

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Monday, January 7, 2019 9:19 AM
To: Catherine.Herridge@FOXNEWS.COM
Subject: Can we move meeting to tomorrow? I

(b)(6)

Sent from my iPhone

Hornbuckle, Wyn (OPA)

From: Hornbuckle, Wyn (OPA)
Sent: Thursday, January 3, 2019 6:29 PM
To: Kupec, Kerri (OPA); Gibson, Jake
Subject: RE: Hi Jake, question

Hi Jake – I'll look into it but doubt I will be able to update these figures to meet deadline tonight. Here's some recent important cases, unlikely there have been that many since July:

Thursday, December 20, 2018: <https://www.justice.gov/opa/pr/justice-department-seeks-denaturalize-illinois-man-who-allegedly-concealed-service-military>

The Justice Department filed a denaturalization lawsuit against Nedjo Milosevic, a native of the former Yugoslavia, who, according to the Department's complaint, was a member of one of the military units responsible for the Srebrenica massacre—the largest mass atrocity in Europe since the Holocaust. The complaint alleges that Milosevic concealed his military service in order to enter the United States as a refugee, and continued to conceal it throughout his naturalization proceedings. The civil complaint was filed in federal court in the Northern District of Illinois.

[Removal of Jakiw Palij Nazi Labor Camp Guard \(EDNY\):](#)

On August 20, the long-sought removal of former Nazi labor camp guard Jakiw Palij was carried out when he was transported by ICE to Germany. One of HRSP's two predecessor units, the Office of Special Investigations (OSI), won **a court order of denaturalization** against the longtime New York City resident **in 2003** and secured an immigration court order of removal in 2004, with both decisions based on Palij's participation in WWII Nazi-sponsored acts of persecution. Palij served in 1943 in German-occupied Poland as an armed guard at an infamous SS forced labor camp for Jews, all of whom (some 6,000 men, women and children) were shot to death on November 3, 1943. Palij subsequently served in two SS formations that mistreated Polish civilian forced laborers. For nearly 14 years, OSI, HRSP, the Office of International Affairs, and Criminal Division leadership worked continuously with the State Department, ICE and other interagency partners to press European countries to admit Palij. In June, heightened State Department and White House efforts yielded German Government agreement to readmit Palij, making it possible at last to enforce the 2004 removal order. **Palij's removal was announced on August 21 by the President.**

<https://www.justice.gov/opa/pr/justice-department-secures-denaturalization-child-sexual-abuser-and-four-somalia-born>

Justice Department Secures Denaturalization of Child Sexual Abuser and Four Somalia-Born Individuals Who Falsely Claimed to be a Family and Were Admitted to the United States on Diversity Immigrant Visas

On April 11, the Department of Justice secured the denaturalization of two individuals – one convicted of engaging in sexual contact with a minor, and the other who fictitiously created a family to secure a Diversity Immigrant Visa. Judge Joe Fish of the U.S. District Court for the Northern District of Texas entered an order to revoke the U.S. citizenship of Emmanuel Olugbenga Omopariola, and Judge Susan Richard Nelson of the U.S. District Court for the District of Minnesota entered an order to revoke the U.S. citizenship of Fosia Abdi Adan.

<https://www.justice.gov/opa/pr/justice-department-seeks-denaturalize-two-foreign-convicted-war-criminals-who-fraudulently>

The Justice Department filed denaturalization lawsuits against two convicted war criminals and natives of the former Yugoslavia, who according to the Department's complaints, murdered civilians and prisoners of

war because of their religion and ethnicity, then fraudulently obtained refugee status and later naturalized into U.S. citizenship by concealing their crimes. The civil complaints were filed in federal court in the District of Oregon and the District of Columbia.

From: Kupec, Kerri (OPA) (b)(6)
Sent: Thursday, January 03, 2019 5:53 PM
To: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Cc: Hornbuckle, Wyn (OPA) <whornbuckle@jmd.usdoj.gov>
Subject: RE: Hi Jake, question

+Wyn

From: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Sent: Thursday, January 3, 2019 5:18 PM
To: Kupec, Kerri (OPA) (b)(6)
Subject: FW: Hi Jake, question

From: Vogel, Anita
Sent: Thursday, January 3, 2019 1:41 PM
To: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Subject: Hi Jake, question

Hi Jake,

Happy New Year!

I am working on a story about the Denaturalization process on the rise under the Trump Administration.

<https://www.latimes.com/local/california/la-me-ln-denaturalization-20180812-story.html>

**From 2009 -2016 an average of 16 civil denaturalization cases were filed each year
in 2017 more than 25 cases were filed
Through mid July of 2018, the DOJ has filed more than 20 more.**

This article that came out last summer has some numbers in here about the numbers of denaturalizations that have take place over the past year... but I really want to update them and the USCIS says I have to get them from the DOJ. Can you please direct me to who I can talk to over there that would be able to help me out? Trying to get the numbers by the end of the day.

Please let me know,

Thank you!!! Anita

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Spunt, David

From: Spunt, David
Sent: Thursday, January 3, 2019 12:56 PM
To: (b)(6) Kerri Kupec (PAO)
Cc: Spunt, David
Subject: Hi Kerri

Kerri,

I hope this email finds you well in the new year. I just started a few weeks ago as a correspondent for Fox based in DC. I'd like to get Justice press releases but the website form won't take and won't let me submit.

Can you see I'm added?

david.spunt@foxnews.com

I appreciate it.

David

David Spunt
Correspondent
Fox News Channel
(b)(6)
David.Spunt@foxnews.com
@davidspunt

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Saagar Enjeti

From: Saagar Enjeti
Sent: Wednesday, January 2, 2019 8:21 PM
To: Geoffrey Ingersoll; (b)(6) Kerri Kupec (PAO)
Subject: Re: Can you come to DOJ tomorrow at 1:30 pm for an off-the-record chat with A/AG Whitaker?

Great! Thanks

Saagar Enjeti
White House Correspondent
The Daily Caller
P: (b)(6)
T: @esaagar

On Wed, Jan 2, 2019 at 7:33 PM Saagar Enjeti <enjeti@dailycaller.com> wrote:

Hi Kerri,

I can attend on behalf of the Daily Caller.

Let me know the details! I'm at (b)(6)

On Wed, Jan 2, 2019 at 7:31 PM Geoffrey Ingersoll <geoffrey@dailycaller.com> wrote:

----- Forwarded message -----

From: Kupec, Kerri (OPA) (b)(6)
Date: Wed, Jan 2, 2019 at 7:24 PM
Subject: Can you come to DOJ tomorrow at 1:30 pm for an off-the-record chat with A/AG Whitaker?
To: geoffrey@dailycaller.com <geoffrey@dailycaller.com>

Let me know – inviting a few reporters. Will be small. 1:30-2:30 pm.

He will be giving a recap of the year and a look ahead.

Everything is off-the-record, but we can negotiate sourcing and likely bring some stuff on the record afterwards. Let me know, and thanks!

Kerri Kupec
Director

Office of Public Affairs

U.S. Department of Justice

(b)(6)

[REDACTED]

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Geoffrey Ingersoll
Editor in Chief
The Daily Caller

P: (b)(6)

--

Saagar Enjeti
White House Correspondent
The Daily Caller

P: (b)(6)

T: @esaagar

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Wednesday, January 2, 2019 8:01 PM
To: Saagar Enjeti; Geoffrey Ingersoll
Subject: RE: Can you come to DOJ tomorrow at 1:30 pm for an off-the-record chat with A/AG Whitaker?

Great! Go to the Visitor's Entrance on Constitution between 9th and 10th avenues. You'll need your ID. Someone will be there to escort you to the meeting. If you have any issues, call me at (b)(6).

See you tomorrow,
Kerri

From: Saagar Enjeti <enjeti@dailycaller.com>
Sent: Wednesday, January 2, 2019 7:34 PM
To: Geoffrey Ingersoll <geoffrey@dailycaller.com>; Kupec, Kerri (OPA) (b)(6)
Subject: Re: Can you come to DOJ tomorrow at 1:30 pm for an off-the-record chat with A/AG Whitaker?

Hi Kerri,

I can attend on behalf of the Daily Caller.

Let me know the details! I'm at (b)(6)

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Kerri Kupec
Director
Office of Public Affairs
U.S. Department of Justice
(b)(6)

--
Geoffrey Ingersoll
Editor in Chief
The Daily Caller

P: (b)(6)

--
Saagar Enjeti
White House Correspondent
The Daily Caller
P: (b)(6)
T: @esaagar

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Wednesday, January 2, 2019 7:43 PM
To: nmadden@crtv.com
Subject: Can you come to DOJ tomorrow at 1:30 pm for an off-the-record chat with A/AG Whitaker?

Hey, Nate! Hope all is well.

Let me know if you can come to the meeting – inviting a few reporters. Will be small. 1:30-2:30 pm.

A/AG Whitaker will be giving a recap of the year and a look ahead.

Everything is off-the-record, but we can negotiate sourcing and likely bring some stuff on the record afterwards. Let me know, and thanks!

Kerri Kupec

Director

Office of Public Affairs

U.S. Department of Justice

(b)(6)

Herridge, Catherine

From: Herridge, Catherine
Sent: Wednesday, January 2, 2019 7:32 PM
To: Cratty, Carol A. (DO) (FBI)
Cc: Maguire, Jacqueline (DO) (FBI); Kupec, Kerri (OPA) (JMD); Berger, Judson; Gibson, Jake
Subject: Re: [EXTERNAL] RE: House Judiciary and Oversight letter -- AAG Whitaker/Copied Director Wray

Thank you for coming back to us, and advising if that changes.

Happy to update
Catherine

Sent from my iPhone

On Jan 2, 2019, at 5:37 PM, Cratty, Carol A. (DO) (FBI) (b)(6) wrote:

Hello Catherine,

We have nothing for you on this.

Thank you.
Carol

From: Herridge, Catherine [<mailto:Catherine.Herridge@FOXNEWS.COM>]
Sent: Wednesday, January 02, 2019 4:49 PM
To: Maguire, Jacqueline (DO) (FBI) (b)(6); Cratty, Carol A. (DO) (FBI) (b)(6); Kupec, Kerri (OPA) (JMD) (b)(6)
Cc: Berger, Judson <Judson.Berger@FOXNEWS.COM>; Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Subject: House Judiciary and Oversight letter -- AAG Whitaker/Copied Director Wray

Good afternoon –

We are reporting on the house Judiciary and Oversight letter sent at the end of last week calling for the appointment of a second special counsel. It raises questions about the former Director's testimony to congress on the handling of the Clinton email case, as well as statements attributed to DAG Rosenstein.

1. Have you received the letter?
2. Will you provide comment on the letter's request for a second special counsel and its findings?
3. Are there plans for DOJ Rosenstein to address lawmakers questions about the allegations?

<https://judiciary.house.gov/wp-content/uploads/2018/12/Joint-Investigation-Letter-3.pdf>

Our reporting touches on the letter sections below, and in the case of DAG Rosenstein incorporates DOJ's previous response to the claims.

Thank you in advance for a response and any additional comment.
Catherine

On FBI Director Comey's statements that the decision was unanimous not to pursue criminal charges --

"FBI General Counsel James Baker, however, initially did believe the [Clinton email] case could be made from an evidentiary standpoint and multiple witnesses testified to the Committees the FBI's decision not to recommend charges was not 'unanimous.'"

On the Rosenstein allegations, first revealed by the New York Times. For ease, the earlier response is incorporated here.

The chairmen said Baker testified **"there were discussions amongst senior FBI and DOJ officials about President Trump's fitness for office, invoking the 25th Amendment, and the prospect of wearing a recording or transmitting device during conversations with the President."** After the allegations first surfaced, Fox News reported on Sept. 22, based on a source who was in the meeting, that Rosenstein's "wire" comments were viewed as "sarcastic." Rosenstein also released a statement saying, "I never pursued or authorized recording the President and any suggestion that I have ever advocated for the removal of the President is absolutely false."

<https://www.foxnews.com/politics/incoming-sen-romney-trump-hasnt-risen-to-the-mantle-of-presidency>

But the letter said, **"Baker relayed comments attributed to Deputy Attorney General Rod Rosenstein as relayed to him. ... There are questions DAG Rosenstein alone can answer and while the allegations are serious, his denial was forceful. The questions deserve to be asked and the DAG deserves his chance to respond."**

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Laco, Kelly (OPA)

From: Laco, Kelly (OPA)
Sent: Friday, December 21, 2018 6:47 PM
To: jake.gibson@foxnews.com
Subject: RE: Jan 11 Human Trafficking Summit

Circling back on this, thanks! (and Merry Christmas!!)

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

From: Laco, Kelly (OPA)
Sent: Monday, December 17, 2018 7:00 PM
To: 'jake.gibson@foxnews.com' <jake.gibson@foxnews.com>
Subject: Jan 11 Human Trafficking Summit

Hi Jake – As you know, January is Human Trafficking awareness month, and I wanted to see if Shannon Bream might be interested in coming down to host one of the panels during our Human Trafficking Summit on Friday, Jan 11th. It will be similar to last year, an all-day event from 9am-5pm.

It is looking like the Session II panel 11-12:15 on judicial/law enforcement response to human trafficking would be open to moderate. We are still nailing down panelists, but shaping up to consist of a rep from the National Center for Missing and Exploited Children, an FBI investigator, county prosecuting attorney, and another rep from a state AG's office. We could probably also work out some side interviews/discussions with some of the panelists participants and Shannon as well.

Let me know if this is something that she would be interested in, or is able to do, and I'll work on locking down more logistics.

Thanks!

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

Kast, David

From: Kast, David
Sent: Friday, December 21, 2018 6:42 PM
To: Laco, Kelly (OPA)
Subject: RE: Fox and Friends statement

GREAT THANKS A LOT

From: Laco, Kelly (OPA) <Kelly.Laco@usdoj.gov>
Sent: Friday, December 21, 2018 6:09 PM
To: Kupec, Kerri (OPA) (b)(6); Kast, David <David.Kast@FOXNEWS.COM>; Press <Press@usdoj.gov>
Subject: [EXTERNAL] RE: Fox and Friends statement

BOP should be reaching out to you soon with their statement on this, thanks.

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

From: Kupec, Kerri (OPA) (b)(6)
Sent: Friday, December 21, 2018 6:04 PM
To: Kast, David <David.Kast@FOXNEWS.COM>; Press <Press@jmd.usdoj.gov>; Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
Subject: RE: Fox and Friends statement

Hi, David – Kelly will get back to you on this, thanks.

From: Kast, David <David.Kast@FOXNEWS.COM>
Sent: Friday, December 21, 2018 5:54 PM
To: Press <Press@jmd.usdoj.gov>; Kupec, Kerri (OPA) (b)(6); Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
Subject: Fox and Friends statement

Hello DOJ,

I am a producer at Fox and Friends. We are covering a story about Nation of Islam receiving federal funding to teach prisoners in U.S. prisons. This story was an exclusive in the Washington Examiner.

<https://www.washingtonexaminer.com/politics/exclusive-nation-of-islam-receiving-federal-cash-to-teach-prisoners>

I realize that it is Friday evening just before the start of the holiday season. But if you could, we would appreciate a statement from the DOJ on this story.

David Kast

Fox & Friends, Associate Producer

W: (b)(6) | P: (b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Friday, December 21, 2018 5:47 PM
To: jake.gibson@foxnews.com
Subject: Interesting fact of the day: Bill Barr, Bob Mueller, and Pam Am

Assuming most of you already know this, but in light of the 30th anniversary of the Pam Am bombing today, thought you might find it interesting that it was then Attorney General Bill Barr who oversaw the investigation into the bombing, working closely with Bob Mueller, who was then head of the Criminal Division.

Kerri Kupec
Director
Office of Public Affairs
U.S. Department of Justice

(b)(6)

Laco, Kelly (OPA)

From: Laco, Kelly (OPA)
Sent: Friday, December 21, 2018 12:55 PM
To: Springer, Dan
Subject: RE: Media Inquiry from Dan Springer - Fox News Channel

Thanks Dan -- apologies for not getting back to you sooner, was dealing with a few other matters yesterday.

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

-----Original Message-----

From: Springer, Dan <Dan.Springer@FOXNEWS.COM>
Sent: Thursday, December 20, 2018 11:35 AM
To: Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
Subject: RE: Media Inquiry from Dan Springer - Fox News Channel

Hi Kelly,

I'm in the office and can speak with DOJ on background now. Who did you have in mind? And will they be calling me? I'm at (b)(6).

Thanks,

Dan

-----Original Message-----

From: Laco, Kelly (OPA) [mailto:Kelly.Laco@usdoj.gov]
Sent: Wednesday, December 19, 2018 2:34 PM
To: Springer, Dan <Dan.Springer@FOXNEWS.COM>
Cc: Kjergaard, Alison (OPA) <Ali.Kjergaard@usdoj.gov>
Subject: [EXTERNAL] RE: Media Inquiry from Dan Springer - Fox News Channel

Hi Dan,

Thanks for reaching out. Is there anything specific you are looking to focus on? As you know, DOJ

Thanks for reaching out. Is there anything specific you are looking to focus on? As you know, DOJ doesn't comment on ongoing litigation, or internal deliberations leading to a complaint, so we will be limited in what we can speak on. Working to see if there is any other background context that I can provide you to help shape your piece though.

Thanks!

Kelly

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

-----Original Message-----

From: Press <Press@jmd.usdoj.gov>
Sent: Monday, December 17, 2018 2:22 PM
To: Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
Cc: Kjergaard, Alison (OPA) <akjergaard@jmd.usdoj.gov>
Subject: FW: Media Inquiry from Dan Springer - Fox News Channel

-----Original Message-----

From: no-reply@usdoj.gov <no-reply@usdoj.gov>
Sent: Monday, December 17, 2018 12:46 PM
To: Press <Press@jmd.usdoj.gov>
Subject: Media Inquiry from Dan Springer - Fox News Channel

Date Monday, December 17, 2018 - 12:46pm EST

Name: Dan Springer

Email Address: dan.springer@foxnews.com

Topic: Civil Actions

Media Outlet: Fox News Channel

Deadline: Thursday, December 20

Inquiry:

I'm doing a story on the DOJ lawsuit filed against the state of Washington over its worker's

compensation law effecting workers at Hanford. I have the lawsuit and would like to speak with someone to get more context.

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Wednesday, December 19, 2018 10:22 PM
To: Shannon Bream
Subject: WSJ piece

https://www.wsj.com/articles/trumps-attorney-general-pick-criticized-an-aspect-of-mueller-probe-in-memo-to-justice-department-11545275973?emailToken=bb2fb9760db9de433b893da3c53312fd750iHgnGwVI1hEvIE7j35wIImb7f4GctamoaKdLsl2B4rNmbD8t3Of8Z3KZiMQL7ge+yz7PqRCnhyI9b5kCr3S6d1kEWliw/ryU+h00X8YTnpCaGU6tJ8d4V1QV7BD8kxDzNYoJbdeY475tT9Hfil8S9oMcA9XOrhll+Z+U0VF0%3D&reflink=article_copyURL_share

Kerri Kupec
Director
Office of Public Affairs
U.S. Department of Justice

(b)(6)

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Wednesday, December 19, 2018 9:10 PM
To: Shannon Bream
Subject: Embargoed statements (embargo lifts when WSJ story is published)

DAG Rod Rosenstein: "I have admired Bill Barr for decades, and I believe that he will be an outstanding Attorney General. Many people offer unsolicited advice, directly or through the news media, about legal issues they believe are pending before the Department of Justice. At no time did former Attorney General Barr seek or receive from me any non-public information regarding any ongoing investigation, including the Special Counsel investigation. His memo has had no impact on the investigation."

DOJ Spokesperson Kerri Kupec: "As a former Attorney General, Mr. Barr, on his own initiative, offered his views in a legal memorandum on an issue he thought, based on media reports, may arise in the Special Counsel's investigation. Those views were based solely on publicly available information. Following the announcement of Mr. Barr's nomination, senior Department ethics officials were consulted and advised that, under the applicable rules of professional conduct, Mr. Barr's memo would present no conflict as to his duties as Attorney General. Mr. Barr has stated that, if confirmed, he will make any decisions based on the actual facts and circumstances of any particular matter."

Kerri Kupec
Director
Office of Public Affairs
U.S. Department of Justice

(b)(6)

From: Kupec, Kerri (OPA)
Sent: Wednesday, December 19, 2018 9:06 PM
To: Shannon Bream
Subject: Barr memo

Barr Memo

Background

- In June of this year, Attorney General nominee Bill Barr submitted a memorandum **in his personal capacity** to DAG Rosenstein and AAG for OLC Engel on the topic of obstruction of justice by a President. He wrote the memo “as a former official **deeply concerned with the institution of the Presidency and the Department of Justice**” and acknowledging “that [he was] in the dark about many facts.”
- Barr’s memo was written during a time when there was **widespread, public speculation** that Special Counsel Mueller would seek to **compel President Trump to submit to an interview** so that Mueller could evaluate his state of mind when he fired James Comey. The supposed legal theory was that Trump may have obstructed justice if he **exercised his constitutional prerogative** to fire Comey for “corrupt” reasons. Barr was understandably concerned about how this theory would affect **the functions of the Department of Justice**.
- Barr’s memo was unsolicited. He did not prepare or submit the memo at the request of anyone. Barr had no non-public information about the Special Counsel’s investigation when preparing the memorandum (and still has none). His memo was based solely on his understanding of the facts from public sources, such as news articles.

Memo

- Barr’s memo is akin to a law review article. It **meticulously dissects and analyzes** a specific subsection of one federal obstruction statute, explaining **why it does not support** what Barr speculated to be an obstruction theory of Mueller’s and explains why such a theory, if pursued, would **damage the Department**.
 - Barr distinguished **two categories** of presidential conduct that might be termed “obstruction of justice”:
 1. The **act of sabotaging** a proceeding’s truth-finding function—for example when a person **destroys or alters evidence**. These actions are **inherently subversive and wrong** and are therefore committed with a culpable state of mind. **Barr observed that a President may fairly be accused of this kind of obstruction** as Nixon and Clinton

ally be accused of this kind of obstruction, as Nixon and Clinton were, and that investigating this form of wrongdoing **does not invade the President's discretion to perform his constitutional duties.**

2. Undertaking a **facially lawful action** – such as making a personnel decision – in a manner that is thought to have been “corrupt” as a matter of federal statutory criminal law. These are actions that are permissible on their face but would theoretically constitute obstruction because, for example, they were performed with a **subjectively bad state of mind or improper motive.**
- Were the Department to adopt the second category as obstruction, Barr argued, it would have **disastrous implications** for the Presidency, the Department of Justice and the Executive Branch as a whole. Barr explained:
 - This interpretation of the relevant obstruction statute **would contradict the Department's longstanding position** that generally worded statutes (such as 18 U.S.C. § 1512(c)(2), at issue here) cannot be applied to a President's conduct absent a clear statement of Congressional intent to do so, which is absent in this case.
 - This interpretation would wrongly conclude that Presidential conduct affecting a matter that touches him personally is inherently corrupt. Were that true, the President would be **completely disempowered** from supervising a category of cases for which **the Constitution clearly grants him supervisory authority.**
 - This interpretation would **impermissibly encroach upon the President's exercise of core Article II powers** by defining a facially valid exercise of executive authority as criminal based solely on subjective motive.
 - This interpretation could allow that a President's facially lawful conduct is said to have obstructed justice **even if there was no underlying illegal conduct.**
 - Barr argued that **the implications of this theory of obstruction are dire for the Department of Justice.**
 - **Everyday decisions** to conclude or constrain an investigation by DOJ lawyers **would be open to inquiry as potential criminal obstruction.** Failure to open such inquiries may itself be regarded as corrupt.
 - The result would be the **further “criminalization” of standard political disputes** between the political parties and branches of government.

Other Points

- Following the announcement of Mr. Barr's nomination, senior Department ethics officials were consulted and advised that, under the applicable rules of professional conduct, Mr. Barr's memo would present no conflict as to his duties as Attorney General.
- If confirmed, Barr make any decisions about specific matters based on the actual facts and circumstances at the time.

Kerri Kupec

Director

Office of Public Affairs

U.S. Department of Justice

(b)(6)

Singman, Brooke

From: Singman, Brooke
Sent: Wednesday, December 19, 2018 2:45 PM
To: Stafford, Steven (OPA)
Subject: RE: Media Inquiry from Brooke Singman - Fox News Channel

Thanks!

-----Original Message-----

From: Stafford, Steven (OPA) [mailto:Steven.Stafford@usdoj.gov]
Sent: Wednesday, December 19, 2018 2:44 PM
To: Singman, Brooke <brooke.singman@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Media Inquiry from Brooke Singman - Fox News Channel

Yes

Steven J. Stafford
U.S. Department of Justice

-----Original Message-----

From: Singman, Brooke <brooke.singman@FOXNEWS.COM>
Sent: Wednesday, December 19, 2018 2:43 PM
To: Stafford, Steven (OPA) <sstafford@jmd.usdoj.gov>
Subject: RE: Media Inquiry from Brooke Singman - Fox News Channel

I already am in touch with Peter, thanks! I meant outside of special counsel's office.. Is Marc Raimondi handling natsec?

-----Original Message-----

From: Stafford, Steven (OPA) [mailto:Steven.Stafford@usdoj.gov]
Sent: Wednesday, December 19, 2018 2:41 PM
To: Singman, Brooke <brooke.singman@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Media Inquiry from Brooke Singman - Fox News Channel

Peter Carr. I will have him reach out

Steven J. Stafford
U.S. Department of Justice

U.S. Department of Justice

-----Original Message-----

From: Singman, Brooke <brooke.singman@FOXNEWS.COM>
Sent: Wednesday, December 19, 2018 2:39 PM
To: Stafford, Steven (OPA) <sstafford@jmd.usdoj.gov>
Subject: RE: Media Inquiry from Brooke Singman - Fox News Channel

Wonderful! Looking forward to working with you.
Who is handling national security/ Russia inquiries? Would you be able to make a connection?

Thank you!

-----Original Message-----

From: Stafford, Steven (OPA) [mailto:Steven.Stafford@usdoj.gov]
Sent: Wednesday, December 19, 2018 2:38 PM
To: Singman, Brooke <brooke.singman@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Media Inquiry from Brooke Singman - Fox News Channel

Immigration

Steven J. Stafford
U.S. Department of Justice

-----Original Message-----

From: Singman, Brooke <brooke.singman@FOXNEWS.COM>
Sent: Wednesday, December 19, 2018 2:35 PM
To: Stafford, Steven (OPA) <sstafford@jmd.usdoj.gov>
Subject: RE: Media Inquiry from Brooke Singman - Fox News Channel

Steven,

Thank you so much. Happy to connect. What areas do you cover?

Thanks!

Brooke Singman
Politics Reporter, Fox News Channel

(b)(6)

Brooke.singman@foxnews.com

-----Original Message-----

From: Stafford, Steven (OPA) [mailto:Steven.Stafford@usdoj.gov]
Sent: Wednesday, December 19, 2018 2:10 PM
To: Singman, Brooke <brooke.singman@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Media Inquiry from Brooke Singman - Fox News Channel

You can attribute the following to me:

“Under the laws passed by Congress, asylum is only for those who have a legitimate fear of persecution on the basis of their race, nationality, religion, political opinion, or membership in a particular social group. Attorney General Sessions' ruling in Matter of A-B- was about following that requirement. We are reviewing our options with regard to this ruling, and we will continue to restore the rule of law in our immigration system.”

Steven J. Stafford
U.S. Department of Justice

-----Original Message-----

From: no-reply@usdoj.gov <no-reply@usdoj.gov>
Sent: Wednesday, December 19, 2018 1:06 PM
To: Press <Press@jmd.usdoj.gov>
Subject: Media Inquiry from Brooke Singman - Fox News Channel

Date Wednesday, December 19, 2018 - 1:06pm EST

Name: Brooke Singman

Email Address: Brooke.Singman@FoxNews.com

Topic: Immigration

Media Outlet: Fox News Channel

Deadline: ASAP

Inquiry:

Hoping for a comment from the Justice Department regarding Judge Emmet Sullivan's ruling against the administration's revised asylum policies?

He ruled in favor of the ACLU and the women who claim to have endured “extensive persecution in the form of sexual and physical violence” if returned back to their home countries. Sullivan ruled that those plaintiffs be brought back into the U.S. for another hearing of their “credible fear” claims.

Deadline asap.

Thank you!

Brooke Singman
Politics Reporter, Fox News Channel

(b)(6)

Brooke.singman@foxnews.com

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Springer, Dan

From: Springer, Dan
Sent: Wednesday, December 19, 2018 2:43 PM
To: Laco, Kelly (OPA)
Cc: Kjergaard, Alison (OPA)
Subject: Re: [EXTERNAL] RE: Media Inquiry from Dan Springer - Fox News Channel

Hi Kelly,

Some background would be helpful. I just called your office. Got voice mail. You want to call me at (b)(6) ?

Thanks,

Dan

Sent from my iPhone

> On Dec 19, 2018, at 11:33 AM, Laco, Kelly (OPA) <Kelly.Laco@usdoj.gov> wrote:

>

> Hi Dan,

>

> Thanks for reaching out. Is there anything specific you are looking to focus on? As you know, DOJ doesn't comment on ongoing litigation, or internal deliberations leading to a complaint, so we will be limited in what we can speak on. Working to see if there is any other background context that I can provide you to help shape your piece though.

>

> Thanks!

>

> Kelly

>

> Kelly Laco

> Office of Public Affairs

> Department of Justice

> Office: 202-353-0173

> Cell: (b)(6)

>

>

> -----Original Message-----

> From: Press <Press@jmd.usdoj.gov>

> Sent: Monday, December 17, 2018 2:22 PM
> To: Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
> Cc: Kjergaard, Alison (OPA) <akjergaard@jmd.usdoj.gov>
> Subject: FW: Media Inquiry from Dan Springer - Fox News Channel

>
>
>
> -----Original Message-----
> From: no-reply@usdoj.gov <no-reply@usdoj.gov>
> Sent: Monday, December 17, 2018 12:46 PM
> To: Press <Press@jmd.usdoj.gov>
> Subject: Media Inquiry from Dan Springer - Fox News Channel

> Date Monday, December 17, 2018 - 12:46pm EST

> Name: Dan Springer

> Email Address: dan.springer@foxnews.com

> Topic: Civil Actions

> Media Outlet: Fox News Channel

> Deadline: Thursday, December 20

> Inquiry:

> I'm doing a story on the DOJ lawsuit filed against the state of Washington over its worker's compensation law effecting workers at Hanford. I have the lawsuit and would like to speak with someone to get more context.

>
>

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Wednesday, December 19, 2018 2:20 PM
To: Mears, William
Cc: Stafford, Steven (OPA)
Subject: RE: Hello from Fox News: Reaction to Judge's Ruling on Asylum

+Steve

From: Mears, William <William.Mears@FOXNEWS.COM>
Sent: Wednesday, December 19, 2018 2:06 PM
To: Kupec, Kerri (OPA) (b)(6)
Subject: Hello from Fox News: Reaction to Judge's Ruling on Asylum

Hi could you please forward any Department reaction to Judge Sullivan's ruling in the asylum case, issued this morning.

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1853-106

Bill Mears
Supreme Court Producer
Fox News Channel
william.mears@foxnews.com

(b)(6) (o)
(b)(6) (c)



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Stafford, Steven (OPA)

From: Stafford, Steven (OPA)
Sent: Wednesday, December 19, 2018 2:11 PM
To: william.mears@foxnews.com
Subject: RE: Hello from Fox News: Reaction to Judge's Ruling on Asylum

You can attribute the following to me:

"Under the laws passed by Congress, asylum is only for those who have a legitimate fear of persecution on the basis of their race, nationality, religion, political opinion, or membership in a particular social group. Attorney General Sessions' ruling in Matter of A-B- was about following that requirement. We are reviewing our options with regard to this ruling, and we will continue to restore the rule of law in our immigration system."

Steven J. Stafford
U.S. Department of Justice

From: Mears, William <William.Mears@FOXNEWS.COM>
Sent: Wednesday, December 19, 2018 2:03 PM
To: Press <Press@jmd.usdoj.gov>
Subject: Hello from Fox News: Reaction to Judge's Ruling on Asylum

Hi could you please forward any Department reaction to Judge Sullivan's ruling in the asylum case, issued this morning.

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1853-106

Bill Mears
Supreme Court Producer
Fox News Channel
william.mears@foxnews.com

(b)(6) (o)
(b)(6) (c)



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Doherty, Brian

From: Doherty, Brian
Sent: Tuesday, December 18, 2018 6:36 PM
To: Kupec, Kerri (OPA)
Subject: RE: Re: Hi, we wanted to see if Kerri KUPEC WOULD BE AVAIL THIS EVENING IN THE 11PM eT HR ON SHANNON'S SHOW

Ok, no problem! thanks

From: Kupec, Kerri (OPA) (b)(6)
Sent: Tuesday, December 18, 2018 6:35 PM
To: Doherty, Brian <Brian.Doherty@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Hi, we wanted to see if Kerri KUPEC WOULD BE AVAIL THIS EVENING IN THE 11PM eT HR ON SHANNON'S SHOW

Hey, Brian! Hope you are doing well. Alexa passed the below note along and I'm just getting to it now. I'd love to come on, but I suspect it's too late for me to get approval to come on – it's been a crazy day around here. Thanks so much for thinking of me.

From: Doherty, Brian <Brian.Doherty@FOXNEWS.COM>
Sent: Tuesday, December 18, 2018 4:55 PM
To: Henning, Alexa A. EOP/WHO (b)(6)
Subject: [EXTERNAL] Hi, we wanted to see if Kerri KUPEC WOULD BE AVAIL THIS EVENING IN THE 11PM eT HR ON SHANNON'S SHOW

...OR IF SHE COULD PROVIDE US W/ A STATRMENT ON THIS STORY:

THANKS,

BRIAN

(b)(6)

Maddow: 'I Am a Religious Person'...and Liberty University Isn't 'Actual Higher Education'

By Tim Graham | December 18, 2018 7:46 AM EST

<https://www.newsbusters.org/blogs/nb/tim-graham/2018/12/18/maddow-i-am-religious-personand-liberty-university-isnt-actual>

In case you couldn't get enough of Chris Hayes and Rachel Maddow on MSNBC TV, Maddow chatted with Hayes last month for his online podcast [Why Is This Happening?](#) Maddow was discussing her podcast [Bag Man](#) about former vice president Spiro Agnew, and how he was a corrupt racist demagogue like George Wallace. Then came her declaration of a vague religious faith in God:

RACHEL MADDOW: I mean, I am a religious person. I am a person who has a belief in God and has

religious faith, and thinks about things in terms of how we all answer to God at the end of our lives, and so therefore, I believe that those types of badness are related, because they come from the same bad place in the universe. But that is a fundamentally non-scientific way of looking at it.

CHRIS HAYES: Right, yeah, yeah.

RACHEL MADDOW: I mean, I'm telling you my prejudice on these things is like, yeah, **corruption and racist demagoguery must go together because those things come from the same dark part of the earth.** But, I mean, it may just as easily be coincidence.

Is it time now for *Theology Today with Rachel Maddow*? Don't jump too far ahead, because soon she whacks the evangelicals as she discusses "This anti-intellectual, anti-elite line of argument that we've seen from right-wing populists since the beginning of time."

MADDOW: We've got a new Justice Department spokesperson who's from Liberty University, and **Liberty University was founded by a televangelist so that your Christian child wouldn't be corrupted by actual higher education.** And now that's the spokesperson for the Justice Department.

These things add up. They have real results in the world. Is there going to be a backlash to that? Is there going to be a resurgent intellectualism in hard line conservatism that isn't the kind of white supremacist stuff that we're seeing, which is the pseudo-intellectual stuff, right? I don't know, but it adds up. It adds up over time.

The new Justice Department spokesperson is [Kerri Kupec, a graduate of Liberty University's law school.](#) These liberals describe Jerry Falwell's evangelical followers as "poor, uneducated, and easy to command," and then wonder why they're accused of elitism.

Hayes later admits he's getting *verklemt* over Maddow: "**I just got goosebumps,** because I feel like I just saw... I've known you for a very long time, and I feel very close to you. **I'm getting weirdly choked up,** but I just feel like I just saw this very clear moment of your moral cosmology. You are, the thing you said about being a person of faith, just the sense that there's a right thing to do and a wrong thing to do, and you're going to have to answer at the end of the day, and that that's actually a thing that's distinct."

Maddow replied "That's why I raised the issue of faith, because for me, it is a little bit mystical," discussing how liberal Republican Elliott Richardson prosecuted Agnew. "What's the thing that you do? You make the decision with integrity, with selflessness, and with an eye on history, and you hope that you can answer for it when you die. It's just — it's a little mystical."

What's a little odd here is that Rachel Maddow thinks integrity is so important....and hasn't located

any serious integrity problems with Bill and Hillary Clinton, like [that Juanita Broaddrick matter](#).

Brian Doherty
Coordinating Producer, News @ Night w/ Shannon Bream
FOX News@Night w/ Shannon Bream
400 North Capitol St NW
Suite 550
Washington, DC 20001
Wk: (b)(6)
Cell: (b)(6)
brian.doherty@foxnews.com

=====

AMERICA has chosen....
FOX NEWS is # 1 in ratings. # 1 with viewers.

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Kerri Kupec
Director
Office of Public Affairs
U.S. Department of Justice
(b)(6)
[REDACTED]

Lynn, Emily

From: Lynn, Emily
Sent: Tuesday, December 18, 2018 3:44 PM
To: Pettit, Mark T. (OPA)
Subject: RE: FOR PLANNING PURPOSES ONLY: Briefing Call at 12:00 PM 12/18 on the new bump-stock-type devices final rule

Thank you, Mark!

From: Pettit, Mark T. (OPA) <Mark.T.Pettit@usdoj.gov>
Sent: Tuesday, December 18, 2018 11:15 AM
To: Lynn, Emily <Emily.Lynn@FOXNEWS.COM>
Subject: [EXTERNAL] FW: FOR PLANNING PURPOSES ONLY: Briefing Call at 12:00 PM 12/18 on the new bump-stock-type devices final rule

Hey Emily,
I got your email from Tucker's auto-response. Please forward this on to him if you can.
Best,
Mark Pettit

Mark T. Pettit
Lead Media Affairs Coordinator
Office of Public Affairs
U.S. Department of Justice
Office: 202.514.1449
Cell: (b)(6)
Email: Mark.T.Pettit@usdoj.gov

From: Pettit, Mark T. (OPA) <mtpettit@jmd.usdoj.gov>
Sent: Tuesday, December 18, 2018 11:06 AM
To: Pettit, Mark T. (OPA) <mtpettit@jmd.usdoj.gov>
Cc: Kupec, Kerri (OPA) (b)(6)
Subject: FOR PLANNING PURPOSES ONLY: Briefing Call at 12:00 PM 12/18 on the new bump-stock-type devices final rule

Good morning,

For your planning purposes, at 12:00 p.m. we will host a briefing on the new bump-stock-type devices final rule. The briefing will be done on background to walk through talking points and what is contained in the rule (attached).

If you agree to the these terms, please RSVP to me.

Please use the following number to call in to the briefing:

(b)(6) US Toll
(b)(6) US Toll Free

Access code: (b)(6)

This email and its contents are off-the-record and for planning purposes only.

Best,
Mark Pettit

This message and its attachments may contain legally privileged or confidential information. It is intended solely for the named addressee. If you are not the addressee indicated in this message (or responsible for delivery of the message to the addressee), you may not copy or deliver this message or its attachments to anyone. Rather, you should permanently delete this message and its attachments and kindly notify the sender by reply e-mail. Any content of this message and its attachments that does not relate to the official business of Fox News or Fox Business must not be taken to have been sent or endorsed by either of them. No representation is made that this email or its attachments are without defect.

(Billing Code: 4410-FY-P)

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Parts 447, 478, and 479

[Docket No. 2018R-22F; AG Order No.

RIN 1140-AA52

Bump-Stock-Type Devices

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives; Department of Justice

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to clarify that bump-stock-type devices—meaning “bump fire” stocks, slide-fire devices, and devices with certain similar characteristics—are “machineguns” as defined by the National Firearms Act of 1934 and the Gun Control Act of 1968 because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger. Specifically, these devices convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue

Pettit, Mark T. (OPA)

From: Pettit, Mark T. (OPA)
Sent: Tuesday, December 18, 2018 11:29 AM
To: AWR Hawkins, PhD
Subject: RE: Bump Stock Ban Background Call

Hey AWR,

Please use the following number to call in to the 12:00 p.m. briefing:

(b)(6) US Toll

(b)(6) US Toll Free

Access code: (b)(6)

Best,
Mark Pettit

Mark T. Pettit
Lead Media Affairs Coordinator
Office of Public Affairs
U.S. Department of Justice
Office: 202.514.1449
Cell: (b)(6)
Email: Mark.T.Pettit@usdoj.gov

From: AWR Hawkins, PhD <awrhawkins@breitbart.com>
Sent: Tuesday, December 18, 2018 11:24 AM
To: Pettit, Mark T. (OPA) <mtpettit@jmd.usdoj.gov>
Subject: Bump Stock Ban Background Call

Mark,

Hi, AWR Hawkins, Breitbart News. Would like to be on the background call please.

Is that a number? Password?

AWR

Pettit, Mark T. (OPA)

From: Pettit, Mark T. (OPA)
Sent: Tuesday, December 18, 2018 8:30 AM
To: Jake Gibson
Subject: We are by the visitor center

Sent from my iPhone

Laco, Kelly (OPA)

From: Laco, Kelly (OPA)
Sent: Monday, December 17, 2018 12:19 PM
To: kelly.laco@usdoj.gov
Bcc: O'Connell, Jonathan; Andrew M Harris (BLOOMBERG/ NEWSROOM:); Ellis Kim; Barker, Jeff; Roberts, John; zoe.tillman@buzzfeed.com; Abdollah, Tami; Josh Gerstein
Subject: Filing - 4th Circuit Court of Appeals on Emoluments
Attachments: Final Mandamus Petition 12.17.18 with Addendum.pdf

See attached, thanks.

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

In re DONALD J. TRUMP, in his official
capacity as President of the United
States,

Petitioner.

No. 2018-_____

[No. 8:17-cv-1596-PJM]

**PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MARYLAND
AND MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS
PENDING MANDAMUS**

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPAN
Deputy Assistant Attorney General

MARK R. FREEMAN
MICHAEL S. RAAB
MEGAN BARBERO
(202) 532-4631
Attorneys
Appellate Staff, Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Attorneys for Petitioner

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

THE DISTRICT OF COLUMBIA
and **THE STATE OF MARYLAND,**

Plaintiffs,

v.

DONALD J. TRUMP,
individually and in his official capacity
as President of the United States,

Defendant.

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Civil No. **PJM 17-1596**

OPINION

This suit alleges that President Donald J. Trump has violated the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.¹ Plaintiffs, the District of Columbia and the State of Maryland, submit that the President is violating these Clauses because the Trump Organization, in which he has an ownership interest and from which he derives financial benefits, owns and operates a global business empire, including hotels, restaurants, and event spaces. The President’s receipt of these benefits is said to offend the sovereign, quasi-sovereign, proprietary, and *parens patriae* interests of the State of Maryland and the District of Columbia. Plaintiffs seek declaratory relief establishing their rights *vis-à-vis* the President’s actions as well as injunctive relief prohibiting him from further violating the Clauses.

¹ The Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8, provides that “no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.” The Domestic Emoluments Clause, U.S. Const. art. II, § 1, cl. 7, provides: “The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.”

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

THE DISTRICT OF COLUMBIA
and **THE STATE OF MARYLAND,**

Plaintiffs,

v.

DONALD J. TRUMP,
individually and in his official capacity
as President of the United States,

Defendant.

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Civil No. **PJM 17-1596**

ORDER

Having considered Defendant’s Motion to Dismiss (ECF No. 21) and Plaintiffs’ Opposition thereto, following oral argument, it is, for the reasons stated in the accompanying Opinion, this 28th day of March, 2018,

ORDERED:

1. Defendant’s Motion to Dismiss (ECF No. 21) is **DENIED-IN-PART** insofar as it disputes Plaintiffs’ standing to challenge the involvement of the President with respect to the Trump International Hotel and all its appurtenances in Washington, D.C. and any and all operations of the Trump Organization with respect to the same;
2. Defendant’s Motion to Dismiss (ECF No. 21) is **GRANTED-IN-PART WITHOUT PREJUDICE** as to the operations of the Trump Organization and the President’s involvement in the same outside the District of Columbia;
3. The Court’s ruling on Defendant’s Motion to Dismiss is **DEFERRED-IN-PART** in that the Court has yet to rule on Defendant’s remaining arguments

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

THE DISTRICT OF COLUMBIA
and **THE STATE OF MARYLAND,**

Plaintiffs,

v.

DONALD J. TRUMP,
individually and in his official capacity
as President of the United States,

Defendant.

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Civil No. **PJM 17-1596**

OPINION

In a previous Opinion¹ the Court held that Plaintiffs, the District of Columbia and the State of Maryland, have standing to challenge actions of President Donald J. Trump, in his official capacity,² that they believe violate the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.³

¹ See Opinion (Mar. 28, 2018), ECF No. 101 (Standing Opinion).

² On February 23, 2018, without objection by the President, Plaintiffs filed a Motion for Leave to File an Amended Complaint which would add him as a Defendant in his individual capacity. On March 12, 2018, the Court granted the Motion, accepting the proposed Amended Complaint that accompanied the Motion. Mem. Order (Mar. 12, 2018), ECF No. 94. The Court, however, decided to proceed on the official capacity claims separately so that its Standing Opinion addressed only the standing arguments raised by the President in his official capacity. On May 1, 2018, the President, in his individual capacity, filed a separate Motion to Dismiss. Def.’s Mot. Dismiss (May 1, 2018), ECF No. 112 (Individual Capacity Motion). The Court will address the individual capacity claims and the arguments to dismiss them in a separate Opinion. The present Opinion addresses only those arguments pertaining to the President’s official capacity as set forth in his Motion to Dismiss.

³ The **Foreign Emoluments Clause**, U.S. Const. art. I, § 9, cl. 8, provides that “no Person holding any Office of Profit or Trust under them [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

The **Domestic Emoluments Clause**, U.S. Const. art. II, § 1, cl. 7, provides: “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”

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

THE DISTRICT OF COLUMBIA
and **THE STATE OF MARYLAND,**

Plaintiffs,

v.

DONALD J. TRUMP,
individually and in his official capacity
as President of the United States,

Defendant.

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Civil No. **PJM 17-1596**

ORDER

Having considered Defendant’s Motion to Dismiss (ECF No. 21) and Plaintiffs’ Opposition thereto, following oral argument, it is, for the reasons stated in the accompanying Opinion, this 25th day of July, 2018,

ORDERED:

1. Defendant’s Motion to Dismiss (ECF No. 21) is **DENIED** insofar as it seeks to dismiss Plaintiffs’ claims against the President in his official capacity that the President and the Trump International Hotel and all its appurtenances in Washington, D.C. and any and all operations of the Trump Organization with respect to the same have violated the Foreign and Domestic Emoluments Clauses of the U.S. Constitution. Plaintiffs have stated viable causes of action as to those claims.
2. The Court **DIRECTS** the parties to consult and submit a Joint Recommendation to the Court suggesting the next steps to be taken in the case, including whether any further amendment of the Amended Complaint is

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

THE DISTRICT OF COLUMBIA *
and **THE STATE OF MARYLAND,** *

Plaintiffs, *

v. * Civil No. **PJM 17-1596**

DONALD J. TRUMP, *
in his official capacity as *
President of the United States, *

Defendant. *

MEMORANDUM OPINION

I. Procedural Background

In a previous Opinion, the Court held that the District of Columbia and the State of Maryland have standing to challenge, in his official capacity, President Donald J. Trump based on his alleged violations of the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.¹ The Court found that Plaintiffs had standing based on proprietary, quasi-sovereign, and *parens patriae* interests vis-a-vis the President's undisputed ownership interest in the Trump International Hotel in Washington.²

¹ See Opinion (March 28, 2018), ECF No. 101 (Standing Opinion).

² *Id.* at 12-29.

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

THE DISTRICT OF COLUMBIA
and **THE STATE OF MARYLAND,**

Plaintiffs,

v.

DONALD J. TRUMP,
in his official capacity
as President of the United States,

Defendant.

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Civil No. **PJM 17-1596**

ORDER

Having considered Defendant Donald J. Trump's Motion for Leave to Appeal (Interlocutory), and for a Stay Pending Appeal (ECF No. 127) it is, for the reasons set forth in the accompanying Memorandum Opinion this 2nd day of November, 2018

ORDERED:

- 1) The President's Motion for Leave to Appeal and for a Stay Pending Appeal (ECF No. 127) is **DENIED**;
- 2) Plaintiffs **SHALL** submit within twenty (20) days a proposed Schedule of Discovery, consistent with the Schedule set out in the earlier Joint Report made to the Court pursuant to F.R.C.P. 26(f) (ECF No. 132).

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

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

THE DISTRICT OF COLUMBIA
441 Fourth Street, N.W.
Washington, D.C. 20001,

and

THE STATE OF MARYLAND
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202,

Plaintiffs,

v.

DONALD J. TRUMP,
President of the United States of America, in
his official capacity and in his individual
capacity

1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500,

Defendant.

Civil Action No. 8:17-cv-1596-PJM

AMENDED COMPLAINT

BRIAN E. FROSH
Attorney General of Maryland

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F: (202) 741-0647

Gibson, Jake

From: Gibson, Jake
Sent: Monday, December 17, 2018 10:51 AM
To: Kupec, Kerri (OPA)
Subject: Re: [EXTERNAL] Re: Fox Meeting

So.. just so I can brief Jay and Bill... who all will be at the meeting?

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

On Dec 17, 2018, at 9:36 AM, Kupec, Kerri (OPA) (b)(6) wrote:

Woohoo! Excellent. Thanks so much.

Sent from my iPhone

On Dec 17, 2018, at 9:28 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

We are good for Tuesday at 830am at DOJ.

Jay Wallace
Bill Sammon
Jake Gibson

On Dec 16, 2018, at 1:10 PM, Kupec, Kerri (OPA) (b)(6) wrote:

Perfect. I want you there!

Sent from my iPhone

On Dec 16, 2018, at 1:02 PM, Gibson, Jake
<Jake.Gibson@FOXNEWS.COM> wrote:

Working to see if Tuesday at 0830 works.

But as far as personnel it would need to be Jay
Wallace and Bill Sammon... and possibly me, but
definitely those two.

On Dec 16, 2018, at 12:21 PM, Kupec, Kerri (OPA)

(b)(6) wrote:

How about 8:30 am on Tuesday morning?

Sent from my iPhone

On Dec 16, 2018, at 10:08 AM, Gibson,

Jake <Jake.Gibson@FOXNEWS.COM>

wrote:

Fox News President Jay
Wallace is in town tomorrow
and [Tuesday Morning](#).

Tomorrow he can do [11:30a-
1:15p](#), [3-4p](#) or Tuesday he
can do anytime [in the
morning until 10:30a](#).

I don't know that we can pull
together any anchors in
short notice. So it might be a
small group.

Jake Gibson
Department of Justice
Producer
Fox News Washington

(b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Sunday, December 16, 2018 10:20 AM
To: Gibson, Jake
Subject: Re: Fox Meeting

Shooting for Tues morning right now -

Sent from my iPhone

On Dec 16, 2018, at 10:08 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

Fox News President Jay Wallace is in town tomorrow and [Tuesday Morning](#).

Tomorrow he can do [11:30a-1:15p](#), [3-4p](#) or Tuesday he can do anytime [in the morning until 10:30a](#).

I don't know that we can pull together any anchors in short notice. So it might be a small group.

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Sunday, December 16, 2018 10:13 AM
To: Gibson, Jake
Subject: Re: Fox Meeting

Jay would be excellent. Could we just have him meet with MW one on one (with you) and pull together some of the anchors for a separate meeting later this week?

Sent from my iPhone

On Dec 16, 2018, at 10:08 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

Fox News President Jay Wallace is in town tomorrow and [Tuesday Morning](#).

Tomorrow he can do [11:30a-1:15p](#), [3-4p](#) or Tuesday he can do anytime [in the morning until 10:30a](#).

I don't know that we can pull together any anchors in short notice. So it might be a small group.

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Monday, December 10, 2018 7:48 PM
To: jake.gibson@foxnews.com
Subject: DOJ guidance documents win
Attachments: SF v. Whitaker_Op. and Order Granting MTD.pdf

FYI – In a win for DOJ today, Judge Tigar dismissed for lack of standing San Francisco’s challenge to DOJ’s rescission of 8 guidance documents, including the *Olmstead* Guidance.

Kerri Kupec

Director

Office of Public Affairs

U.S. Department of Justice

(b)(6)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff,

v.

MATTHEW G. WHITAKER, et al.,

Defendants.

Case No. 18-cv-02068-JST

**ORDER GRANTING MOTION TO
DISMISS**

Re: ECF No. 36

Before the Court is Defendants Department of Justice and Acting Attorney General Matthew Whitaker’s (collectively, “DOJ”) motion to dismiss Plaintiff City and County of San Francisco’s (the “City”) complaint. ECF No. 36. The Court will grant the motion.

I. BACKGROUND

A. Facts

In February 2017, President Donald Trump issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” which, among other things, instructed executive agencies to identify regulatory actions that were “outdated, unnecessary, or ineffective” as candidates for repeal, modification, or replacement. 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017). In November 2017, then-Attorney General Jefferson Sessions issued a memorandum addressed specifically at DOJ guidance documents, in which he observed that DOJ had “in the past published guidance documents or similar instruments of future effect by other names, such as letters to regulated entities that effectively bind private parties without undergoing the rulemaking process.” Attorney General Memorandum, *Prohibition on Improper Guidance Documents*, at 1 (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>. The memorandum instructed DOJ to refrain from this practice in the future, stating that the agency would no longer

Gibson, Jake

From: Gibson, Jake
Sent: Friday, December 7, 2018 12:53 PM
To: Kupec, Kerri (OPA)
Subject: Any DOJ response? - Issa - DOJ lawyer telling Comey not to answer questions

From: Herridge, Catherine
To: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Subject: Fwd: Issa - DOJ lawyer telling Comey not to answer questions

Can u ask DOJ on what basis they are refusing to answer questions and which topics

Issa says not classified

Sent from my iPhone

====

Issa also said that the Congressman present have been frustrated with the testimony so far and that Comey didn't seem upset about being told by his lawyers that he doesn't have to answer certain questions.

Caroline

====

Issa says they will need s to bring Comey back and get anser from DOJ

Feeding shortly

Sent from my iPhone

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Thursday, December 6, 2018 10:43 AM
To: Gibson, Jake
Subject: Re: Hey there-

Speech from Whitaker at PSN

Sent from my iPhone

> On Dec 6, 2018, at 10:02 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

>

>

> Anything going on today?

>

>

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Roberts, John

From: Roberts, John
Sent: Tuesday, December 4, 2018 6:06 PM
To: Laco, Kelly (OPA)
Subject: Re: [EXTERNAL] RE: Hi Kelly.....Kerri told me to reach out to you..

Thanks

John Roberts
Chief White House Correspondent
Fox News Channel
+(b)(6)
John.Roberts@foxnews.com
@johnrobertsfox

On Dec 4, 2018, at 5:59 PM, Laco, Kelly (OPA) <Kelly.Laco@usdoj.gov> wrote:

<image002.jpg>
DOJ declines to comment. Thanks!

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

From: Roberts, John <John.roberts@FOXNEWS.COM>
Sent: Tuesday, December 4, 2018 5:17 PM
To: Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
Subject: RE: Hi Kelly.....Kerri told me to reach out to you..

Hi Kelly.....subpoenas have gone out.....any DOJ response planned?

Subpoenas to federal agencies:
<http://oag.dc.gov/sites/default/files/2018-12/Emoluments-Federal-Government-Subpoenas.pdf>

Subpoenas to Trump Organization entities:
<http://oag.dc.gov/sites/default/files/2018-12/Emoluments-Trump-Organization-Subpoenas.pdf>

Thx,

John Roberts
Chief White House Correspondent
Fox News Channel
john.roberts@foxnews.com
(b)(6) mobile

(b)(6)

@JohnRobertsFox

From: Laco, Kelly (OPA) <Kelly.Laco@usdoj.gov>
Sent: Tuesday, December 04, 2018 2:06 PM
To: Roberts, John <John.roberts@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Hi Kelly.....Kerri told me to reach out to you..

Hi John,

Just for planning purposes only – nothing has been filed yet and no update on timing at this point.

Feel free to keep checking in.

Thanks!

Kelly

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

From: Roberts, John <John.roberts@FOXNEWS.COM>
Sent: Tuesday, December 4, 2018 1:59 PM
To: Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
Subject: Hi Kelly.....Kerri told me to reach out to you..

On BG – will DOJ file mandamus on the Trump International subpoenas from DC and MD?

Thanks!

John Roberts
Chief White House Correspondent
Fox News Channel
john.roberts@foxnews.com
+(b)(6) mobile
@JohnRobertsFox

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Sarnoff, Marisa

From: Sarnoff, Marisa
Sent: Tuesday, December 4, 2018 5:35 PM
To: Press; Flores, Sarah Isgur (OPA)
Subject: Fox News research / Inquiry re: Whitaker / Mueller investigation

Hi there –

I'm a researcher with the Fox News Channel, and I've been asked to confirm who is overseeing the Mueller investigation. Is it Whitaker, at this point? I haven't seen reports that he's recused, but I am not finding confirmation that he is actually overseeing the Special Counsel's investigation.

I am on a tight deadline, so I hope to hear back from you soon. Please email me at this address, or feel free to call me at (b)(6). Thank you.

Best Regards,
Marisa Sarnoff

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Roberts, John

From: Roberts, John
Sent: Tuesday, December 4, 2018 2:09 PM
To: 'Laco, Kelly (OPA)'
Subject: RE: Hi Kelly.....Kerri told me to reach out to you..

Thanks Kelly....production subpoenas from DC and MD are going out this afternoon...

John Roberts
Chief White House Correspondent
Fox News Channel
john.roberts@foxnews.com
+(b)(6) mobile
@JohnRobertsFox

From: Laco, Kelly (OPA) <Kelly.Laco@usdoj.gov>
Sent: Tuesday, December 04, 2018 2:06 PM
To: Roberts, John <John.roberts@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Hi Kelly.....Kerri told me to reach out to you..

Hi John,

Just for planning purposes only – nothing has been filed yet and no update on timing at this point.

Feel free to keep checking in.

Thanks!

Kelly

Kelly Laco
Office of Public Affairs
Department of Justice
Office: 202-353-0173
Cell: (b)(6)

From: Roberts, John <John.roberts@FOXNEWS.COM>
Sent: Tuesday, December 4, 2018 1:59 PM
To: Laco, Kelly (OPA) <klaco@jmd.usdoj.gov>
Subject: Hi Kelly.....Kerri told me to reach out to you..

On BG – will DOJ file mandamus on the Trump International subpoenas from DC and MD?

Thanks!

John Roberts

Chief White House Correspondent
Fox News Channel
john.roberts@foxnews.com
+(b)(6) mobile
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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Monday, December 3, 2018 8:45 PM
To: jake.gibson@foxnews.com
Subject: Changes at OPA

Hey, everyone –

As you might have heard, I am the new director of OPA at DOJ. We all very much appreciate the great work Sarah did while she was in this spot, and I am grateful for the opportunities I had (and have) thanks to her advocacy. [Coming soon – be on the lookout for an email from us about a get-together to celebrate Sarah's time as OPA director.]

Looking forward to continuing to work with you all in this new role. Don't hesitate to call or text me if you need anything or want to chat. 😊

Kerri

Kerri Kupec
Director
Office of Public Affairs
U.S. Department of Justice
(b)(6)

Pappas, Alex

From: Pappas, Alex
Sent: Monday, December 3, 2018 9:48 AM
To: Kupec, Kerri (OPA)
Subject: RE: Comment on the Jerome Corsi complaint

Thanks Kerri

From: Kupec, Kerri (OPA) (b)(6)
Sent: Monday, December 03, 2018 9:47 AM
To: Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov>; Pappas, Alex <Alex.Pappas@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Comment on the Jerome Corsi complaint

Decline to comment, thanks.

From: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>
Sent: Monday, December 3, 2018 9:34 AM
To: Pappas, Alex <Alex.Pappas@FOXNEWS.COM>
Cc: Kupec, Kerri (OPA) (b)(6)
Subject: Re: Comment on the Jerome Corsi complaint

Hi I don't handle press inquiries any longer. Adding Kerri.

On Dec 3, 2018, at 9:32 AM, Pappas, Alex <Alex.Pappas@FOXNEWS.COM> wrote:

Sarah,

We are writing a [FoxNews.com](https://www.foxnews.com) story on Jerome Corsi filing a complaint against the Special Counsel team. He alleges a "pattern of coercing and extorting" of Corsi to "lie" or "be indicted himself." Corsi's lawyer says it was filed with the acting attorney general, among other places. Would anyone there like to comment on it?

Thanks,

--
Alex Pappas
Fox News, Washington
(b)(6)

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or its attachments are without defect.

Pappas, Alex

From: Pappas, Alex
Sent: Monday, December 3, 2018 9:35 AM
To: Flores, Sarah Isgur (OPA)
Subject: RE: Comment on the Jerome Corsi complaint

Thanks Sarah

From: Flores, Sarah Isgur (OPA) [mailto:Sarah.Isgur.Flores@usdoj.gov]
Sent: Monday, December 03, 2018 9:34 AM
To: Pappas, Alex <Alex.Pappas@FOXNEWS.COM>
Cc: Kupec, Kerri (OPA) (b)(6)
Subject: [EXTERNAL] Re: Comment on the Jerome Corsi complaint

Hi I don't handle press inquiries any longer. Adding Kerri.

On Dec 3, 2018, at 9:32 AM, Pappas, Alex <Alex.Pappas@FOXNEWS.COM> wrote:

Sarah,

We are writing a FoxNews.com story on Jerome Corsi filing a complaint against the Special Counsel team. He alleges a "pattern of coercing and extorting" of Corsi to "lie" or "be indicted himself." Corsi's lawyer says it was filed with the acting attorney general, among other places. Would anyone there like to comment on it?

Thanks,

--
Alex Pappas
Fox News, Washington
(b)(6)

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Pappas, Alex

From: Pappas, Alex
Sent: Monday, December 3, 2018 9:29 AM
To: Carr, Peter (OPA)
Subject: Comment on Jerome Corsi complaint?

Peter,

Reaching out from FoxNews.com, where we are writing a story on Jerome Corsi filing a complaint against the Special Counsel team. He alleges a "pattern of coercing and extorting" of Corsi to "lie" or "be indicted himself."

Could you comment on this?

Thanks,

—
Alex Pappas
Fox News, Washington
(b)(6)

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Stafford, Steven (OPA)

From: Stafford, Steven (OPA)
Sent: Saturday, December 1, 2018 11:34 AM
To: Elizabeth.Zwirz@FOXNEWS.COM
Subject: statement on Sanctuary City ruling

Hi Elizabeth,

I don't have any new comment on this, but would just point you to the statement I put out a few days ago on this issue:

You can attribute to me: "The federal government is not asking the states or anyone else to enforce our immigration laws. The United States is simply asking sanctuary jurisdictions to stop actively obstructing federal law enforcement. That is not only allowed by the Constitution, it is demanded by the Constitution. Sanctuary jurisdictions make the absurd claim that they should continue to receive federal law enforcement funding despite their deliberate efforts to frustrate the enforcement of federal law."

Steven J. Stafford
U.S. Department of Justice

Stafford, Steven (OPA)

From: Stafford, Steven (OPA)
Sent: Friday, November 30, 2018 10:44 PM
To: Gibson, Jake
Subject: Re: Any comment on this?

Yes. I put out this statement a few days ago on this issue:

You can attribute to me: "The federal government is not asking the states or anyone else to enforce our immigration laws. The United States is simply asking sanctuary jurisdictions to stop actively obstructing federal law enforcement. That is not only allowed by the Constitution, it is demanded by the Constitution. Sanctuary jurisdictions make the absurd claim that they should continue to receive federal law enforcement funding despite their deliberate efforts to frustrate the enforcement of federal law."

On Nov 30, 2018, at 10:24 PM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

Okay.
Can you provide any of those statements please?

On Nov 30, 2018, at 9:19 PM, Stafford, Steven (OPA) <Steven.Stafford@usdoj.gov> wrote:

Hi Jake,

I don't have any new comment for you on this. I would simply point you to previous statements we have put out on this issue.

Thanks,

Steven J. Stafford
U.S. Department of Justice

On Nov 30, 2018, at 6:53 PM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

Another court nixes Trump push to cut 'sanctuary city' funds
BC-US--Sanctuary Cities-Lawsuit,1st Ld-Writethru
Nov 30, 2018 5:09PM (GMT [22:09](#)) - 478 words
By [JENNIFER PELTZ](#), Associated Press
Eds: Updates with details, quotes, byline.
NEW YORK (AP) — The Trump administration can't withhold over \$29 million from six states and New York City in a clash over their

immigration policies as "sanctuary" jurisdictions, a federal judge said Friday in the latest of several similar rulings around the country.

Friday's decision involves Connecticut, Massachusetts, New Jersey, Rhode Island, Virginia and Washington state, and the state and city of New York. It follows similar opinions by federal courts in California, Illinois and Pennsylvania.

However, there's no nationwide ruling — at least for now — on whether the federal government can block states, cities and counties from receiving a longtime public safety grant if they limit their cooperation with immigration officials.

The federal Department of Justice declined to comment on Friday's ruling. New York Attorney General Barbara Underwood called the decision "a major win."

"The Trump administration's attempt to withhold these vital funds was nothing more than a political attack at the expense of our public safety," Underwood, a Democrat, said in a statement.

New York City's Democratic mayor, Bill de Blasio, said President Donald Trump had been trying to trying "to bully our city into enforcing his Draconian immigration policies."

Trump, a Republican, has emphasized cracking down on illegal immigration and often casts it as a public safety threat. Shortly after taking office last year, he issued an [order](#) barring federal grants to "sanctuary" cities in many circumstances.

The Justice Department followed up with new conditions on a [grant program](#) that dates back years. Named for a New York City police officer killed in the line of duty in 1988, it benefits state and local governments.

The new requirements included telling federal agents when immigrants in the country illegally are getting out of custody and letting agents question inmates about their immigration status. The local governments also had to agree not to set limitations on giving immigration officials citizenship information about anyone.

"We must encourage these 'sanctuary' jurisdictions to change their policies and partner with federal law enforcement to remove criminals," then-U.S. Attorney Jeff Sessions said in announcing the conditions.

But targeted states and cities said that turning police into de facto immigration agents discourages immigrants from reporting crimes or aiding investigations.

New York and the others involved in Friday's decision argued the cooperation conditions violated constitutional limits on the administration's authority over spending decisions and on federal power over states.

U.S. District Judge Edgardo Ramos agreed.

The information-sharing requirement "impinges on (the states' and city's) sovereign authority and their citizens' liberty to be regulated under their preferred state and local policies," he wrote.

However, Ramos turned down their request to strike down the conditions nationwide. A federal judge and a three-judge appeals panel in Chicago did so earlier this year, but those rulings were later limited to apply just to the city.

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Friday, November 30, 2018 9:19 PM
To: Gibson, Jake
Cc: Stafford, Steven (OPA)
Subject: Re: Any comment on this?

+Stafford

Sent from my iPhone

On Nov 30, 2018, at 6:53 PM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

Another court nixes Trump push to cut 'sanctuary city' funds

BC-US--Sanctuary Cities-Lawsuit,1st Ld-Writethru

Nov 30, 2018 5:09PM (GMT [22:09](#)) - 478 words

By [JENNIFER PELTZ](#), Associated Press

Eds: Updates with details, quotes, byline.

NEW YORK (AP) — The Trump administration can't withhold over \$29 million from six states and New York City in a clash over their immigration policies as "sanctuary" jurisdictions, a federal judge said Friday in the latest of several similar rulings around the country.

Friday's decision involves Connecticut, Massachusetts, New Jersey, Rhode Island, Virginia and Washington state, and the state and city of New York. It follows similar opinions by federal courts in California, Illinois and Pennsylvania.

However, there's no nationwide ruling — at least for now — on whether the federal government can block states, cities and counties from receiving a longtime public safety grant if they limit their cooperation with immigration officials.

The federal Department of Justice declined to comment on Friday's ruling. New York Attorney General Barbara Underwood called the decision "a major win."

"The Trump administration's attempt to withhold these vital funds was nothing more than a political attack at the expense of our public safety," Underwood, a Democrat, said in a statement.

New York City's Democratic mayor, Bill de Blasio, said President Donald Trump had been trying to trying "to bully our city into enforcing his Draconian immigration policies."

Trump, a Republican, has emphasized cracking down on illegal immigration and often casts it as a public safety threat. Shortly after taking office last year, he issued an [order](#) barring federal grants to "sanctuary" cities in many circumstances.

The Justice Department followed up with new conditions on a [grant program](#) that dates back years. Named for a New York City police officer killed in the line of duty in 1988, it benefits state and local governments.

The new requirements included telling federal agents when immigrants in the country illegally are getting out of custody and letting agents question inmates about their

immigration status. The local governments also had to agree not to set limitations on giving immigration officials citizenship information about anyone.

"We must encourage these 'sanctuary' jurisdictions to change their policies and partner with federal law enforcement to remove criminals," then-U.S. Attorney Jeff Sessions said in announcing the conditions.

But targeted states and cities said that turning police into de facto immigration agents discourages immigrants from reporting crimes or aiding investigations.

New York and the others involved in Friday's decision argued the cooperation conditions violated constitutional limits on the administration's authority over spending decisions and on federal power over states.

U.S. District Judge Edgardo Ramos agreed.

The information-sharing requirement "impinges on (the states' and city's) sovereign authority and their citizens' liberty to be regulated under their preferred state and local policies," he wrote.

However, Ramos turned down their request to strike down the conditions nationwide. A federal judge and a three-judge appeals panel in Chicago did so earlier this year, but those rulings were later limited to apply just to the city.

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

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Ross, Lee

From: Ross, Lee
Sent: Thursday, November 29, 2018 5:38 PM
To: Stafford, Steven (OPA)
Subject: Re: [EXTERNAL] RE: Hello from Fox News

Ahhh. Good to know. I'm based in our west coast office. La. Usually work with lajeunesse. So lets stay in touch. Lee

Sent from my iPhone

On Nov 29, 2018, at 2:37 PM, Stafford, Steven (OPA) <Steven.Stafford@usdoj.gov> wrote:

Yessir

Steven J. Stafford
U.S. Department of Justice

From: Ross, Lee <lee.ross@FOXNEWS.COM>
Sent: Thursday, November 29, 2018 5:33 PM
To: Stafford, Steven (OPA) <sstafford@jmd.usdoj.gov>
Subject: Re: [EXTERNAL] RE: Hello from Fox News

Again. Thank you. I should have asked. Have you taken over Devin's portfolio? I worked with him on immigration until he left for treasury. I think.

Sent from my iPhone

On Nov 29, 2018, at 2:09 PM, Stafford, Steven (OPA) <Steven.Stafford@usdoj.gov> wrote:

What's your number

Steven J. Stafford
U.S. Department of Justice

From: Ross, Lee <lee.ross@FOXNEWS.COM>
Sent: Thursday, November 29, 2018 5:07 PM
To: Stafford, Steven (OPA) <sstafford@jmd.usdoj.gov>
Subject: Re: [EXTERNAL] RE: Hello from Fox News

Thank you. CBP refereed me to DOJ. If the AP story is correct I would think that would be a USA decision or from Main Justice. Please advise. Lee

Sent from my iPhone

On Nov 29, 2018, at 2:05 PM, Stafford, Steven (OPA)

On NOV 27, 2018, at 4:03 PM, Stafford, Steven (OFA)

<Steven.Stafford@usdoj.gov> wrote:

Lee, I would refer you to CBP

Steven J. Stafford
U.S. Department of Justice

From: Ross, Lee <lee.ross@FOXNEWS.COM>
Sent: Thursday, November 29, 2018 12:32 PM
To: Cipriani, Cindy (USACAS) <CCipriani@usa.doj.gov>; Barajas, Hortencia (USACAS) (b)(6)
Subject: Hello from Fox News

I got a bounce back from Kelly. With your emails as contacts.

I had someone forward this AP write up to me. A decision from your office? Can you confirm. And explain? Thank you. Lee

https://apnews.com/6a9b9dc6a75a4f919290e23de16535b4?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP

Sent from my iPhone

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Ross, Lee

From: Ross, Lee
Sent: Thursday, November 29, 2018 5:10 PM
To: Stafford, Steven (OPA)
Subject: Re: [EXTERNAL] RE: Hello from Fox News

(b)(6) So hopefully it gets through.

Sent from my iPhone

On Nov 29, 2018, at 2:09 PM, Stafford, Steven (OPA) <Steven.Stafford@usdoj.gov> wrote:

What's your number

Steven J. Stafford
U.S. Department of Justice

From: Ross, Lee <lee.ross@FOXNEWS.COM>
Sent: Thursday, November 29, 2018 5:07 PM
To: Stafford, Steven (OPA) <sstafford@jmd.usdoj.gov>
Subject: Re: [EXTERNAL] RE: Hello from Fox News

Thank you. CBP refereed me to DOJ. If the AP story is correct I would think that would be a USA decision or from Main Justice. Please advise. Lee

Sent from my iPhone

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Steven J. Stafford
U.S. Department of Justice

From: Ross, Lee <lee.ross@FOXNEWS.COM>
Sent: Thursday, November 29, 2018 12:32 PM
To: Cipriani, Cindy (USACAS) <CCipriani@usa.doj.gov>; Barajas, Hortencia (USACAS) (b)(6)
Subject: Hello from Fox News

I got a bounce back from Kelly. With your emails as contacts.

I had someone forward this AP write up to me. A decision from your office? Can you confirm. And explain? Thank you. Lee

[https://apnews.com/6a9b9dc6a75a4f919290e23de16535b4?
utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP](https://apnews.com/6a9b9dc6a75a4f919290e23de16535b4?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP)

Sent from my iPhone

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Gibson, Jake

From: Gibson, Jake
Sent: Wednesday, November 28, 2018 4:28 PM
To: Kerri.Kupec@usdoj.gov
Subject: Any news in tomorrow's 0830 Rosenstein speech?

Jake Gibson
Department of Justice Producer
Fox News Washington
(b)(6)

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Stafford, Steven (OPA)

From: Stafford, Steven (OPA)
Sent: Tuesday, November 27, 2018 9:05 PM
To: jake.gibson@foxnews.com
Subject: stay brief
Attachments: 51 -- Notice of Appeal.pdf; 52 -- Motion for Stay Pending Appeal.pdf

Steven J. Stafford
U.S. Department of Justice

1 JOSEPH H. HUNT

Assistant Attorney General

2 SCOTT G. STEWART

Deputy Assistant Attorney General

3 AUGUST E. FLENTJE

Special Counsel

4 WILLIAM C. PEACHEY

Director

5 EREZ REUVENI

Assistant Director

6 Office of Immigration Litigation

7 U.S. Department of Justice, Civil Division

8 P.O. Box 868, Ben Franklin Station

9 Washington, DC 20044

Tel: (202) 307-4293

10 Email: Erez.R.Reuveni@usdoj.gov

PATRICK GLEN

Senior Litigation Counsel

11 JOSEPH DARROW

12 FRANCESCA GENOVA

13 CHRISTINA GREER

Trial Attorneys

14
15
16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18

19 _____)
East Bay Sanctuary Covenant, *et al.*,)

20)
21 Plaintiffs,)

22 v.)

23 Donald J. Trump, President of the United)
24 States, *et al.*,)

25 Defendants.)
26 _____)

NOTICE OF APPEAL

Civil Action No. 1:18-cv-06810-JST

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Tuesday, November 27, 2018 9:02 PM
To: Gibson, Jake
Cc: Stafford, Steven (OPA)
Subject: Re: Do you have anything on this?

+Stafford

Sent from my iPhone

On Nov 27, 2018, at 8:29 PM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

SCOOP: Justice Dept. official tells me in the next 30 minutes, DOJ will file a stay motion in U.S. District Court for the Northern District of California where Judge Jon S. Tigar had blocked Trump's asylum policy
https://twitter.com/Anna_Giaritelli/status/1067543073025069056

On Nov 27, 2018, at 7:44 PM, Kupec, Kerri (OPA) (b)(6) wrote:

Hi, all –

See below for a recap of today and what's ahead for the rest of the week.

Today: Acting Attorney General Whitaker met with the following law enforcement groups at Main Justice: National Organization of Black Law Enforcement Officers, Major County Sheriffs of America, National Sheriffs' Association, and the International Association of Chiefs of Police.

Wednesday

- In the morning, Acting Attorney General Whitaker will deliver remarks at the Department of Defense Counternarcotic and Global Threats Conference in McClean, Virginia. [Closed Press]
- In the afternoon, Acting Attorney General Whitaker will travel to Memphis, Tennessee and visit the U.S Attorney's Office for the Western District of Tennessee, where he will deliver remarks on a law enforcement initiative to combat violent crime. [Open Press – See Advisory for details]
While there, the A/AG will meet with USA Michael Dunavant and receive a briefing on violent crime; he will also meet with members of federal, state, and local law enforcement. The A/AG will then depart for a tour of the FedEx Mail Facility in Memphis (largest FedEx Express Hub in the world).
- At Main Justice, Deputy Attorney General Rod J. Rosenstein, Assistant

- At Miami Justice, Deputy Attorney General Rod J. Rosenstein, Assistant Attorney General Brian A. Benczkowski of the Criminal Division and U.S. Attorney Craig Carpenito for the District of New Jersey, along with partners at the FBI, will hold a press conference at 10:30 a.m. EST, to announce enforcement efforts against international computer hacking and extortion scammers. *Please note the DAG will be leaving after his remarks and not taking questions. [Open Press – See Advisory for details]

Thursday

- Acting Attorney General Matt Whitaker will travel to Nashville, Tennessee and visit the U.S Attorney's Office for the Middle District of Tennessee, where he will deliver remarks. [Open Press– Advisory and more details forthcoming]
- On Thursday morning, Deputy Attorney General Rod Rosenstein will deliver keynote remarks at the ACI 35th International Conference on FCPA at the Gaylord National Resort & Convention Center in National Harbor, MD. [Open Press – See Advisory for details]
- On Thursday afternoon, Deputy Attorney General Rod Rosenstein will deliver keynote remarks at the “Cybercrime 2020: Revisiting the Future of Online Crime and Investigations” symposium at Georgetown Law Center in Washington, DC. [Open Press – Advisory and more details forthcoming]

Friday: Acting Attorney General Whitaker will travel to Cincinnati, Ohio and visit the U.S Attorney's Office for the Southern District of Ohio, where he will deliver remarks. [Open Press – Advisory and more details forthcoming]

Kerri Kupec

Office of Public Affairs

U.S. Department of Justice

(b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Monday, November 26, 2018 8:20 PM
To: jake.gibson@foxnews.com
Cc: Laco, Kelly (OPA)
Subject: FW: Chris Geidner on Twitter: "CENSUS CASE UPDATE: DOJ goes to #SCOTUS on the eve of closing arguments in the Census citizenship question trial and "suggests" it "may wish to reconsider" putting trial proceedings on hold while it considers the discove..."

Are you looking for this? https://www.supremecourt.gov/DocketPDF/18/18-557/73266/20181126163620791_18-557%20Letter.pdf

From: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Sent: Monday, November 26, 2018 7:09 PM
To: Kupec, Kerri (OPA) (b)(6)
Subject: Fwd: Chris Geidner on Twitter: "CENSUS CASE UPDATE: DOJ goes to #SCOTUS on the eve of closing arguments in the Census citizenship question trial and "suggests" it "may wish to reconsider" putting trial proceedings on hold while it considers the discove..."

Do you have these docs somewhere that you could pass along?

Thanks!

Subject: Chris Geidner on Twitter: "CENSUS CASE UPDATE: DOJ goes to #SCOTUS on the eve of closing arguments in the Census citizenship question trial and "suggests" it "may wish to reconsider" putting trial proceedings on hold while it considers the discovery qu...

Can we get this if we don't have already? Thanks

<https://twitter.com/chrisgeidner/status/1067195615011135489>

Sent from my iPhone

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Hornbuckle, Wyn (OPA)

From: Hornbuckle, Wyn (OPA)
Sent: Monday, November 26, 2018 2:32 PM
To: Kupec, Kerri (OPA); Jake.Gibson@FOXNEWS.COM
Subject: RE: Wyn, can you connect Jake with BOP public affairs? Apparently they are never responsive

Yes, will do

-----Original Message-----

From: Kupec, Kerri (OPA)
Sent: Monday, November 26, 2018 2:07 PM
To: Jake.Gibson@FOXNEWS.COM
Cc: Hornbuckle, Wyn (OPA) <whornbuckle@jmd.usdoj.gov>
Subject: Wyn, can you connect Jake with BOP public affairs? Apparently they are never responsive

Sent from my iPhone

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Friday, November 23, 2018 4:12 PM
To: Gibson, Jake
Subject: RE: [EXTERNAL] Re: Any comment on this?

The analysis overall

From: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Sent: Friday, November 23, 2018 9:19 AM
To: Kupec, Kerri (OPA) (b)(6)
Subject: Re: [EXTERNAL] Re: Any comment on this?

Okay... which part in particular... the last graph?

On Nov 23, 2018, at 9:09 AM, Kupec, Kerri (OPA) (b)(6) wrote:

Nothing official from us, but I'd take a look at this: <https://osc.gov/Resources/fha-26.pdf>

Sent from my iPhone

On Nov 23, 2018, at 9:02 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

Want to talk about it on background?

On Nov 23, 2018, at 9:00 AM, Kupec, Kerri (OPA) (b)(6) wrote:

Decline, thanks

Sent from my iPhone

On Nov 23, 2018, at 8:46 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

Do you want to comment on this?
On the record or on background... either is fine.

From FNC correspondent Ellison Barber:

Yesterday, we reported that a watchdog group American Oversight, was asking three federal office to investigate Acting AG Matt Whitaker for potential Hatch Act violations as well as discrepancies on his financial disclosure forms and potential conflicts of interest.

We can now report that a case has been opened in regards to one of those requests.

The Office of Special Counsel tells Fox News, they have opened a case file to review allegations of a Hatch Act Violation involving Acting AG Whitaker.

OSC tells Fox News they received two complaints, one from American Oversight and another from Senator Whitehouse.

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Thursday, November 22, 2018 12:35 PM
To: Allison.barber@foxnews.com
Subject: Re: Whitaker - give me a call - (b)(6)

Sent from my iPhone

Gibson, Jake

From: Gibson, Jake
Sent: Wednesday, November 21, 2018 1:13 PM
To: (b)(6) Kerri Kupec (PAO)
Subject: Hey... any comment on FACT story?

Shep's show asking...
Any comment on the \$1.2Million he was paid by this group.
I think Shep is going to do something on it.

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

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Gibson, Jake

From: Gibson, Jake
Sent: Wednesday, November 21, 2018 10:15 AM
To: Kupec, Kerri (OPA)
Subject: Re: 911 Memorial/museum?

Do you have prepared remarks you could send along?

I'll hold them until he starts... or until you say the embargo is lifted.

Thanks,

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

> On Nov 21, 2018, at 9:01 AM, Kupec, Kerri (OPA) (b)(6) wrote:

>

> Do you have a photog?

>

> Sent from my iPhone

>

>> On Nov 21, 2018, at 8:55 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

>>

>>

>> Want me to meet you there?

>>

>>

>>

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Gibson, Jake

From: Gibson, Jake
Sent: Wednesday, November 21, 2018 9:04 AM
To: Kupec, Kerri (OPA)
Subject: Re: [EXTERNAL] Re: 911 Memorial/museum?

No. It's just me.
I just arrived at Penn Station.

> On Nov 21, 2018, at 9:01 AM, Kupec, Kerri (OPA) (b)(6) wrote:

>

> Do you have a photog?

>

> Sent from my iPhone

>

>> On Nov 21, 2018, at 8:55 AM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

>>

>>

>> Want me to meet you there?

>>

>>

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Gibson, Jake

From: Gibson, Jake
Sent: Tuesday, November 20, 2018 4:58 PM
To: Pettit, Mark T. (OPA)
Subject: RE: AG's 278s

Thanks much

From: Pettit, Mark T. (OPA) [mailto:Mark.T.Pettit@usdoj.gov]
Sent: Tuesday, November 20, 2018 4:57 PM
To: Pettit, Mark T. (OPA) <Mark.T.Pettit@usdoj.gov>
Cc: Kupec, Kerri (OPA) (b)(6)
Subject: [EXTERNAL] AG's 278s

AG's 278s

Mark T. Pettit
Lead Media Affairs Coordinator
Office of Public Affairs
U.S. Department of Justice
Office: 202.514.1449
Cell: (b)(6)
Email: Mark.T.Pettit@usdoj.gov

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Sutton, Sarah E. (OPA)

From: Sutton, Sarah E. (OPA)
Sent: Tuesday, November 20, 2018 4:45 PM
To: Gitt, Tamara
Subject: RE: [EXTERNAL] RE: RSVP: JTTF Media Advisory for Acting AG Matthew Whitaker

Got it! Thank you!

From: Gitt, Tamara <tamara.gitt@FOXNEWS.COM>
Sent: Tuesday, November 20, 2018 4:38 PM
To: Sutton, Sarah E. (OPA) <sesutton@jmd.usdoj.gov>
Subject: Re: [EXTERNAL] RE: RSVP: JTTF Media Advisory for Acting AG Matthew Whitaker

Here you go: I'll send in separate emails (I'm a security weirdo)
Tamara Gitt

(b)(6)

Tamara Gitt
Fox News Channel
[1211 Avenue of the Americas, 18th Floor](#)
[New York, NY 10036](#)

O: (b)(6)

C: (b)(6)

On Nov 20, 2018, at 4:35 PM, Sutton, Sarah E. (OPA) <Sarah.E.Sutton@usdoj.gov> wrote:

Yes please!

From: Gitt, Tamara <tamara.gitt@FOXNEWS.COM>
Sent: Tuesday, November 20, 2018 4:23 PM
To: Sutton, Sarah E. (OPA) <sesutton@jmd.usdoj.gov>
Cc: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Subject: Re: [EXTERNAL] RE: RSVP: JTTF Media Advisory for Acting AG Matthew Whitaker

Thanks! Do you need that info from me too?

On Nov 20, 2018, at 4:15 PM, Sutton, Sarah E. (OPA) <Sarah.E.Sutton@usdoj.gov> wrote:

Got it!

Jake can you send me your full name, DOB, and SSN? Will need to provide that to FBI to grant you access to the building. Thanks!

From: Gitt, Tamara <tamara.gitt@FOXNEWS.COM>
Sent: Tuesday, November 20, 2018 3:51 PM
To: Sutton, Sarah E. (OPA) <sesutton@jmd.usdoj.gov>
Subject: RSVP: JTTF Media Advisory for Acting AG Matthew Whitaker

Sorry had wrong email for you earlier!!

Tamara Gitt
Fox News Channel
[1211 Avenue of the Americas, 18th Floor](#)
[New York, NY 10036](#)

O: (b)(6)

C: (b)(6)

Begin forwarded message:

From: "Gitt, Tamara" <tamara.gitt@FOXNEWS.COM>
Date: November 20, 2018 at 2:53:36 PM EST
To: "sarah.e.sutton@usdoj.com" <sarah.e.sutton@usdoj.com>
Cc: "Gibson, Jake (Jake.Gibson@FOXNEWS.COM)" <Jake.Gibson@FOXNEWS.COM>
Subject: RSVP: JTTF Media Advisory for Acting AG Matthew Whitaker

Hi Sarah,

I would like RSVP for myself and Jake Gibson for tomorrow's event with Acting AG Whitaker.

Full list of names:

Tamara Gitt
Jake Gibson

Thank you,
Tamara

Tamara Gitt
Fox News Channel
1211 Avenue of the Americas, 18th Floor
New York, NY 10036

O: (b)(6)

C: (b)(6)

[image001.jpg](#)

**FOR PLANNING PURPOSES ONLY
TUESDAY, NOVEMBER 20, 2018**

**ACTING ATTORNEY GENERAL WHITAKER WILL TRAVEL
TO NEW YORK CITY TO GIVE REMARKS TO THE JOINT
TERRORISM TASK FORCE**

******* MEDIA ADVISORY *******

WASHINGTON -- Acting Attorney General Matthew G. Whitaker will travel to New York, New York, to give remarks to the Joint Terrorism Task Force (JTTF) on **Wednesday, November 21, 2018** on national security efforts.

WHO:

Acting Attorney General Matthew G. Whitaker

WHAT:

Acting Attorney General Matthew G. Whitaker will give remarks to JTTF on national security efforts.

WHEN:

WEDNESDAY, November 21, 2018

11:20 A.M. EDT

WHERE:

85 10th Ave.

8th Floor

New York, NY 10001

OPEN PRESS

(Cameras must be preset for K9 Sweep by 10:30 a.m. EDT)

NOTE: All media must RSVP and present government-issued photo I.D. (such as a driver's license) as well as valid media credentials.

Please RSVP with the email address of the person(s) attending the event, so that we may reach them directly if details change. The RSVP and any inquiries regarding logistics should be directed to [Sarah Sutton](#). **All press must RSVP by Tuesday, November 20, 2018 at 4:00 PM EDT.**

#

Do not reply to this message. If you have questions, please use the contacts in the message or call the Office of Public Affairs at 202-514-2007.

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Gitt, Tamara

From: Gitt, Tamara
Sent: Tuesday, November 20, 2018 4:38 PM
To: Sutton, Sarah E. (OPA)
Subject: Re: [EXTERNAL] RE: RSVP: JTTF Media Advisory for Acting AG Matthew Whitaker
Attachments: SecureMessageAtt.html



This is a secure message.

[Click here](#) by 2018-12-04 16:38 EST to read your message.
After that, open the attachment.

[More Info](#)

Disclaimer: This email and its content are confidential and intended solely for the use of the addressee. Please notify the sender if you have received this email in error or simply delete it.

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Gibson, Jake

From: Gibson, Jake
Sent: Tuesday, November 20, 2018 3:22 PM
To: Sutton, Sarah E. (OPA); Feely, Martin R. (NY) (FBI)
Subject: RE: Introduction

Thanks Sarah!

Hello Martin, I will be at the event in NYC tomorrow, maybe we can connect there.

Thanks.

Jake Gibson
Department of Justice Producer
Fox News Washington

(b)(6)

From: Sutton, Sarah E. (OPA) [mailto:Sarah.E.Sutton@usdoj.gov]
Sent: Tuesday, November 20, 2018 3:18 PM
To: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>; Feely, Martin R. (NY) (FBI) (b)(6)
Subject: [EXTERNAL] Introduction

Hey Martin,

Connecting you to one of our awesome beat reporters at DOJ, Jake Gibson, from Fox News. He's especially interested in meeting some people from the JTTF team and working with them. I told him to reach out to you.

Thanks!

Sarah Sutton
U.S. Department of Justice
Office of Public Affairs

Office: (202) 616-0079
Cell: (b)(6)
Email: sarah.e.sutton@usdoj.gov

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Gibson, Jake

From: Gibson, Jake
Sent: Tuesday, November 20, 2018 2:30 PM
To: Sutton, Sarah E. (OPA); Kupec, Kerri (OPA)
Subject: RE: Can you give Jake a call? Thanks

I'm here at the DOJ Fox booth, which is (b)(6)

Thanks much.

From: Sutton, Sarah E. (OPA) [mailto:Sarah.E.Sutton@usdoj.gov]
Sent: Tuesday, November 20, 2018 2:26 PM
To: Kupec, Kerri (OPA) (b)(6)
Cc: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Can you give Jake a call? Thanks

Yep! What's your number Jake?

Sent from my iPhone

On Nov 20, 2018, at 13:35, Kupec, Kerri (OPA) (b)(6) wrote:

Kerri Kupec
Principal Deputy Director
Office of Public Affairs
U.S. Department of Justice
(b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Tuesday, November 20, 2018 12:41 PM
To: McDonnell, Brigid Mary
Subject: RE: [EXTERNAL] RE: Checking In

Thank you, will do!

(And no media at all for the foreseeable future)

From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Tuesday, November 20, 2018 12:03 PM
To: Kupec, Kerri (OPA) (b)(6)
Subject: Re: [EXTERNAL] RE: Checking In

Hey Kerri -
Just touching base. Pls keep Shannon in mind. Thank you!

Sent from my iPhone

On Nov 13, 2018, at 8:01 PM, Kupec, Kerri (OPA) (b)(6) wrote:

Thanks, Brigid! An interview with him is a hot-ticket item these days, that's for sure- whew. He's not doing any media this week – focusing on AG stuff – but I'm reassessing this weekend. I'll be in touch.

From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Tuesday, November 13, 2018 4:40 PM
To: Kupec, Kerri (OPA) (b)(6)
Subject: RE: Checking In

Congrats on the move!!! Shannon is REALLY hoping to score the first interview with the AG. Would love to make it happen – let me know what you need on my end. Thx!

From: McDonnell, Brigid Mary
Sent: Tuesday, November 13, 2018 4:30 PM
To: 'Flores, Sarah Isgur (OPA)' <Sarah.Isgur.Flores@usdoj.gov>; Bream, Shannon <shannon.bream@FOXNEWS.COM>
Cc: Doherty, Brian <Brian.Doherty@FOXNEWS.COM>; Kupec, Kerri (OPA) (b)(6)
Subject: RE: Checking In

Thanks very much. Hi Kerri – good to connect again! Please let us know if we could lock something in with Shannon and AG Whitaker. Sometime this week?

Best,
Brigid Mary

From: Flores, Sarah Isgur (OPA) [<mailto:Sarah.Isgur.Flores@usdoj.gov>]
Sent: Tuesday, November 13, 2018 4:27 PM
To: Bream, Shannon <shannon.bream@FOXNEWS.COM>
Cc: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>; Doherty, Brian <Brian.Doherty@FOXNEWS.COM>; Kupec, Kerri (OPA) (b)(6)
Subject: [EXTERNAL] Re: Checking In

Adding Kerri--she's handling AG whitaker:)

On Nov 13, 2018, at 4:24 PM, Bream, Shannon <shannon.bream@FOXNEWS.COM> wrote:

Yes – door is always open!

From: McDonnell, Brigid Mary
Sent: Tuesday, November 13, 2018 4:21 PM
To: 'Flores, Sarah Isgur (OPA)' <Sarah.Isgur.Flores@usdoj.gov>
Cc: Bream, Shannon <shannon.bream@FOXNEWS.COM>; Doherty, Brian <Brian.Doherty@FOXNEWS.COM>
Subject: Checking In

Hi Sarah –

Hope all is well. Wanted to touch base and say that there's an open invite to you, former AG Sessions, and current acting AG Whitaker on Fox News @ Night. Please keep us in mind and let me know what I can do to make it happen.

Thank you for your consideration!
Brigid Mary

Brigid Mary McDonnell
Fox News @ Night w/ Shannon Bream
Cell: (b)(6)
@BrigidMaryMcD
BrigidMary.McDonnell@FoxNews.com

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Gibson, Jake

From: Gibson, Jake
Sent: Tuesday, November 20, 2018 11:30 AM
To: Kupec, Kerri (OPA)
Subject: Re: [EXTERNAL] RE: Have a sec?

Can u give me anything on Whitaker releasing financial disclosure later today?

Jake Gibson
Department of Justice Producer
Fox News Washington
(b)(6)

> On Nov 20, 2018, at 11:29 AM, Kupec, Kerri (OPA) (b)(6) wrote:

>

> Nope in back to back meetngs

>

> -----Original Message-----

> From: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>

> Sent: Tuesday, November 20, 2018 11:18 AM

> To: Kupec, Kerri (OPA) (b)(6)

> Subject: Have a sec?

>

>

>

> Jake Gibson

> Department of Justice Producer

> Fox News Washington

> (b)(6)

>

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Gibson, Jake

From: Gibson, Jake
Sent: Tuesday, November 20, 2018 8:00 AM
To: (b)(6) Kerri Kupec (PAO)
Subject: Any DOJ reax on Tigar ruling?

On asylum... Northern California District Court...

Jake Gibson
Department of Justice Producer
Fox News Washington
(b)(6)

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Monday, November 19, 2018 10:12 AM
To: kwong@breitbart.com
Subject: RE: Whitaker question

Hi, Kristina –decline to comment, thanks.

From: kwong@breitbart.com <kwong@breitbart.com>
Sent: Monday, November 19, 2018 10:05 AM
To: Kupec, Kerri (OPA) (b)(6)
Subject: Whitaker question

Hi Kerri,

Hope you're well. Has acting AG Matthew Whitaker consulted with top DOJ ethics officer Lee Lofthus yet?

Is that something one will be able to confirm in the future or will be kept private?

Thank you,

Kristina

Kristina Wong
National Security Correspondent, Breitbart News
(b)(6)
[@kristina_wong](#)

Gibson, Jake

From: Gibson, Jake
Sent: Friday, November 16, 2018 5:44 PM
To: Kupec, Kerri (OPA); Flores, Sarah Isgur (OPA)
Subject: SCOTUS QUESTION



SCOTUSblog @SCOTUSblog · 39s

Motion filed today at #SCOTUS to substitute Dep Atty Gen Rod Rosenstein for Acting AG Matthew Whitaker in case w/pending cert petition, arguing Whitaker's appointment violates federal statute re AG succession and appointments clause of Constitution [scotusblog.com/wp-content/upl...](https://www.scotusblog.com/wp-content/upl...)

<http://www.scotusblog.com/wp-content/uploads/2018/11/Motion-to-Substitute.pdf>

<https://twitter.com/SCOTUSblog/status/1063555432344682497>



SCOTUSblog on Twitter
twitter.com

"Motion filed today at #SCOTUS to substitute Dep Atty Gen Rod Rosenstein for Acting AG Matthew Whitaker in case w/pending cert petition, arguing Whitaker's

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Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Thursday, November 15, 2018 1:52 PM
To: Jake.Gibson@FOXNEWS.COM
Subject: SR-293

Sent from my iPhone

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Thursday, November 15, 2018 1:52 PM
To: Jake.Gibson@FOXNEWS.COM
Subject: Can you call me?

Sent from my iPhone

Kupec, Kerri (OPA)

From: Kupec, Kerri (OPA)
Sent: Thursday, November 15, 2018 1:50 PM
To: Jake.Gibson@FOXNEWS.COM
Subject: Can you call me?

Sent from my iPhone

Flores, Sarah Isgur (OPA)

From: Flores, Sarah Isgur (OPA)
Sent: Thursday, November 15, 2018 1:17 PM
To: Gibson, Jake
Subject: Re: NEOMI FNS

That's actually super helpful to know!! Thank you!

On Nov 15, 2018, at 1:00 PM, Gibson, Jake <Jake.Gibson@FOXNEWS.COM> wrote:

FNS has no record of her being on their show...

I will poke around some more.

From: "Minas, Marina" <Marina.Minas@FOXNEWS.COM>
Date: November 15, 2018 at 12:54:56 PM EST
To: "Gibson, Jake" <Jake.Gibson@FOXNEWS.COM>
Cc: "Ward, Patrick" <Patrick.Ward@FOXNEWS.COM>
Subject: NEOMI FNS

We have no record of her being on our show, maybe she was on a different show? You could reach out to brainroom they might know. But our records don't show her to have ever been on. Sorry

Marina C. Minas
Fox News Channel
x(b)(6)

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LeCroy, Lillian

From: LeCroy, Lillian
Sent: Thursday, November 15, 2018 10:40 AM
To: Sutton, Sarah E. (OPA); Pamas, Alexandra; Morse, Rick; sanford@onestopshopproductions.com
Subject: Re: FOLLOWING UP- IMPORTANT: Fox News RSVP: AG Whitakers' Veterans Appreciation Day remarks Thursday, Nov. 15 at DOJ

Thanks so much.

Lillian

From: Sutton, Sarah E. (OPA) <Sarah.E.Sutton@usdoj.gov>
Sent: Thursday, November 15, 2018 10:38:38 AM
To: LeCroy, Lillian; Maltas, Mike; Morse, Rick; sanford@onestopshopproductions.com; 531-DCDeskOps
Subject: [EXTERNAL] RE: FOLLOWING UP- IMPORTANT: Fox News RSVP: AG Whitakers' Veterans Appreciation Day remarks Thursday, Nov. 15 at DOJ

I am told the pool feed is all ready to go on our end. Thanks!

From: LeCroy, Lillian <Lillian.LeCroy@FOXNEWS.COM>
Sent: Thursday, November 15, 2018 10:19 AM
To: Maltas, Mike <Mike.Maltas@FOXNEWS.COM>; Press <Press@jmd.usdoj.gov>; Morse, Rick <Rick.Morse@FOXNEWS.COM>; sanford@onestopshopproductions.com
Cc: 531-DCDeskOps <DCdeskops@foxnews.com>
Subject: FOLLOWING UP- IMPORTANT: Fox News RSVP: AG Whitakers' Veterans Appreciation Day remarks Thursday, Nov. 15 at DOJ

This is Lillian LeCroy with Fox News Channel. We are the network pool for this event. Please reply all to this mail to let us know what time our camera crew can set up and confirm that you can make the appropriate patch on the 7th floor once we plug into the pool line in the Great Hall.

Thank you.

Lillian

(b)(6)

From: Maltas, Mike
Sent: Wednesday, November 14, 2018 5:00 PM
To: press@usdoj.gov
Cc: 531-DCDeskOps
Subject: Fox News RSVP: AG Whitakers' Veterans Appreciation Day remarks Thursday, Nov. 15 at DOJ

Hello,

Fox News has been designated network pool and would like to RSVP for Acting Attorney General Matthew Whitaker's Veterans Appreciation Day remarks. Thursday, Nov. 15th, 1:00pm at the DOJ's Great Hall.

Our crew members Sanford Criner (camera) and Rick Morse (audio). Please reach all with any time/location

Our crew names: Samora Gaines (camera) and Nick Morse (audio). Please reply all with game time/location, preset logistics and specific DOJ contact information.

We would also like to request DOJ audio/visual personnel assistance in patching the pool/HD line out of the Great Hall (2 patches: one in the multi-media department and a second in the DOJ Briefing Rack Room in the back of the 7th floor briefing room).

Thank you

Mike Maltas
Fox News
400 N. Capitol St., NW
Washington, DC 20002
Office: (b)(6)
Cell: (b)(6)
Mike.maltas@foxnews.com

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Flores, Sarah Isgur (OPA)

From: Flores, Sarah Isgur (OPA)
Sent: Wednesday, November 14, 2018 5:27 PM
To: Gibson, Jake
Subject: RE: [EXTERNAL] question/favor?

No rush!

xxx

Sarah Isgur Flores
Director of Public Affairs

(b)(6)

From: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Sent: Wednesday, November 14, 2018 5:26 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>
Subject: Re: [EXTERNAL] question/favor?

I can get it tomorrow
Still in CNN hearing...

On Nov 14, 2018, at 5:21 PM, Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov> wrote:

She doesn't know the date. (eye roll) Not the end of the world if we say its not available but I was asked to ask.

xxx

Sarah Isgur Flores
Director of Public Affairs

(b)(6)

From: Gibson, Jake <Jake.Gibson@FOXNEWS.COM>
Sent: Wednesday, November 14, 2018 5:17 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>
Subject: Re: [EXTERNAL] question/favor?

I think I can get it.
Just might take a bit..

Date?

On Nov 14, 2018, at 5:15 PM, Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov> wrote:

I am hoping fox has some easy-to-search archive and you can check for a transcript of Neomi Rao on Fox News Sunday that I cant find on the internet. Is that a thing

that exists?

xxxx

Sarah Isgur Flores
Director of Public Affairs

(b)(6)

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Carey, Alyssa

From: Carey, Alyssa
Sent: Wednesday, November 14, 2018 2:13 PM
To: Kupec, Kerri (OPA)
Cc: Flores, Sarah Isgur (OPA)
Subject: RE: [EXTERNAL] Re: Hannity Request

Thank you!

-----Original Message-----

From: Kupec, Kerri (OPA) (b)(6)
Sent: Wednesday, November 14, 2018 2:13 PM
To: Carey, Alyssa <Alyssa.Carey@FOXNEWS.COM>
Cc: Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov>
Subject: RE: [EXTERNAL] Re: Hannity Request

Hey, Alyssa - appreciate you checking in. He's not doing any media interviews this week - focusing on first week as acting AG and task at hand - but I'll circle back with you at end of week and see where we are at.

-----Original Message-----

From: Carey, Alyssa <Alyssa.Carey@FOXNEWS.COM>
Sent: Wednesday, November 14, 2018 2:10 PM
To: Kupec, Kerri (OPA) (b)(6)
Cc: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>
Subject: RE: [EXTERNAL] Re: Hannity Request

Hi again,
Just wanted to check in to see if there is any way to set up an interview for tonight or tomorrow?
Thank you!

-----Original Message-----

From: Carey, Alyssa
Sent: Monday, November 12, 2018 2:42 PM
To: 'Kupec, Kerri (OPA)' (b)(6)
Cc: Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov>
Subject: RE: [EXTERNAL] Re: Hannity Request

Ok thanks!

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-----Original Message-----

From: Kupec, Kerri (OPA) (b)(6)
Sent: Monday, November 12, 2018 2:42 PM
To: Carey, Alyssa <Alyssa.Carey@FOXNEWS.COM>
Cc: Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov>
Subject: Re: [EXTERNAL] Re: Hannity Request

He's not doing any tv right now but I'll circle back in a couple of days.

Sent from my iPhone

> On Nov 12, 2018, at 2:40 PM, Carey, Alyssa <Alyssa.Carey@FOXNEWS.COM> wrote:

>
> Hello Kerri and Sarah,
> Just checking back in to see if any update on the status of trying to set up an interview one day
this week with Acting AG Whitaker and Sean?
> Thank you!

>
> -----Original Message-----
> From: Carey, Alyssa
> Sent: Monday, November 12, 2018 9:38 AM
> To: Kupec, Kerri (OPA) (b)(6)
> Cc: Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov>
> Subject: Re: [EXTERNAL] Re: Hannity Request

>
> Thank you both- appreciate it
>
>> On Nov 12, 2018, at 4:23 AM, Kupec, Kerri (OPA) (b)(6) wrote:

>>
>> Hi Alyssa - Thanks for reaching out. I'll circle back to you on this.
>>
>> Sent from my iPhone

>>
>>> On Nov 11, 2018, at 11:15 PM, Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov> wrote:
>>>
>>> Plus Kerri

>>>
>>>> On Nov 11, 2018, at 7:33 PM, Carey, Alyssa <Alyssa.Carey@FOXNEWS.COM> wrote:
>>>>
>>>> Hi Sarah,
>>>> Hope all is well.
>>>> We wanted to see if acting Attorney General Whitaker is available to join us for an interview
with Sean one day this week Tues-Fri?
>>>> Thank you,
>>>> Alyssa

<<<<<<<

>>>>

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Pettit, Mark T. (OPA)

From: Pettit, Mark T. (OPA)
Sent: Wednesday, November 14, 2018 9:35 AM
To: Pettit, Mark T. (OPA)
Cc: Kupec, Kerri (OPA)
Bcc: lehman@freebeacon.com; kappell@CRCPublicRelations.com; gmueller@CRCPublicRelations.com; Martha.MacCallum@FOXNEWS.COM; kr@rove.com; alicestewart1@msn.com; (b)(6) Katie Pavlich Personal Email; ewhelan@eppc.org; steve@howiecarrshow.com; (b)(6) Ian Prior Personal Email; mbmukasey@debevoise.com
Subject: OLC Opinion
Attachments: Acting AG Op.pdf

Hello –

Please find attached the OLC opinion discussed in today's call. The opinion and talking points are **embargoed until 10:00 a.m.**

Talking Points –Designation of Matt Whitaker as Acting Attorney General

Top Line

- **President Trump's designation of Matt Whitaker as Acting Attorney General of the United States is lawful and consistent with centuries of historical practice and precedent, including the Vacancies Reform Act, the Appointments Clause, Supreme Court precedent, past Department of Justice opinions, and actions of past U.S. presidents.**
- **There are over 150 instances in American history in which non-Senate confirmed persons performed, on a temporary basis, the duties of a Senate-confirmed position. These include high offices like Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, and the Postmaster General.**

Vacancies Reform Act

- Mr. Whitaker's designation as Acting Attorney General conforms with the plain terms of the Vacancies Reform Act, because he had been serving in the Department of Justice at a sufficiently senior pay level for over a year. He is plainly eligible under the text of the statute.
- The Department of Justice's statute provides that the Deputy Attorney General (or others) may be Acting Attorney General in the case of a vacancy.

Appointments Clause

- Mr. Whitaker's designation is consistent with the Appointments Clause of the U.S. Constitution.
 - Although the Attorney General is a principal officer requiring Senate confirmation, someone who temporarily performs his duties is not.

- All three branches of government have long recognized that the President may designate an acting official to perform the duties of a vacant principal office, including a Cabinet office, even when the acting official has not been confirmed by the Senate.
- Congress first authorized the President to direct officials to act as principal in multiple statutes starting in **1792**.
 - In that year, Congress authorized the President to ensure the government's uninterrupted work by designating persons to perform temporarily the work of a vacant office.
 - The President's authority applied to principal offices and did not require the President to select Senate-confirmed officers.
 - There are over 150 times before 1860 alone in which non-Senate-confirmed persons performed, on a temporary basis, the duties of such high offices as the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, and the Postmaster General.

The Supreme Court

- In *United States v. Eaton*, the Supreme Court held that an inferior officer may temporarily act for a principal officer without Senate confirmation, because such temporary service amounts to an inferior office under the Constitution.
- The Supreme Court has never departed from *Eaton's* holding and has repeatedly relied upon that decision in its recent Appointments Clause cases.

The Department of Justice

- In 2003, the Department of Justice reviewed the President's authority in connection with the Director of the Office of Management and Budget ("OMB"), who is a principal officer, applied *Eaton*, and concluded that the President could designate a non-Senate-confirmed official to serve temporarily as Acting Director.

American Presidents

- Presidents George W. Bush and Barack Obama placed non-Senate confirmed officers in the lines of agency succession and actually designated certain unconfirmed officials as the acting heads of other agencies.
- President Trump, too, has previously exercised that authority in other departments; Mr. Whitaker is not the first unconfirmed official to act as the head of an agency in this administration.

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November 14, 2018

MEMORANDUM FOR EMMET T. FLOOD
COUNSEL TO THE PRESIDENT

Re: Designating an Acting Attorney General

After Attorney General Jefferson B. Sessions III resigned on November 7, 2018, the President designated Matthew G. Whitaker, Chief of Staff and Senior Counselor to the Attorney General, to act temporarily as the Attorney General under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d. This Office had previously advised that the President could designate a senior Department of Justice official, such as Mr. Whitaker, as Acting Attorney General, and this memorandum explains the basis for that conclusion.

Mr. Whitaker’s designation as Acting Attorney General accords with the plain terms of the Vacancies Reform Act, because he had been serving in the Department of Justice at a sufficiently senior pay level for over a year. *See id.* § 3345(a)(3). The Department’s organic statute provides that the Deputy Attorney General (or others) may be Acting Attorney General in the case of a vacancy. *See* 28 U.S.C. § 508. But that statute does not displace the President’s authority to use the Vacancies Reform Act as an alternative. As we have previously recognized, the President may use the Vacancies Reform Act to depart from the succession order specified under section 508. *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007) (“2007 Acting Attorney General”).

We also advised that Mr. Whitaker’s designation would be consistent with the Appointments Clause of the U.S. Constitution, which requires the President to obtain “the Advice and Consent of the Senate” before appointing a principal officer of the United States. U.S. Const. art. II, § 2, cl. 2. Although an Attorney General is a principal officer requiring Senate confirmation, someone who temporarily performs his duties is not. As all three branches of government have long recognized, the President may designate an acting official to perform the duties of a vacant principal office, including a Cabinet office, even when the acting official has not been confirmed by the Senate.

Congress did not first authorize the President to direct non-Senate-confirmed officials to act as principal officers in 1998; it did so in multiple statutes starting in 1792. In that year, Congress authorized the President to ensure the government’s uninterrupted work by designating persons to perform temporarily the work of vacant offices. The President’s authority applied to principal offices and did not require the President to select Senate-confirmed officers. In our brief survey of the history, we have identified over 160 times before 1860 in which non-Senate-confirmed persons performed, on a temporary basis, the duties of such high offices as Secretary of State, Secretary of the Treasury, Secretary of War, Secretary of the Navy, Secretary of the Interior, and Postmaster General. While designations to the office of Attorney General were less

frequent, we have identified at least one period in 1866 when a non-Senate-confirmed Assistant Attorney General served as Acting Attorney General. Mr. Whitaker's designation is no more constitutionally problematic than countless similar presidential orders dating back over 200 years.

Were the long agreement of Congress and the President insufficient, judicial precedent confirms the meaning of the Appointments Clause in these circumstances. When Presidents appointed acting Secretaries in the nineteenth century, those officers (or their estates) sometimes sought payment for their additional duties, and courts recognized the lawfulness of such appointments. The Supreme Court confirmed the legal understanding of the Appointments Clause that had prevailed for over a century in *United States v. Eaton*, 169 U.S. 331 (1898), holding that an inferior officer may perform the duties of a principal officer “for a limited time[] and under special and temporary conditions” without “transform[ing]” his office into one for which Senate confirmation is required. *Id.* at 343. The Supreme Court has never departed from *Eaton*'s holding and has repeatedly relied upon that decision in its recent Appointments Clause cases.

In the Vacancies Reform Act, Congress renewed the President's authority to designate non-Senate-confirmed senior officials to perform the functions and duties of principal offices. In 2003, we reviewed the President's authority in connection with the Director of the Office of Management and Budget (“OMB”), who is a principal officer, and concluded that the President could designate a non-Senate-confirmed official to serve temporarily as Acting Director. *See Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003) (“*Acting Director of OMB*”). Presidents George W. Bush and Barack Obama placed non-Senate-confirmed officials in several lines of agency succession and actually designated unconfirmed officials as acting agency heads. President Trump, too, has previously exercised that authority in other departments; Mr. Whitaker is not the first unconfirmed official to act as the head of an agency in this administration.

It is no doubt true that Presidents often choose acting principal officers from among Senate-confirmed officers. But the Constitution does not mandate that choice. Consistent with our prior opinion and with centuries of historical practice and precedents, we advised that the President's designation of Mr. Whitaker as Acting Attorney General on a temporary basis did not transform his position into a principal office requiring Senate confirmation.

I. The Vacancies Reform Act

Mr. Whitaker's designation as Acting Attorney General comports with the terms of the Vacancies Reform Act. That Act provides three mechanisms by which an acting officer may take on the functions and duties of an office, when an executive officer who is required to be appointed by the President with the advice and consent of the Senate “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. § 3345(a). First, absent any other designation, the “first assistant” to the vacant office shall perform its functions and duties. *Id.* § 3345(a)(1). Second, the President may depart from that default course by directing another presidential appointee, who is already Senate confirmed, to perform the functions and duties of the vacant office. *Id.* § 3345(a)(2). Or, third, the President may designate an officer or employee within the same agency to perform the functions and duties of

the vacant office, provided that he or she has been in the agency for at least 90 days in the 365 days preceding the vacancy, in a position for which the rate of pay is equal to or greater than the minimum rate for GS-15 of the General Schedule. *Id.* § 3345(a)(3). Except in the case of a vacancy caused by sickness, the statute imposes time limits on the period during which someone may act. *Id.* § 3346. And the acting officer may not be nominated by the President to fill the vacant office and continue acting in it, unless he was already the first assistant to the office for at least 90 days in the 365 days preceding the vacancy or is a Senate-confirmed first assistant. *Id.* § 3345(b)(1)–(2); *see also Nat’l Labor Relations Bd. v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017).

A.

The Vacancies Reform Act unquestionably authorizes the President to direct Mr. Whitaker to act as Attorney General after the resignation of Attorney General Sessions on November 7, 2018.¹ Mr. Whitaker did not fall within the first two categories of persons made eligible by section 3345(a). He was not the first assistant to the Attorney General, because 28 U.S.C. § 508(a) identifies the Deputy Attorney General as the “first assistant to the Attorney General” “for the purpose of section 3345.” Nor did Mr. Whitaker already hold a Senate-confirmed office. Although Mr. Whitaker was previously appointed, with the advice and consent of the Senate, as the United States Attorney for the Southern District of Iowa, he resigned from that position on November 25, 2009. At the time of the resignation of Attorney General Sessions, Mr. Whitaker was serving in a position to which he was appointed by the Attorney General.

In that position, Mr. Whitaker fell squarely within the third category of officials, identified in section 3345(a)(3). As Chief of Staff and Senior Counselor, he had served in the Department of Justice for more than 90 days in the year before the resignation, at a GS-15 level or higher. And Mr. Whitaker has not been nominated to be Attorney General, an action that would render him ineligible to serve as Acting Attorney General under section 3345(b)(1). Accordingly, under the plain terms of the Vacancies Reform Act, the President could designate

¹ Attorney General Sessions submitted his resignation “[a]t [the President’s] request,” Letter for President Donald J. Trump, from Jefferson B. Sessions III, Attorney General, but that does not alter the fact that the Attorney General “resign[ed]” within the meaning of section 3345(a). Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered “otherwise unable to perform the functions and duties of the office” for purposes of section 3345(a). As this Office recently explained, “an officer is ‘unable to perform the functions and duties of the office’ during both short periods of unavailability, such as a period of sickness, and potentially longer ones, such as one resulting from the officer’s removal (which would arguably not be covered by the reference to ‘resign[ation].’)” *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, at *4 (2017); *see also Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 61 (1999) (“In floor debate, Senators said, by way of example, that an officer would be ‘otherwise unable to perform the functions and duties of the office’ if he or she were fired, imprisoned, or sick.”). Indeed, any other interpretation would leave a troubling gap in the ability to name acting officers. For most Senate-confirmed offices, the Vacancies Reform Act is “the exclusive means” for naming an acting officer. 5 U.S.C. § 3347(a). If the statute did not apply in cases of removal, then it would mean that no acting officer—not even the first assistant—could take the place of a removed officer, even where the President had been urgently required to remove the officer, for instance, by concerns over national security, corruption, or other workplace misconduct.

Mr. Whitaker to serve temporarily as Acting Attorney General subject to the time limitations of section 3346.

B.

The Vacancies Reform Act remains available to the President even though 28 U.S.C. § 508 separately authorizes the Deputy Attorney General and certain other officials to act as Attorney General in the case of a vacancy.² We previously considered whether this statute limits the President’s authority under the Vacancies Reform Act to designate someone else to be Acting Attorney General. *2007 Acting Attorney General*, 31 Op. O.L.C. 208. We have also addressed similar questions with respect to other agencies’ succession statutes. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __ (2017) (“*Acting Director of CFPB*”); *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1. In those instances, we concluded that the Vacancies Reform Act is not the “exclusive means” for the temporary designation of an acting official, but that it remains available as an option to the President. We reach the same conclusion here: Section 508 does not limit the President’s authority to invoke the Vacancies Reform Act to designate an Acting Attorney General.

We previously concluded that section 508 does not prevent the President from relying upon the Vacancies Reform Act to determine who will be the Acting Attorney General. Although the Vacancies Reform Act, which “ordinarily is the exclusive means for naming an acting officer,” *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 (citing 5 U.S.C. § 3347), makes an exception for, and leaves in effect, statutes such as section 508, “[t]he Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used.” *Id.* In fact, the structure of the Vacancies Reform Act makes clear that office-specific provisions are treated as exceptions from its generally exclusive applicability, not as provisions that supersede the Vacancies Reform Act altogether.³ Furthermore, as we noted, “the Senate Committee Report accompanying the Act expressly disavows” the view that, where another statute is available, the Vacancies Reform Act may not be used. *Id.* (citing S. Rep. No. 105-250, at 17 (1998)). That report stated that, “with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies [Reform] Act would continue to provide an alternative procedure for temporarily occupying the office.” *Id.* We therefore concluded that the President could direct the Assistant Attorney General for the Civil Division to act as Attorney General under the Vacancies Reform Act, even though the incumbent Solicitor General would otherwise have served under the chain of succession specified in section 508 (as supplemented by an Attorney General order).

² Under 28 U.S.C. § 508(a), in the case of a vacancy in the office of Attorney General, “the Deputy Attorney General may exercise all the duties of that office, and for the purpose of [the Vacancies Reform Act] the Deputy Attorney General is the first assistant to the Attorney General.” If the offices of Attorney General and Deputy Attorney General are both vacant, “the Associate Attorney General shall act as Attorney General,” and “[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.” *Id.* § 508(b).

³ One section (entitled “Exclusion of certain offices”) is used to exclude certain offices altogether. 5 U.S.C. § 3349c. Office-specific statutes, however, are mentioned in a different section (entitled “Exclusivity”) that generally makes the Vacancies Reform Act “the exclusive means” for naming an acting officer but also specifies exceptions to that exclusivity. *Id.* § 3347(a)(1).

At the time of our *2007 Acting Attorney General* opinion, the first two offices specified in section 508(a) and (b)—Deputy Attorney General and Associate Attorney General—were both vacant. *See* 31 Op. O.L.C. at 208. That is not currently the case; there is an incumbent Deputy Attorney General. But the availability of the Deputy Attorney General does not affect the President’s authority to invoke section 3345(a)(3). Nothing in section 508 suggests that the Vacancies Reform Act does not apply when the Deputy Attorney General can serve. To the contrary, the statute expressly states that the Deputy Attorney General is the “first assistant to the Attorney General” “for the purpose of section 3345 of title 5” (i.e., the provision of the Vacancies Reform Act providing for the designation of an acting officer). 28 U.S.C. § 508(a). It further provides that the Deputy Attorney General “may” serve as Acting Attorney General, not that he “must,” underscoring that the Vacancies Reform Act remains an alternative means of appointment.⁴ These statutory cross-references confirm that section 508 works in conjunction with, and does not displace, the Vacancies Reform Act.

Although the Deputy Attorney General is the default choice for Acting Attorney General under section 3345(a)(1), the President retains the authority to invoke the other categories of eligible officials, “notwithstanding [the first-assistant provision in] paragraph (1).” 5 U.S.C. § 3345(a)(2), (3). Moreover, there is reason to believe that Congress, in enacting the Vacancies Reform Act, deliberately chose to make the second and third categories of officials in section 3345(a) applicable to the office of Attorney General. Under the previous Vacancies Act, the first assistant to an office was also the default choice for filling a vacant Senate-confirmed position, and the President was generally able to depart from that by selecting another Senate-confirmed officer. *See* 5 U.S.C. § 3347 (1994). That additional presidential authority, however, was expressly made inapplicable “to a vacancy in the office of Attorney General.” *Id.*; *see also* Rev. Stat. § 179 (2d ed. 1878). Yet, when Congress enacted the Vacancies Reform Act in 1998, it did away with the exclusion for the office of Attorney General. *See* 5 U.S.C. § 3349c (excluding certain other officers).⁵

Our conclusion that the Vacancies Reform Act remains available, notwithstanding section 508, is consistent with our prior opinions. In *Acting Director of OMB*, we recognized that an OMB-specific statute, 31 U.S.C. § 502(f), did not displace the President’s authority under the Vacancies Reform Act. *See* 27 Op. O.L.C. at 121 n.1 (“The Vacancies Reform Act does not provide, however, that where there is another statute providing for a presidential designation, the Vacancies Reform Act becomes unavailable.”). More recently, we confirmed that the President could designate an Acting Director of the Bureau of Consumer Financial Protection (“CFPB”),

⁴ We do not mean to suggest that a different result would follow if section 508 said “shall” instead of “may,” since as discussed at length in *Acting Director of CFPB*, such mandatory phrasing in a separate statute does not itself oust the Vacancies Reform Act. *See* 41 Op. O.L.C. ___, *7–9 & n.3. The point is that, in contrast with the potential ambiguity arising from the appearance of “shall” in the CFPB-specific statute, section 508 expressly acknowledges that the Deputy Attorney General is the first assistant but will not necessarily serve in the case of a vacancy in the office of Attorney General.

⁵ When it reported the Vacancies Reform Act, the Senate Committee on Governmental Affairs contemplated that the Attorney General would continue to be excluded by language in a proposed section 3345(c) that would continue to make section 508 “applicable” to the office. *See* S. Rep. No. 105-250, at 13, 25; 144 Cong. Rec. 12,433 (June 16, 1998). But that provision “was not enacted as part of the final bill, and no provision of the Vacancies Reform Act bars the President from designating an Acting Attorney General under that statute.” *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 n.1.

notwithstanding 12 U.S.C. § 5491(b)(5), which provides that the Deputy Director of the CFPB “shall” serve as Acting Director when the Director is unavailable. *See Acting Director of CFPB*, 41 Op. O.L.C. ___. We reasoned that the CFPB-specific statute should “interact with the Vacancies Reform Act in the same way as other, similar statutes providing an office-specific mechanism for an individual to act in a vacant position.” *Id.* at *7–9 & n.3. We noted that the Vacancies Reform Act itself provides that a first assistant to a vacant office “shall perform the functions and duties” of that office unless the President designates someone else to do so, 5 U.S.C. § 3345(a), and that mandatory language in either the CFPB-specific statute or the Vacancies Reform Act does not foreclose the availability of the other statute. *Acting Director of CFPB*, 41 Op. O.L.C. ___, at *7–8.

Courts have similarly concluded that the Vacancies Reform Act remains available as an alternative to office-specific statutes. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016) (General Counsel of the National Labor Relations Board, which has its own office-specific statute prescribing a method of filling a vacancy); *English v. Trump*, 279 F. Supp. 3d 307, 323–24 (D.D.C. 2018) (holding that the mandatory language in the CFPB-specific statute is implicitly qualified by the Vacancies Reform Act’s language providing that the President also “may direct” qualifying individuals to serve in an acting capacity), *appeal dismissed upon appellant’s motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

For these reasons, we believe that the President could invoke the Vacancies Reform Act in order to designate Mr. Whitaker as Acting Attorney General ahead of the alternative line of succession provided under section 508.

II. The Appointments Clause

While the Vacancies Reform Act expressly authorizes the President to select an unconfirmed official as Acting Attorney General, Congress may not authorize an appointment mechanism that would conflict with the Constitution. *See Freytag v. Commissioner*, 501 U.S. 868, 883 (1991). The Appointments Clause requires the President to “appoint” principal officers, such as the Attorney General, “by and with the Advice and Consent of the Senate.” U.S. Const., art. II, § 2, cl. 2. But for “inferior Officers,” Congress may vest the appointment power “in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.*

The President’s designation of Mr. Whitaker as Acting Attorney General is consistent with the Appointments Clause so long as Acting Attorney General is not a principal office that requires Senate confirmation. If so, it does not matter whether an acting official temporarily filling a vacant principal office is an inferior officer or not an “officer” at all within the meaning of the Constitution, because Mr. Whitaker was appointed in a manner that satisfies the requirements for an inferior officer: He was appointed by Attorney General Sessions, who was the Head of the Department, and the President designated him to perform additional duties. *See Acting Director of OMB*, 27 Op. O.L.C. at 124–25. If the designation constituted an appointment to a principal office, however, then section 3345(a)(3) would be unconstitutional as applied, because Mr. Whitaker does not currently occupy a position requiring Senate confirmation.

For the reasons stated below, based on long-standing historical practice and precedents, we do not believe that the Appointments Clause may be construed to require the Senate’s advice and consent before Mr. Whitaker may be Acting Attorney General.

A.

The Attorney General is plainly a principal officer, who must be appointed with the advice and consent of the Senate. *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Morrison v. Olson*, 487 U.S. 654, 670–72 (1988). The Attorney General has broad and continuing authority over the federal government’s law-enforcement, litigation, and other legal functions. *See, e.g.*, 28 U.S.C. §§ 516, 533. The Supreme Court has not “set forth an exclusive criterion for distinguishing between” inferior officers and principal officers. *Edmond*, 520 U.S. at 661. “Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President.” *Id.* at 662. There is no officer below the President who supervises the Attorney General.

Although the Attorney General is a principal officer, it does not follow that an Acting Attorney General should be understood to be one. An office under the Appointments Clause requires both a “continuing and permanent” position and the exercise of “significant authority pursuant to the laws of the United States.” *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 74 (2007). While a person acting as the Attorney General surely exercises sufficient authority to be an “Officer of the United States,” it is less clear whether Acting Attorney General is a principal office.

Because that question involves the division of powers between the Executive and the Legislative Branches, “historical practice” is entitled to “significant weight.” *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see also, e.g., The Pocket Veto Case*, 279 U.S. 655, 689 (1929). That practice strongly supports the constitutionality of authorizing someone who has not been Senate-confirmed to serve as an acting principal officer. Since 1792, Congress has repeatedly legislated on the assumption that temporary service as a principal officer does not require Senate confirmation. As for the Executive Branch’s practice, our non-exhaustive survey has identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or ad interim principal officer in the Cabinet.

Furthermore, judicial precedents culminating in *United States v. Eaton*, 169 U.S. 331 (1898), endorsed that historical practice and confirm that the temporary nature of acting service weighs against principal-officer status. The Supreme Court in *Eaton* held that an inferior officer may perform the duties of a principal officer “for a limited time[] and under special and temporary conditions” without “transform[ing]” his office into one for which Senate confirmation is required. *Id.* at 343. That holding was not limited to the circumstances of that case, but instead reflected a broad consensus about the status of an acting principal officer that the Supreme Court has continued to rely on in later Appointments Clause decisions.

1.

Since the Washington Administration, Congress has “authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office [i.e., one requiring Presidential Appointment and Senate confirmation] in an acting capacity, without Senate confirmation.” *SW General*, 137 S. Ct. at 934; *see also Noel Canning*, 134 S. Ct. at 2609 (Scalia, J., dissenting in relevant part) (observing that the President does not need to use recess appointments to fill vacant offices because “Congress can authorize ‘acting’ officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792”). Those statutes, and evidence of practice under them during the early nineteenth century, did not limit the pool of officials eligible to serve as an acting principal officer to those who already have Senate-confirmed offices. This history provides compelling support for the conclusion that the position of an *acting* principal officer is not itself a principal office.

In 1792, Congress first “authorized the appointment of ‘any person or persons’ to fill specific vacancies in the Departments of State, Treasury, and War.” *SW General*, 137 S. Ct. at 935 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281). Although the statute expressly mentioned vacancies in the position of Secretary in each of those Departments, the President was authorized to choose persons who held no federal office at all—much less one requiring Senate confirmation. Although the 1792 statute “allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed,” Congress “imposed a six-month limit on acting service” in 1795. *Id.* at 935 (citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415). In 1863, in response to a plea from President Lincoln, *see* Message to Congress (Jan. 2, 1863), Cong. Globe, 37th Cong., 3d Sess. 185 (1863), Congress extended the provision to permit the President to handle a vacancy in the office of “the head of any Executive Department of the Government, or of any officer of either of the said Departments whose appointment is not in the head thereof.” Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656. The 1863 statute allowed the duties of a vacant office to be performed for up to six months by “the head of any other Executive Department” or by any other officer in those departments “whose appointment is vested in the President.” *Id.*

In 1868, Congress replaced all previous statutes on the subject of vacancies with the Vacancies Act of 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. That act provided that, “in case of the death, resignation, absence, or sickness of the head of any executive department of the government, the first or sole assistant thereof shall . . . perform the duties of such head until a successor be appointed or the absence or sickness shall cease.” *Id.*, § 1, 15 Stat. at 168. In lieu of elevating the “first or sole assistant,” the President could also choose to authorize any other officer appointed with the Senate’s advice and consent to perform the duties of the vacant office until a successor was appointed or the prior occupant of the position was able to return to his post. *Id.* § 3, 15 Stat. at 168. In cases of death or resignation, an acting official could serve for no longer than ten days. *Id.* The 1868 act thus eliminated the President’s prior discretion to fill a vacant office temporarily with someone who did not hold a Senate-confirmed position. Yet, it preserved the possibility that a non-Senate-confirmed first assistant would serve as an acting head of an executive department.

Over the next 120 years, Congress repeatedly amended the Vacancies Act of 1868, but it never eliminated the possibility that a non-Senate-confirmed first assistant could serve as an acting head of an executive department. In 1891, it extended the time limit for acting service in cases of death or resignation from ten to thirty days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733. In 1966, it made minor changes during the course of re-codifying and enacting title 5 of the United States Code. See S. Rep. No. 89-1380, at 20, 70–71 (1966); 5 U.S.C. §§ 3345–3349 (1970). Congress amended the act once more in 1988, extending the time limit on acting service from 30 to 120 days and making the statute applicable to offices that are not in “Departments” and thus are less likely to have Senate-confirmed first assistants. Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988).

Accordingly, for more than two centuries before the Vacancies Reform Act, Congress demonstrated its belief that the Appointments Clause did not require Senate confirmation for temporary service in a principal office, by repeatedly enacting statutes that affirmatively authorized acting service—even in principal offices at the heads of executive departments—by persons who did not already hold an appointment made with the Senate’s advice and consent.

2.

Not only did Congress authorize the Presidents to select officials to serve temporarily as acting principal officers, but Presidents repeatedly exercised that power to fill temporarily the vacancies in their administrations that arose from resignations, terminations, illnesses, or absences from the seat of government. In providing this advice, we have not canvassed the entire historical record. But we have done enough to confirm that Presidents often exercised their powers under the 1792 and 1795 statutes to choose persons who did not hold any Senate-confirmed position to act temporarily as principal officers in various departments. In the Washington, Adams, and Jefferson Administrations, other Cabinet officers (or Chief Justice John Marshall) were used as temporary or “ad interim” officials when offices were vacant between the departure of one official and the appointment of his successor. See, e.g., *Biographical Directory of the American Congress, 1774–1971*, at 13–14 (1971); see *id.* at 12 (explaining that the list of Cabinet officers excludes “[s]ubordinates acting temporarily as heads of departments” and therefore lists only those who served ad interim after an incumbent’s departure).

President Jefferson made the first designation we have identified of a non-Senate-confirmed officer to serve temporarily in his Cabinet. On February 17, 1809, approximately two weeks before the end of the Jefferson Administration, John Smith, the chief clerk of the Department of War, was designated to serve as Acting Secretary of War. See *id.* at 14; Letter from Thomas Jefferson to the War Department (Feb. 17, 1809), *Founders Online*, National Archives, <https://founders.archives.gov/documents/Jefferson/99-01-02-9824> (“Whereas, by the resignation of Henry Dearborne, late Secretary at War, that office is become vacant. I therefore do hereby authorize John Smith, chief clerk of the office of the Department of War, to perform the duties of the said office, until a successor be appointed.”). As chief clerk, Smith was not a principal officer. He was instead “an inferior officer . . . appointed by the [Department’s] principal officer.” Act of Aug. 5, 1789, ch. 6, § 2, 1 Stat. 49, 50. The next Secretary of War did not enter upon duty until April 8, 1809, five weeks after the beginning of the Madison Administration. See *Biographical Directory* at 14.

Between 1809 and 1860, President Jefferson’s successors designated a non-Senate-confirmed officer to serve as an acting principal officer in a Cabinet position on at least 160 other occasions. We have identified 109 additional instances during that period where chief clerks, who were not Senate confirmed, temporarily served as ad interim Secretary of State (on 51 occasions), Secretary of the Treasury (on 36 occasions), or Secretary of War (on 22 occasions). *See id.* at 15–19; 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors*, 575–81, 585–88, 590–91 (Washington, GPO 1868); *In re Asbury Dickins*, 34th Cong., 1st Sess., Rep. C.C. 9, at 4–5 (Ct. Cl. 1856) (listing 18 times between 1829 and 1836 that chief clerk Asbury Dickins was “appointed to perform the duties of Secretary of the Treasury” or Secretary of State “during the absence from the seat of government or sickness” of those Secretaries, for a total of 359 days).⁶ Between 1853 and 1860 there were also at least 21 occasions on which non-Senate-confirmed Assistant Secretaries were authorized to act as Secretary of the Treasury.⁷

We have also identified instances involving designations of persons who apparently had no prior position in the federal government, including Alexander Hamilton’s son, James A. Hamilton, whom President Jackson directed on his first day in office to “take charge of the Department of State until Governor [Martin] Van Buren should arrive in the city” three weeks later. 1 *Trial of Andrew Johnson* at 575; *see Biographical Directory* at 16. President Jackson also twice named William B. Lewis, who held no other government position, as acting Secretary of War. *See* 1 *Trial of Andrew Johnson* at 575. Moving beyond the offices expressly covered by the 1792 and 1795 statutes, there were at least 23 additional instances before 1861 in which Presidents authorized a non-Senate-confirmed chief clerk to perform temporarily the duties of the Secretary of the Navy (on 21 occasions), or the Secretary of the Interior (on 2 occasions).⁸

At the time, it was well understood that when an Acting or ad interim Secretary already held an office such as chief clerk, he was not simply performing additional duties, but he was deemed the Acting Secretary. We know this, because the chief clerks sometimes sought

⁶ *See also* Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (providing that the chief clerk in what became the Department of State was “an inferior officer, to be appointed by the [Department’s] principal officer”); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (providing for an “Assistant to the Secretary of the Treasury,” later known as the chief clerk, who “shall be appointed by the said Secretary”). The sources cited in the text above indicate that (1) the following chief clerks served as ad interim Secretary of State: Aaron Ogden Dayton, Aaron Vail (twice), Asbury Dickins (ten times), Daniel Carroll Brent (five times), Daniel Fletcher Webster, Jacob L. Martin (three times), John Appleton, John Graham, Nicholas Philip Trist (four times), Richard K. Cralle, William S. Derrick (fifteen times), William Hunter (seven times); (2) the following chief clerks served as ad interim Secretary of the Treasury: Asbury Dickins (eight times), John McGinnis, and McClintock Young (twenty-seven times); and (3) the following chief clerks (or acting chief clerks) served as ad interim Secretary of War: Albert Miller Lee, Archibald Campbell (five times), Christopher Vandeventer, George Graham, John D. McPherson, John Robb (six times), Philip G. Randolph (five times), Samuel J. Anderson, and William K. Drinkard.

⁷ *See* 1 *Trial of Andrew Johnson* at 580–81, 590–91 (entries for William L. Hodge and Peter Washington); Act of Mar. 3, 1849, ch. 108, § 13, 9 Stat. 395, 396–97 (providing for appointment by the Secretary of an “Assistant Secretary of the Treasury”).

⁸ *See Biographical Directory* at 14–17 (chief clerks of the Navy in 1809, 1814–15, 1829, 1831, and 1841); *id.* at 18 (chief clerk of the Department of the Interior, Daniel C. Goddard, in 1850 (twice)); *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 3, 12–13 (Ct. Cl. 1857) (identifying 13 times between 1831 and 1838 that chief clerk John Boyle was appointed as Acting Secretary of the Navy, for a total of 466 days).

payment for the performance of those additional duties. Attorney General Legaré concluded that Chief Clerk McClintock Young had a claim for compensation as “Secretary of the Treasury *ad interim*.” *Pay of Secretary of the Treasury ad Interim*, 4 Op. Att’y Gen. 122, 122–23 (1842). And the Court of Claims later concluded that Congress should appropriate funds to compensate such officers for that service. *See, e.g., In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 9, 1857 WL 4155, at *4 (Ct. Cl. 1857) (“The office of Secretary *ad interim* being a distinct and independent office in itself, when it is conferred on the chief clerk, it is so conferred not because it pertains to him *ex officio*, but because the President, in the exercise of his discretion, sees fit to appoint him[.]”); *Dickins*, 34 Cong. Rep. C.C. 9, at 16, 1856 WL 4042, at *3.

Congress not only acquiesced in such appointments, but also required a non-Senate-confirmed officer to serve as a principal officer in some instances. In 1810, Congress provided that in the case of a vacancy in the office of the Postmaster General, “all his duties shall be performed by his senior assistant.” Act of Apr. 30, 1810, ch. 37, § 1, 2 Stat. 592, 593. The senior assistant was one of two assistants appointed by the Postmaster General. *Id.* When Congress reorganized the Post Office in 1836, it again required that the powers and duties of the Postmaster General would, in the case of “death, resignation, or absence” “devolve, for the time being on the First Assistant Postmaster General,” who was still an appointee of the Postmaster General. Act of July 2, 1836, ch. 270, § 40, 5 Stat. 80, 89. On four occasions before 1860, a First Assistant Postmaster General served as Postmaster General *ad interim*. *See Biographical Directory* at 17–19 (in 1841 (twice), 1849, and 1859).

On the eve of the Civil War in January 1861, President Buchanan summarized the Chief Executive’s view of his authority to designate interim officers in a message submitted to Congress to explain who had been performing the duties of the Secretary of War:

The practice of making . . . appointments [under the 1795 statute], whether in a vacation or during the session of Congress, has been constantly followed during every administration from the earliest period of the government, and *its perfect lawfulness has never, to my knowledge, been questioned or denied*. Without going back further than the year 1829, and without taking into the calculation any but the chief officers of the several departments, it will be found that provisional appointments to fill vacancies were made to the number of one hundred and seventy-nine Some of them were made while the Senate was in session, some which were made in vacation were continued in force long after the Senate assembled. *Sometimes, the temporary officer was the commissioned head of another department, sometimes a subordinate in the same department.*

Message from the President of the United States, 36th Cong., 2d Sess., Exec. Doc. No. 2, at 1–2 (1861) (emphases added).

3.

When it comes to vacancy statutes, the office of Attorney General presents an unusual case, albeit not one suggesting any different constitutional treatment. The office was established in the Judiciary Act of 1789, *see* Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93, and the Attorney General was a member of the President’s Cabinet, *see Office and Duties of Attorney*

General, 6 Op. Att’y Gen. 326, 330 (1854). But the Attorney General did not supervise an “executive department,” and the Department of Justice was not established until 1870. *See* Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162. Thus, the terms of the 1792, 1795, and 1863 statutes, and of the Vacancies Act of 1868, did not expressly apply to vacancies in the office of the Attorney General.

Even so, the President made “temporary appointment[s]” to the office of Attorney General on a number of occasions. In 1854, Attorney General Cushing noted that “proof exists in the files of the department that temporary appointment has been made by the President in that office.” *Office and Duties of Attorney General*, 6 Op. Att’y Gen. at 352. Because the 1792 and 1795 statutes did not provide the President with express authority for those temporary appointments, Cushing believed it “questionable” whether the President had the power, but he also suggested that “[p]erhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one.” *Id.* Cushing nonetheless recommended the enactment of “a general provision . . . to remove all doubt on the subject” for the Attorney General and “other non-enumerated departments.” *Id.*

Congress did not immediately remedy the problem that Cushing identified, but Presidents designated Acting Attorneys General, both before and after the Cushing opinion. In some instances, the President chose an officer who already held another Senate-confirmed office. *See Acting Attorneys General*, 8 Op. O.L.C. 39, 40–41 (1984) (identifying instances in 1848 and 1868 involving the Secretary of the Navy or the Secretary of the Interior).⁹ In other instances, however, non-Senate-confirmed individuals served. After the resignation of Attorney General James Speed, for instance, Assistant Attorney General J. Hubley Ashton was the ad interim Attorney General from July 17 to July 23, 1866. *See id.* at 41; *Biographical Directory* at 20. At the time, the Assistant Attorney General was appointed by the Attorney General alone. *See* Act of March 3, 1859, ch. 80, 11 Stat. 410, 420 (“[T]he Attorney-General . . . is hereby[] authorized to appoint one assistant in the said office, learned in the law, at an annual salary of three thousand dollars[.]”).¹⁰

On other occasions between 1859 and 1868, Ashton and other Assistant Attorneys General who had not been Senate confirmed also signed several formal legal opinions as “Acting Attorney General,” presumably when their incumbent Attorney General was absent or otherwise

⁹ This list is almost certainly under-inclusive because the published sources we have located identify only those who were Acting Attorney General during a period between the resignation of one Attorney General and the appointment of his successor. They do not identify individuals who may have performed the functions and duties of Attorney General when an incumbent Attorney General was temporarily unavailable on account of an absence or sickness that would now trigger either 28 U.S.C. § 508(a) or 5 U.S.C. § 3345(a).

¹⁰ In 1868, Congress created two new Assistant Attorneys General positions to be “appointed by the President, by and with the advice and consent of the Senate,” and specified that those positions were “in lieu of,” among others, “the assistant attorney-general now provided for by law,” which was “abolished” effective on July 1, 1868. Act of June 25, 1868, ch. 71, § 5, 15 Stat. 75, 75. A few weeks later, Ashton was confirmed by the Senate as an Assistant Attorney General. *See* 18 Sen. Exec. J. 369 (July 25, 1868). He was therefore holding a Senate-confirmed office when he served another stint as Acting Attorney General for several days at the beginning of the Grant Administration in March 1869, *see Biographical Directory* at 21, and when he signed five opinions as “Acting Attorney General” in September and October 1868.

unavailable. See *Case of Colonel Gates*, 11 Op. Att’y Gen. 70, 70 (1864) (noting that the question from the President “reached this office in [the Attorney General’s] absence”).¹¹ In 1873, when Congress reconciled the Vacancies Act of 1868 with the Department of Justice’s organic statute, it expressly excepted the office of Attorney General from the general provision granting the President power to choose who would temporarily fill a vacant Senate-confirmed office. See Rev. Stat. § 179 (1st ed. 1875). There is accordingly no Attorney General-specific practice with respect to the pre-1998 statutes.

B.

Well before the Supreme Court’s foundational decision in *Eaton* in 1898, courts approved of the proposition that acting officers are entitled to payment for services during their temporary appointments as principal officers. See, e.g., *United States v. White*, 28 F. Cas. 586, 587 (C.C.D. Md. 1851) (Taney, Circuit J.) (“[I]t often happens that, in unexpected contingencies, and for temporary purposes, the appointment of a person already in office, to execute the duties of another office, is more convenient and useful to the public, than to bring in a new officer to execute the duty.”); *Dickins*, 34 Cong. Rep. C.C. 9, at 17, 1856 WL 4042, at *3 (finding a chief clerk was entitled to additional compensation “for his services[] as acting Secretary of the Treasury and as acting Secretary of State”). Most significantly, in *Boyle*, the Court of Claims concluded that the chief clerk of the Navy (who was not Senate confirmed) had properly served as Acting Secretary of the Navy on an intermittent basis over seven years for a total of 466 days. 34 Cong. Rep. C.C. 44, at 8, 1857 WL 4155, at *1–2 (1857). The court expressly addressed the Appointments Clause question and distinguished, for constitutional purposes, between the office of Secretary of the Navy and the office of Acting Secretary of the Navy. *Id.* at 8, 1857 WL 4155 at *3 (“It seems to us . . . plain that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary[.]”). Furthermore, the court emphasized, the defining feature of the office of Secretary *ad interim* was its “temporary” character, and it must therefore be considered an inferior office:

Congress has exercised the power of vesting the appointment of a Secretary *ad interim* in the President alone, and we think, in perfect consistency with the Constitution of the United States. We do not think that there can be any doubt that he is an *inferior* officer, in the sense of the Constitution, whose appointment may be vested by Congress in the President alone.

Id.

When the Supreme Court addressed this Appointments Clause issue in 1898, it reached a similar conclusion. In *United States v. Eaton*, the Court considered whether Congress could authorize the President alone to appoint a subordinate officer “charged with the duty of temporarily performing the functions” of a principal officer. 169 U.S. at 343. The statute

¹¹ There were two additional opinions signed by Ashton as “Acting Attorney General” in 1864 and 1865 (11 Op. Att’y Gen. 482; 11 Op. Att’y Gen. 127); as well as four signed as “Acting Attorney General” by Assistant Attorney General John Binckley in 1867 (12 Op. Att’y Gen. 231; 12 Op. Att’y Gen. 229; 12 Op. Att’y Gen. 222; 12 Op. Att’y Gen. 227); two signed as “Acting Attorney General” by Assistant Attorney General Titian J. Coffey in 1862 and 1863 (10 Op. Att’y Gen. 492; 10 Op. Att’y Gen. 377); and one signed as “Acting Attorney General” by Assistant Attorney General Alfred B. McCalmont in 1859 (9 Op. Att’y Gen. 389).

authorized the President “to provide for the appointment of vice-consuls . . . in such a manner and under such regulations as he shall deem proper.” *Id.* at 336 (quoting Rev. Stat. § 1695 (2d ed. 1878)). The President’s regulation provided that “[i]n case a vacancy occurs in the offices both of the consul and the vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government . . . immediate notice being given to the Department of State.” *Id.* at 338 (quoting regulation). Pursuant to that authority, Sempronius Boyd, who was the diplomatic representative and consul-general to Siam, appointed Lewis Eaton (then a missionary who was not employed by the government) as a vice-consul-general and directed him to take charge of the consulate after Boyd’s departure. *Id.* at 331–32. With the “knowledge” and “approval” of the Department of State, Eaton remained in charge of the consulate, at times calling himself “acting consul-general of the United States at Bangkok,” from July 12, 1892, until a successor vice-consul-general arrived on May 18, 1893. *Id.* at 332–33. In a dispute between Boyd’s widow and Eaton over salary payments, the Court upheld Eaton’s appointment, and the underlying statutory scheme, against an Appointments Clause challenge. *Id.* at 334–35, 352.

The Constitution expressly includes “Consuls” in the category of officers whose appointment requires the Senate’s advice and consent. U.S. Const. art. II, § 2, cl. 2. The *Eaton* Court, however, concluded that a “vice-consul” is an inferior officer whose appointment Congress may “vest in the President” alone. 169 U.S. at 343. The Court held that Eaton’s exercise of the authority of a Senate-confirmed office did not transform him into an officer requiring Senate confirmation:

Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

Id. The Court concluded that more than forty years of practice “sustain the theory that a vice-consul is a mere subordinate official,” which defeated the contention that Eaton’s appointment required Senate confirmation. *Id.* at 344. In so doing, the Court cited Attorney General Cushing’s 1855 opinion about appointments of consular officials, which had articulated the parameters for that practice. *See id.*¹² Significantly, the Court also made clear that its holding was not limited to vice-consuls or to the exigencies of Eaton’s particular appointment. Rather, the Court emphasized that the temporary performance of a principal office is not the same as holding that office itself. The Court feared that a contrary holding would bear upon “any and every delegation of power to an inferior to perform *under any circumstances or exigency.*” *Id.* at

¹² In the 1855 opinion, Attorney General Cushing explained that a vice-consul is “the person employed to fill the [consul’s] place temporarily in his absence.” *Appointment of Consuls*, 7 Op. Att’y Gen. 242, 262 (1855). He noted that consuls had to be Senate-confirmed, but vice-consuls were regarded as the “subordinates of consuls” and therefore did not require “nomination to the Senate.” *Id.* at 247.

343 (emphasis added). In view of the long history of such appointments, *Eaton* simply confirmed the general rule. It did not work any innovation in that practice.

The Court has not retreated from *Eaton*, or narrowed its holding, but instead has repeatedly cited the decision for the proposition that an inferior officer may temporarily perform the duties of a principal officer without Senate confirmation. In *Edmond*, the Court observed that “‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” 520 U.S. at 663. But the Court also observed that there is no “exclusive criterion for distinguishing between principal and inferior officers” and restated *Eaton*’s holding that “a vice consul charged temporarily with the duties of the consul” is an “inferior” officer. *Id.* at 661. In *Morrison*, the Court emphasized that a subordinate who performed a principal officer’s duties “for a limited time and under special and temporary conditions” is not “thereby transformed into the superior and permanent official,” and explained that a vice-consul appointed during the consul’s “temporary absence” remained a “subordinate officer notwithstanding the Appointment Clause’s specific reference to ‘Consuls’ as principal officers.” 487 U.S. at 672–73 (quoting *Eaton*, 169 U.S. at 343)). Justice Scalia’s dissenting opinion in *Morrison* similarly described *Eaton* as holding that “the appointment by an Executive Branch official other than the President of a ‘vice-consul,’ charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause.” *Id.* at 721 (Scalia, J., dissenting). Likewise, in his dissenting opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), *aff’d in part and rev’d in part*, 561 U.S. 447 (2010), then-Judge Kavanaugh cited *Eaton* to establish that “[t]he temporary nature of the office is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation.” *Id.* at 708 n.17 (Kavanaugh, J. dissenting). Notably, Judge Kavanaugh also cited our 2003 opinion, which concluded that an OMB official who was not Senate confirmed could serve as Acting Director of OMB. *See id.* (citing *Acting Director of OMB*, 27 Op. O.L.C. at 123).

In *SW General*, the Court acknowledged the long history of Acts of Congress permitting the President to authorize officials to temporarily perform the functions of vacant offices requiring Senate approval. 137 S. Ct. at 935. Although the Court’s opinion did not address the Appointments Clause, Justice Thomas’s concurring opinion suggested that a presidential directive to serve as an officer under the Vacancies Reform Act should be viewed as an appointment, and that such a direction would “raise[] grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.” *Id.* But Justice Thomas also distinguished *Eaton* on the ground that the acting designation at issue in *SW General* was not “special and temporary” because it had remained in place “for more than three years in offices limited by statute to a 4-year term.” *Id.* at 946 n.1. Justice Thomas’s opinion may therefore be understood to be consistent not only with *Eaton*, but also with the precedents of this Office, which have found it “implicit” that “the tenure of an Acting Director should not continue beyond a reasonable time.” *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 289–90 (1977). Even under Justice Thomas’s opinion, Mr. Whitaker’s designation as Acting Attorney General, which was made one week ago, and which would lapse in the absence of a presidential nomination, should qualify as “special and temporary” under *Eaton*.

C.

Executive practice and more recent legislation reinforces that an inferior officer may temporarily act in the place of a principal officer. In 1980, for instance, this Office raised no constitutional concerns in concluding (in the context of a non-executive office) that the Comptroller General was statutorily authorized to “designate an employee” of the General Accounting Office to be Acting Comptroller General during the absence or incapacity of both the Senate-confirmed Comptroller General and the Senate-confirmed Deputy Comptroller General. *Authority of the Comptroller General to Appoint an Acting Comptroller General*, 4B Op. O.L.C. 690, 690–91 (1980).

Most significantly, in 2003, this Office relied on *Eaton* in concluding that, although “the position of Director [of OMB] is a principal office, . . . an Acting Director [of OMB] is only an inferior officer.” *Acting Director of OMB*, 27 Op. O.L.C. at 123. We did not think that that conclusion had been called into question by *Edmond*’s statement that an inferior officer is one who reports to a superior officer below the President, because in that case “[t]he Court held only that ‘[g]enerally speaking’ an inferior officer is subordinate to an officer other than the President,” and because *Edmond* did not deal with temporary officers. 27 Op. O.L.C. at 124 (citations omitted). Assuming that for constitutional purposes the official designated as acting head of an agency would need to be an inferior officer (and that the OMB official in question was not already such an officer), we further concluded that the President’s designation of an acting officer under the Act should be regarded as an appointment by the President alone—a constitutionally permissible mode for appointing an inferior officer. *Id.* at 125. Since then, Presidents George W. Bush and Obama each used their authority under the Vacancies Reform Act to place non-Senate-confirmed Chiefs of Staff in the lines of succession to be the acting head of several federal agencies.¹³ In three instances, President Obama placed a Chief of Staff above at least one Senate-confirmed officer within the same department.¹⁴ And, in practice, during the Bush, Obama, and Trump Administrations, multiple unconfirmed officers were designated to serve as acting agency heads, either under the Vacancies Reform Act or another office-specific

¹³ See Memorandum, Designation of Officers of the Social Security Administration, 71 Fed. Reg. 20333 (Apr. 17, 2006); Memorandum, Designation of Officers of the Council on Environmental Quality, 73 Fed. Reg. 54487 (Sept. 18, 2008) (later superseded by 2017 memorandum cited below); Memorandum, Designation of Officers of the Overseas Private Investment Corporation to Act as President of the Overseas Private Investment Corporation, 76 Fed. Reg. 33613 (June 6, 2011); Memorandum, Designation of Officers of the Millennium Challenge Corporation to Act as Chief Executive Officer of the Millennium Challenge Corporation, 77 Fed. Reg. 31161 (May 21, 2012); Memorandum, Designation of Officers of the General Services Administration to Act as Administrator of General Services, 78 Fed. Reg. 59161 (Sept. 20, 2013); Memorandum, Designation of Officers of the Office of Personnel Management to Act as Director of the Office of Personnel Management, 81 Fed. Reg. 54715 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Humanities, 81 Fed. Reg. 54717 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Arts, 81 Fed. Reg. 96335 (Dec. 23, 2016); Memorandum, Designation of Officers or Employees of the Office of Science and Technology Policy to Act as Director, 82 Fed. Reg. 7625 (Jan. 13, 2017); Memorandum, Providing an Order of Succession Within the Council on Environmental Quality, 82 Fed. Reg. 7627 (Jan. 13, 2017).

¹⁴ See Executive Order 13612, Providing an Order of Succession Within the Department of Agriculture, 77 Fed. Reg. 31153 (May 21, 2012); Executive Order 13735, Providing an Order Within the Department of the Treasury, 81 Fed. Reg. 54709 (Aug. 12, 2016); Executive Order 13736, Providing an Order of Succession Within the Department of Veterans Affairs, 81 Fed. Reg. 54711 (Aug. 12, 2016).

statute.¹⁵ Those determinations reflect the judgments of these administrations that the President may lawfully designate an unconfirmed official, including a Chief of Staff, to serve as an acting principal officer.

Congress too has determined in the Vacancies Reform Act and many other currently operative statutes that non-Senate-confirmed officials may temporarily perform the functions of principal officers. By its terms, the Vacancies Reform Act applies to nearly all executive offices for which appointment “is required to be made by the President, by and with the advice and consent of the Senate.” 5 U.S.C. § 3345(a); *see id.* § 3349c(1)–(3) (excluding only certain members of multi-member boards, commissions, or similar entities). And it specifically provides for different treatment in some respects depending on whether the vacant office is that of an agency head. *Id.* § 3348(b)(2). Moreover, the statute contemplates that non-Senate-confirmed officials will be able to serve as acting officers in certain applications of section 3345(a)(1) as well as in all applications of section 3345(a)(3), which refers to an “officer or employee.” The latter provision had no counterpart in the Vacancies Act of 1868, but it was not completely novel, because clerks, who were not Senate-confirmed, were routinely authorized to serve as acting officers under the 1792 and 1795 statutes.¹⁶

Congress has also enacted various statutes that enable deputies not confirmed by the Senate to act when the office of the Senate-confirmed agency head is vacant. *See* 12 U.S.C. § 4512(f) (providing for an Acting Director of the Federal Housing Finance Agency); *id.* § 5491(b)(5) (providing for an Acting Director of the Bureau of Consumer Financial Protection); 21 U.S.C. § 1703(a)(3) (providing for an Acting Director of the Office of National Drug Control Policy); 40 U.S.C. § 302(b) (providing for an Acting Administrator of the General Services Administration); 44 U.S.C. § 2103(c) (providing for an Acting Archivist). All of those provisions contemplate the temporary service of non-Senate-confirmed officials as acting

¹⁵ For example, during this administration, Grace Bochenek, a non-Senate-confirmed laboratory director, served as Acting Secretary of Energy from January 20, 2017, until March 2, 2017; Tim Horne, a non-Senate-confirmed Regional Commissioner, served as Acting Administrator of the General Services Administration from January 20, 2017, until December 12, 2017 (pursuant to a designation under a GSA-specific statute); Phil Rosenfelt, a non-Senate-confirmed Deputy General Counsel, served as Acting Secretary of Education from January 20, 2017, until February 7, 2017 (pursuant to a designation under a statute specific to that department); Don Wright, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Health and Human Services from September 30, 2017, until October 10, 2017; Peter O’Rourke, a non-Senate-confirmed Chief of Staff, served as Acting Secretary of Veterans Affairs from May 29, 2018, until July 30, 2018; and Shelia Crowley, a non-Senate-confirmed Chief of Operations, served, upon President’s Obama’s designation, as Acting Director of the Peace Corps from January 20, 2017, until November 16, 2017. During the Obama administration, Darryl Hairston, a career employee, served as Acting Administrator of the Small Business Administration from January 22, 2009, until April 6, 2009, and Edward Hugler, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Labor from February 2, 2009, until February 24, 2009. During the Bush Administration, Augustine Smythe, a non-Senate-confirmed Executive Associate Director served as Acting Director of OMB from June 10, 2003, until late June 2003, consistent with our opinion.

¹⁶ Echoing the movement in the early nineteenth century to chief clerks rather than Senate-confirmed officials from other departments, section 3345(a)(3) was reportedly the product of a desire to give the President “more flexibility” to use “qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level.” S. Rep. No. 105-250, at 31 (additional views of Sen. Glenn et al.); *id.* at 35 (minority views of Sens. Durbin and Akaka).

principal officers, and these statutes would appear to be unconstitutional if only a Senate-confirmed officer could temporarily serve as an acting principal officer.

Similarly, other current statutes provide that, although the deputy is appointed by the President with the Senate's advice and consent, the President or the department head may designate another official to act as the agency head, even though that official is not Senate-confirmed. *See* 20 U.S.C. § 3412(a)(1) (providing that "[t]he Secretary [of Education] shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 31 U.S.C. § 502(f) (providing that the President may designate "an officer of the Office [of Management and Budget] to act as Director"); 38 U.S.C. § 304 (providing that the Deputy Secretary of Veterans Affairs serves as Acting Secretary "[u]nless the President designates another officer of the Government"); 42 U.S.C. § 7132(a) (providing that "[t]he Secretary [of Energy] shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 49 U.S.C. § 102(e) (providing that the Secretary of Transportation shall establish an order of succession that includes Assistant Secretaries who are not Senate-confirmed for instances in which the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant); 40 U.S.C. § 302(b) (providing that the Deputy Administrator serves as Acting Administrator of General Services when that office "is vacant," "unless the President designates another officer of the Federal Government"); *cf.* 44 U.S.C. § 304 (limiting the individuals whom the President may choose to serve as Acting Director of the Government Printing Office to those who occupy offices requiring presidential appointment with the Senate's advice and consent).

Indeed, if it were unconstitutional for an official without Senate confirmation to serve temporarily as an acting agency head, then the recent controversy over the Acting Director of the CFPB should have been resolved on that ground alone—even though it was never raised by any party, the district court, or the judges at the appellate argument. On November 24, 2017, the Director of the CFPB appointed a new Deputy Director, expecting that she would become the Acting Director upon his resignation later that day. *Acting Director of CFPB*, 41 Op. O.L.C. ___, at *2 n.1. The Director of the CFPB relied on 12 U.S.C. § 5491(b)(5), which expressly contemplates that a non-Senate-confirmed official (the Deputy Director) will act as a principal officer (the Director). The President, however, exercised his authority under 5 U.S.C. § 3345(a)(2) to designate the Director of OMB as Acting Director of the CFPB. *See English*, 279 F. Supp. 3d at 330. When the Deputy Director challenged the President's action, we are not aware that anyone ever contended that the Deputy Director was constitutionally ineligible to serve as Acting Director because she had not been confirmed by the Senate. If the newly installed Deputy Director of the CFPB could lawfully have become the Acting Director, then the Chief of Staff to the Attorney General may serve as Acting Attorney General in the case of a vacancy.

D.

The constitutionality of Mr. Whitaker's designation as Acting Attorney General is supported by Supreme Court precedent, by acts of Congress passed in three different centuries, and by countless examples of executive practice. To say that the Appointments Clause now

prohibits the President from designating Mr. Whitaker as Acting Attorney General would mean that the Vacancies Reform Act and a dozen statutes were unconstitutional, as were countless prior instances of temporary service going back to at least the Jefferson Administration.

There is no question that Senate confirmation is an important constitutional check on the President's appointments of senior officers. The Senate's role "serves both to curb Executive abuses of the appointment power, and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond*, 520 U.S. at 659 (internal quotation marks omitted). At the same time, the "constitutional process of Presidential appointment and Senate confirmation . . . can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted." *SW General*, 137 S. Ct. at 935. Despite their frequent disagreements over nominees, for over 200 years, Congress and the President have agreed upon the value and permissibility of using temporary appointments, pursuant to limits set by Congress, in order to overcome the delays of the confirmation process.

If the President could not rely on temporary designations for principal offices, then the efficient functioning of the Executive Branch would be severely compromised. Because most Senate-confirmed officials resign at the end of an administration, a new President must rely on acting officials to serve until nominees have been confirmed. If Senate confirmation were required before anyone could serve, then the Senate could frustrate the appropriate functioning of the Executive Branch by blocking the confirmation of principal officers for some time. *See* 144 Cong. Rec. 27496 (Oct. 21, 1998) (statement of Sen. Thompson) (noting that section 3345(a)(3) had been added because "[c]oncerns had been raised that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate-confirmed officers in the government," as well as "concerns . . . about designating too many Senate-confirmed persons from other offices to serve as acting officers in additional positions"). A political dispute with the Senate could frustrate the President's ability to execute the laws by delaying the appointment of his principal officers.

The problems with a contrary rule are not limited to the beginning of an administration. Many agencies would run into problems on an ongoing basis, because they have few officers subject to Senate confirmation. Thus, when a vacancy in the top spot arises, such an agency would either lack a head or be forced to rely upon reinforcements from Senate-confirmed appointees outside the agency. Those outside officers may be inefficient choices when a non-Senate-confirmed officer within the agency is more qualified to act as a temporary caretaker. At best, designating a Senate-confirmed officer to perform temporary services would solve a problem at one agency only by cannibalizing the senior personnel of another.

It is true that these concerns do not apply to the current circumstances of the Department of Justice, which is staffed by a number of Senate-confirmed officers. Following Attorney General Sessions's resignation, the President could have relied upon the Deputy Attorney General, the Solicitor General, or an Assistant Attorney General to serve as Acting Attorney General. But the availability of potential alternatives does not disable Congress from providing the President with discretion to designate other persons under section 3345(a)(3) of the Vacancies Reform Act. Nothing in the text of the Constitution or historical practice suggests that

the President may turn to an official who has not been confirmed by the Senate if, but only if, there is no appropriate Senate-confirmed official available.

III.

The President's designation to serve as Acting Attorney General of a senior Department of Justice official who does not currently hold a Senate-confirmed office is expressly authorized by 5 U.S.C. § 3345(a)(3). Mr. Whitaker has been designated based upon a statute that permits him to serve as Acting Attorney General for a limited period, pending the Senate's consideration of a nominee for Attorney General. Consistent with our 2003 opinion, with *Eaton*, and with two centuries of practice, we advised that his designation would be lawful.

A handwritten signature in black ink, appearing to read 'S. Engel', with a stylized flourish at the end.

STEVEN A. ENGEL
Assistant Attorney General

Pettit, Mark T. (OPA)

From: Pettit, Mark T. (OPA)
Sent: Wednesday, November 14, 2018 8:50 AM
To: Pettit, Mark T. (OPA)
Bcc: lehman@freebeacon.com; kappell@CRCPublicRelations.com;
gmueller@CRCPublicRelations.com; Martha.MacCallum@FOXNEWS.COM;
kr@rove.com; alicestewart1@msn.com; (b)(6) Katie Pavlich Personal Email;
ewhelan@eppc.org; steve@howiecarrshow.com; (b)(6) Ian Prior Personal Email;
mbmukasey@debevoise.com
Subject: 9:30 a.m. OLC Call

DOJ Call

Wednesday, November 14, 2018

9:30 am | Eastern Standard Time (New York, GMT-05:00) | 30 mins

Meeting number (access code): (b)(6)

(b)(6) US Toll

(b)(6) US Toll Free

Mark T. Pettit

Lead Media Affairs Coordinator

Office of Public Affairs

U.S. Department of Justice

Office: 202.514.1449

Cell: (b)(6)

Email: Mark.T.Pettit@usdoj.gov

Gibson, Jake

From: Gibson, Jake
Sent: Wednesday, November 14, 2018 8:45 AM
To: Pettit, Mark T. (OPA)
Subject: Re: [EXTERNAL] FOR PLANNING PURPOSES ONLY: Briefing Call at 9:00 AM 11/14 on New OLC Opinion

You have a call in number for me please?
Thanks!

Jake Gibson
Department of Justice Producer
Fox News Washington
(b)(6)

On Nov 13, 2018, at 6:36 PM, Pettit, Mark T. (OPA) <Mark.T.Pettit@usdoj.gov> wrote:

Good evening,

Off-the-record and for your planning purposes only tomorrow morning at 9:00 a.m. we will host a briefing on a new opinion from the Office of Legal Counsel. The briefing will be done on background to walk through what will be contained in the opinion. The meeting will be held in our usual meeting room next to the press room at Main Justice.

The OLC opinion and the information discussed in the call will be embargoed until 10:00 a.m. on Wednesday, November 14th.

If you agree to the these terms, please RSVP to me. If you cannot attend in-person, but would like to call in, please request that I send you the call-in number. I will provide the call-in number shortly before the call is scheduled to begin.

This email and its contents are off-the-record and for planning purposes only.

Best,
Mark Pettit

Mark T. Pettit
Lead Media Affairs Coordinator
Office of Public Affairs
U.S. Department of Justice
Office: 202.514.1449
Cell: (b)(6)
Email: Mark.T.Pettit@usdoj.gov

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Pettit, Mark T. (OPA)

From: Pettit, Mark T. (OPA)
Sent: Tuesday, November 13, 2018 9:52 PM
To: Kupec, Kerri (OPA)
Cc: Martha.MacCallum@FOXNEWS.COM
Subject: Re: Mark, please send Martha info for both calls tomorrow. Thanks!

Will do!

Sent from my iPhone

> On Nov 13, 2018, at 8:48 PM, Kupec, Kerri (OPA) (b)(6) wrote:

>

>

>

> Sent from my iPhone

MacCallum, Martha

From: MacCallum, Martha
Sent: Tuesday, November 13, 2018 8:46 PM
To: Kupec, Kerri (OPA)
Subject: Whitaker

I had the pleasure of meeting Matt at the luncheon SIF arranges with AG Sessions. If he would consider doing an interview, I am here and would like to do it anytime.
M

Sent from my iPhone

On Nov 13, 2018, at 8:20 PM, Kupec, Kerri (OPA) (b)(6) wrote:

Sounds good – I'll give you a call tomorrow.

Just a heads up –for planning purposes, tomorrow morning, our Office of Legal Counsel is issuing an opinion that strongly supports the constitutionality of the President's appointment of Acting AG Whitaker. We are doing a press call on it at 9 am and a surrogate call at 9:30 am. We will have an attorney on from that office to take any questions. Let me know if you or one of your staff would like to jump on!

Thanks,
Kerri

From: MacCallum, Martha <Martha.MacCallum@FOXNEWS.COM>
Sent: Tuesday, November 13, 2018 8:13 PM
To: Kupec, Kerri (OPA) (b)(6)
Subject: Re: [EXTERNAL] RE: DOJ CATHOLIC SEX ABUSE

Kerri,

So safe to say you have a very full plate!
In that case, if there are any updates on Mr. Whitaker, or any guidance you have on coverage, I'd greatly appreciate that as well, either on background or OTR.

This Catholic Church situation is something I've covered extensively and would like to speak on background when you can. I'm not clear on the DOJ's role here and would like to understand it better.

My cell is (b)(6), or I'm happy to call you when you have a few minutes.

Best,
Martha

Sent from my iPhone

On Nov 13, 2018, at 7:50 PM, Kupec, Kerri (OPA) (b)(6) wrote:

Hi, Martha – great to meet you. Love your show (I previously worked at Alliance Defending Freedom and was recently at the White House on the Kavanaugh confirmation team).

Will keep you posted as I can – as you know, won't be able to say much since we have a policy about not discussing or acknowledging ongoing investigations, but if I'm able to point you in any direction as things move along, I'll certainly do so.

Let me know if there is anything else you'd like me to flag for you; among other things, I'm currently responsible for all things Acting AG Whitaker.

Have a good night!
Kerri

From: MacCallum, Martha <Martha.MacCallum@FOXNEWS.COM>
Sent: Tuesday, November 13, 2018 5:12 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>
Cc: Kupec, Kerri (OPA) (b)(6)
Subject: RE: DOJ CATHOLIC SEX ABUSE

Thank you.
Kerri, glad to meet you.
Would greatly appreciate if you could keep me in the loop on the DOJ investigation of Church cases of sexual abuse.
M

Martha MacCallum
Anchor, The Story (7pm EST) Fox News
Assistant: Lori Frye, lori.frye@foxnews.com (b)(6)

From: Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov>
Sent: Tuesday, November 13, 2018 4:59 PM
To: MacCallum, Martha <Martha.MacCallum@FOXNEWS.COM>
Cc: Kupec, Kerri (OPA) (b)(6)
Subject: [EXTERNAL] Re: DOJ CATHOLIC SEX ABUSE

Adding Kerri!

On Nov 13, 2018, at 4:35 PM, MacCallum, Martha
<Martha.MacCallum@FOXNEWS.COM> wrote:

Sarah,

We are going to be doing more stories on this as these investigations move forward.
Is there someone overseeing them that I could speak with or who would be a good contact when they have news?

Best,
Martha

Martha MacCallum

Anchor, The Story (7pm EST) Fox News

Assistant: Lori Frye, lori.frye@foxnews.com(b)(6)

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MacCallum, Martha

From: MacCallum, Martha
Sent: Tuesday, November 13, 2018 8:42 PM
To: Kupec, Kerri (OPA)
Subject: Re: [EXTERNAL] RE: DOJ CATHOLIC SEX ABUSE

Great thanks, Kerri
Yes could you send the number for the call?

Sent from my iPhone

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Sounds good – I'll give you a call tomorrow.

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Assistant: Lori Frye, lori.frye@foxnews.com (b)(6)

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Sent: Tuesday, November 13, 2018 4:59 PM
To: MacCallum, Martha <Martha.MacCallum@FOXNEWS.COM>
Cc: Kupec, Kerri (OPA) (b)(6)
Subject: [EXTERNAL] Re: DOJ CATHOLIC SEX ABUSE

Adding Kerri!

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Best,
Martha

Martha MacCallum

Anchor, The Story (7pm EST) Fox News

Assistant: Lori Frye, lori.frye@foxnews.com(b)(6)

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McDonnell, Brigid Mary

From: McDonnell, Brigid Mary
Sent: Tuesday, November 13, 2018 8:26 PM
To: Kupec, Kerri (OPA)
Subject: RE: Checking In

I bet yall are swamped – can't imagine. Thx for keeping us in mind... and you also have an open invite to join us!

Have a great night & talk soon!
Brigid Mary

From: Kupec, Kerri (OPA) (b)(6)
Sent: Tuesday, November 13, 2018 7:59 PM
To: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Subject: [EXTERNAL] RE: Checking In

Thanks, Brigid! An interview with him is a hot-ticket item these days, that's for sure- whew. He's not doing any media this week – focusing on AG stuff – but I'm reassessing this weekend. I'll be in touch.

From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Tuesday, November 13, 2018 4:40 PM
To: Kupec, Kerri (OPA) (b)(6)
Subject: RE: Checking In

Congrats on the move!!! Shannon is REALLY hoping to score the first interview with the AG. Would love to make it happen – let me know what you need on my end. Thx!

From: McDonnell, Brigid Mary
Sent: Tuesday, November 13, 2018 4:30 PM
To: 'Flores, Sarah Isgur (OPA)' <Sarah.Isgur.Flores@usdoj.gov>; Bream, Shannon <shannon.bream@FOXNEWS.COM>
Cc: Doherty, Brian <Brian.Doherty@FOXNEWS.COM>; Kupec, Kerri (OPA) (b)(6)
Subject: RE: Checking In

Thanks very much. Hi Kerri – good to connect again! Please let us know if we could lock something in with Shannon and AG Whitaker. Sometime this week?

Best,
Brigid Mary

From: Flores, Sarah Isgur (OPA) [<mailto:Sarah.Isgur.Flores@usdoj.gov>]
Sent: Tuesday, November 13, 2018 4:27 PM
To: Bream, Shannon <shannon.bream@FOXNEWS.COM>
Cc: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>; Doherty, Brian <Brian.Doherty@FOXNEWS.COM>; Kupec, Kerri (OPA) (b)(6)
Subject: [EXTERNAL] Re: Checking In

Adding Kerri--she's handling AG whitaker:)

On Nov 13, 2018, at 4:24 PM, Bream, Shannon <shannon.bream@FOXNEWS.COM> wrote:

Yes – door is always open!

From: McDonnell, Brigid Mary
Sent: Tuesday, November 13, 2018 4:21 PM
To: 'Flores, Sarah Isgur (OPA)' <Sarah.Isgur.Flores@usdoj.gov>
Cc: Bream, Shannon <shannon.bream@FOXNEWS.COM>; Doherty, Brian <Brian.Doherty@FOXNEWS.COM>
Subject: Checking In

Hi Sarah –

Hope all is well. Wanted to touch base and say that there's an open invite to you, former AG Sessions, and current acting AG Whitaker on Fox News @ Night. Please keep us in mind and let me know what I can do to make it happen.

Thank you for your consideration!
Brigid Mary

Brigid Mary McDonnell
Fox News @ Night w/ Shannon Bream
Cell: (b)(6)
@BrigidMaryMcD
BrigidMary.McDonnell@FoxNews.com

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