hatch Act provides that a federal employee may only accept a political contribution from a member of the same Federal labor organization, where that person is not a subordinate employee, and where the contribution solicited is for a multicandidate political committee. 5 U.S.C. § 7323(a)(2). Mr. Whitaker's Senate campaign committee is plainly not a multicandidate political committee, and there is no indication that Mr. Whitaker's donors — at least two of whom appear to be employed by former lobbying clients of Mr. Whitaker's — are members of a common Federal labor organization.

[8] William E. Reukauf, OFFICE OF SPECIAL COUNSEL, *Federal Hatch Act Advisory Opinion: Retirement of Campaign Debt*, Feb. 14, 2001, https://osc.gov/Resources/fha-26.htm.

[9] WHITAKER FOR SENATE INC, FEC FORM 3, Oct. 18, 2018, http://docquery.fec.gov/pdf/108/201810180300239108/201810180300239108.pdf (showing $49,187.37 owed to Matthew G. Whitaker from an original loan of $50,000 with no recent payments).

[10] Forms available at https://www.americanoversight.org/document/acting-attorney-general-whitakers-annual-form-278.

Moreover, the fact that the campaign's only possible debt is to Mr. Whitaker himself raises additional questions if the contributions were purportedly for the purpose of retiring campaign debt. Mr. Whitaker himself would be the only potential beneficiary of the retirement of campaign debt and would benefit personally from any contributions for that purpose. These circumstances differ materially from OSC's past analysis regarding retirement of campaign debt. In light of the increased "potential for coercion" likely to occur when a federal employee's personal finances are directly affected by accepting political contributions, a more stringent standard may be more appropriate in such circumstances. These concerns may be exacerbated here, where at least some of the contributors appear to be affiliated with Mr. Whitaker's former lobbying clients.

Although Mr. Whitaker's FEC filings do not detail the full circumstances surrounding the solicitation and receipt of these contributions, they raise significant questions about Mr. Whitaker's compliance with the Hatch Act that merit further investigation by OSC. Particular facts surrounding these contributions suggesting further investigation may be warranted include

- The fact that the campaign committee resumed activity in 2018 after appearing to have been dormant throughout the 2015-2016 election cycle;
- The fact that the activity in 2018 occurred after Mr. Whitaker joined the federal government in a senior capacity;
- The fact that the campaign committee's reported expenditures do not reflect any payments to any employees or agents who may have engaged in solicitation of these contributions in place of Mr. Whitaker, leaving the inference that these contributions were received and, perhaps, solicited directly by Mr. Whitaker himself;
- The fact that after more than three years of dormancy, four individual contributions were made in the period of a few days in early 2018; and
- The fact that expenditures were made shortly after the contributions were received for current operating expenses for rental space.

The sudden resumption of activity by the campaign committee after three years of dormancy also raises the possibility that its activities may relate to a potential campaign for partisan office in a future election. For instance, Mr. Whitaker's home state, Iowa, has a Senate seat at issue in the 2020 federal election. If this activity relates to potential future political opportunities, Mr. Whitaker would also be in violation of the Hatch Act's prohibition of federal employees acting as candidates for election to a partisan office.[11]

It is critically important that all DOJ employees, and particularly the person appointed as acting attorney general and responsible for stewarding all of DOJ's law enforcement efforts, be beyond reproach. This is why DOJ has long held all political appointees to a higher standard due to the sensitivity of the Department's mission. DOJ's departmental policy accordingly treats all political appointees as subject to the requirements of "further restricted" employees under the Hatch Act in

[11] 5 U.S.C. § 7323(a)(3).

order to "to ensure that there is not an appearance that politics plays any part in the Department's day to day operations."[12]

American Oversight believes that the facts reported in the FEC filings of the Whitaker for Senate campaign committee raise significant questions regarding whether Acting Attorney General Whitaker has violated the Hatch Act. We hope you will fully investigate this conduct. If you conclude that Mr. Whitaker has violated the Hatch Act, we further urge you to impose or recommend a sanction that takes account of this administration's repeated transgressions of the Hatch Act.

American Oversight is a non-partisan organization dedicated to accountability and ethics in government. No doubt we share that commitment with you. Consistent with OSC's authority to investigate allegations of wrongdoing by government actors, including "[v]iolation[s] of a law, rule, or regulation," "gross wastes of funds," and "abuse[s] of authority," as well as enforcement of the Hatch Act,[13] we urge you to investigate Acting Attorney General Whitaker's partisan political activity.

Respectfully submitted,

Austin R. Evers
Executive Director
American Oversight

[12] Sally Q. Yates, *MEMORANDUM FOR ALL DEPARTMENT OF JUSTICE NON-CAREER EMPLOYEES*, DEP'T OF JUSTICE, Mar. 10, 2016, https://www.justice.gov/jmd/file/834496/download; DEP'T OF JUSTICE, JUSTICE MGMT. DIV., https://www.justice.gov/jmd/political-activities.

[13] *Disclosure of Wrongdoing*, OFFICE OF SPECIAL COUNSEL, https://osc.gov/Pages/DOW.aspx (last visited July 24, 2017).