

U.S. House of Representatives
Committee on the Judiciary

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950 Pennsylvania Avenue, NW
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Dear Mr. Assistant Attorney General,

Thank you for attending our meeting with former Acting Attorney General Matthew Whitaker last week. Although I was surprised to find the head of the Office of Legal Counsel acting as agency counsel for Mr. Whitaker, I appreciated both your guidance and your presence in the room—and I am writing to take you up on your offer to assist the Committee in the course of our work.

Early in that meeting, when asked about certain conversations we believe Mr. Whitaker may have had with President Trump, Mr. Whitaker refused to answer. He did not cite any privilege that would prevent him from answering. Rather, he refused to answer on the basis that the President may one day want to invoke executive privilege to prevent the content of these communications from becoming public.

The mere possibility that the President may one day invoke the privilege should not allow the Administration to avoid answering our questions indefinitely. Longstanding executive branch policy requires the Department to comply with congressional requests for information “as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege.”¹ If a Department official finds that we have raised “a substantial question of executive privilege,” then he or she has an obligation to consult with the Attorney General and White House Counsel, who may either waive the privilege or present the

¹ Mem. from President Ronald Reagan, *Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982); see also William P. Barr, Office of Legal Counsel, *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 152, 161 (1989).

issue to the President.² I was concerned to learn at Wednesday's meeting that, although we provided Mr. Whitaker with the relevant questions in January,³ the Department has still not identified any specific question of privilege or referred our questions to the White House.

You must have sensed my frustration with Mr. Whitaker's response when you and I engaged in a dialogue about this very problem. As an accommodation to the Committee, you offered to take a narrowly focused set of questions to the White House for review as government policy requires. I accept. I ask that you take the following questions to the White House to ascertain whether the President plans to assert executive privilege—and I ask that you provide me with a response, one way or the other, no later than March 29, 2019:

- During Mr. Whitaker's tenure as Acting Attorney General, did President Trump and Mr. Whitaker ever discuss the proceedings against Michael Cohen?
- During Mr. Whitaker's tenure as Acting Attorney General, did President Trump and Mr. Whitaker ever discuss the fact that he was identified as "Individual 1" in documents related to criminal proceedings against Michael Cohen?
- During Mr. Whitaker's tenure as Acting Attorney General, did President Trump and Mr. Whitaker ever discuss the possibility of firing or reassigning a United States Attorney?
- During Mr. Whitaker's tenure as Acting Attorney General, did President Trump and Mr. Whitaker ever discuss the recusal of Geoffrey Berman, United States Attorney for the Southern District of New York?

To be clear, the Committee has reason to believe that President Trump did, in fact, contact Mr. Whitaker to discuss some of these matters shortly after Mr. Cohen's guilty pleas. We also concur with the Department's long-established policy that executive privilege should not be invoked to conceal evidence of misconduct.⁴ If the President contacted Mr. Whitaker in an attempt to interfere in an ongoing investigation or limit his own legal exposure, then executive privilege may not apply here at all. In any event, receiving answers to these questions is critical to the Committee's fulfilling its function of safeguarding the rule of law and protecting the Department from undo influence.

² Mem. from President Reagan, *supra*.

³ See Letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew G. Whitaker, Jan. 22, 2019.

⁴ Robert B. Shanks, Office of Legal Counsel, *Congressional Subpoenas of Department of Justice Investigative Files*, 8 Op. O.L.C. 262, 267 (1984).

As you work with the White House to determine whether the President wishes to invoke executive privilege to prevent the Department from commenting on these conversations, it may be useful to place the Committee's interactions with Mr. Whitaker into context.

On November 30, 2018, shortly after his appointment, on a telephone call with me and Chairman Elijah Cummings of the Committee on Oversight and Reform, Mr. Whitaker committed to testifying before the House Judiciary Committee sometime in January.⁵ We later agreed that Mr. Whitaker would appear at a Committee hearing on February 8, 2019.⁶

On January 22, 2019, well in advance of his scheduled appearance, I provided Mr. Whitaker with a list of questions that might, conceivably, implicate executive privilege. Among those questions, I listed the following:

- It has been reported that President Trump “lashed out” at you on at least two occasions: after Michael Cohen pleaded guilty on November 29, 2018, and after federal prosecutors identified President Trump as “Individual 1” in a court filing on December 8, 2018.
 - Did President Trump contact you after Michael Cohen pleaded guilty? What did he say? Did you take any action as a result of that conversation?
 - Did President Trump contact you after he was identified as “Individual 1” in documents related to the criminal sentencing of Michael Cohen? What did he say? Did you take any action as a result of that conversation?
 - ...
 - In any of these conversations, did President Trump discuss the possibility of firing or reassigning certain personnel who work for the Office of the U.S. Attorney for the Southern District of New York?
 - In any of these conversations, did the President discuss the recusal of Geoffrey Berman, the current U.S. Attorney for the Southern District of New York, from the Michael Cohen case and other matters related to the work of the Special Counsel?⁷

⁵ See Letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, Jan. 9, 2019.

⁶ Letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, Jan. 15, 2019.

⁷ Letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, Jan. 22, 2019 (internal citations omitted).

I asked Mr. Whitaker to “take any steps that may be necessary for the White House to consider these communications and for the President to determine whether he will invoke executive privilege.”⁸ I warned, specifically, that the Committee would “not accept your declining to answer any question on the theory that the President may want to invoke his privileges in the future.”⁹ If the President planned to invoke the privilege, I requested that Mr. Whitaker notify the Committee no later than 48 hours prior to his hearing.

That 48-hour deadline passed without a response from the Department of Justice. Instead, on the afternoon before Mr. Whitaker’s scheduled appearance, Assistant Attorney General Stephen Boyd wrote to me threatening to withdraw the Acting Attorney General from the hearing altogether. He also spoke to the question of executive privilege:

[T]he Department strongly objects to the suggestion . . . that the Acting Attorney General should request, in advance of his testimony, that the President assert executive privilege over communications involving the subject areas you have identified

If there are questions at the hearing that the Acting Attorney General does not answer to the satisfaction of the Committee, then the appropriate next step would be for the Committee to contact this office to initiate a joint effort by the Committee and the Department to negotiate a mutually acceptable accommodation¹⁰

Although the Committee disagrees with the Department’s contention that we could not have worked out the privilege issues in advance of the hearing, we are now attempting to reach the exact accommodation described by Mr. Boyd on February 7 (and have been for some time).

Mr. Whitaker appeared before the Committee on February 8, 2019. Our members asked him about reports that President Trump had called Mr. Whitaker at least twice to express his frustration after Michael Cohen pleaded guilty in the Southern District of New York to lying to Congress and for arranging hush money payments on the President’s behalf.¹¹ Representative David Cicilline asked him the question directly: “Did the President lash out to you about Mr.

⁸ *Id.*

⁹ *Id.*

¹⁰ Letter from Assistant Attorney General Stephen Boyd, Office of Legislative Affairs, U.S. Dept. of Justice, to Chairman Jerrold Nadler, H. Comm. on the Judiciary, Feb. 7, 2019.

¹¹ See, e.g., Laura Jarrett and Pamela Brown, *Trump lashed out at Whitaker after explosive Cohen revelations*, CNN, Dec. 21, 2018.

Cohen’s guilty plea?” He responded: “No, he did not.”¹² Representative Cicilline asked again whether “the President . . . or anyone on the President’s behalf . . . reach[ed] out to you in some way to express dissatisfaction” about the case. Mr. Whitaker responded: “No.”¹³ Later in the hearing, Representative Val Demings asked a similar question: “I want to know whether you talked to President Trump at all about the Southern District of New York’s case involving Michael Cohen.” This time, Mr. Whitaker refused to answer this question altogether.¹⁴

To many of our Members, that initial testimony appeared to be inaccurate. According to several detailed media reports, President Trump had, in fact, called “his newly installed attorney general” to ask “whether Geoffrey S. Berman, the United States attorney for the Southern District of New York and a Trump ally, could be put in charge of the widening investigation.”¹⁵ Moreover, in the immediate aftermath of Mr. Whitaker’s comments, the Committee identified several individuals who claimed to have direct knowledge of these conversations. Accordingly, we asked Mr. Whitaker to return to the Committee to clarify his testimony.¹⁶

At our March 13 meeting, Mr. Whitaker told us several important things. First, although he refused to answer my questions about conversations he may have had with President Trump about the Michael Cohen cases, Mr. Whitaker no longer insisted that the communications never took place—as he had asserted in the hearing room. In fact, at the close of our meeting, summing up what we had learned, Ranking Member Doug Collins asked him the question directly: “And you had no discussions with President Trump about Michael Cohen?”¹⁷ Mr. Whitaker and Department counsel rushed to explain that this was *not* Mr. Whitaker’s position. He had simply refused to answer the question.

Second, Mr. Whitaker described a series of troubling internal conversations he appeared to have had around the time the President may have called him about the Michael Cohen cases:

- Mr. Whitaker discussed the firing or reassignment of U.S. Attorneys in various offices around the country. “We did all the time,” he said.

¹² *Oversight of the Department of Justice*, hearing before the H. Comm. on the Judiciary, Feb. 8, 2019 (exchange between Rep. David Cicilline and Acting Attorney General Whitaker).

¹³ *Id.*

¹⁴ *Id.* (exchange between Rep. Val Demings and Acting Attorney General Whitaker).

¹⁵ Mark Mazzetti, et al., *Intimidation, Pressure, and Humiliation: Inside Trump’s Two-Year War on the Investigations Encircling Him*, N.Y. Times, Feb. 19, 2019.

¹⁶ Letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, Feb. 13, 2019

¹⁷ In accordance with our agreement for Mr. Whitaker’s voluntary return to the Committee, our conversation was not transcribed or recorded. Quotations here are approximations based on the contemporaneous notes of Committee counsel.

- Mr. Whitaker had concerns about the scope of U.S. Attorney Berman’s recusal from the Cohen case and related matters in the Southern District of New York. He felt the terms of the recusal were “convoluted,” and he “never understood” why Mr. Berman’s recusal applied to certain cases.
- Mr. Whitaker could not recall if he had ever discussed reversing Mr. Berman’s recusal with his own staff.
- Mr. Whitaker also could not recall if he had ever discussed Mr. Berman’s recusal with President Trump.
- Mr. Whitaker was concerned that the campaign finance charges brought against Mr. Cohen may have been “specious” and conveyed as much to his staff. He raised “serious questions” about the theory of the case.
- Mr. Whitaker recalled discussing the Special Counsel’s case with his staff frequently and for a variety of reasons.

In sum, Mr. Whitaker no longer denies having spoken to the President about the proceedings against Michael Cohen. He described a flurry of activity at the Department during his brief tenure as Acting Attorney General that appears to have been focused on matters involving Mr. Cohen and the manner in which the U.S. Attorney’s Office for the Southern District of New York handled Mr. Cohen’s guilty plea and sentencing. It is reasonable to believe that this activity—the questions Mr. Whitaker asked about Mr. Cohen’s case, and the manner in which he asked them—reflected fears about the case that were likely expressed to Mr. Whitaker by the President himself.

As I indicated at our meeting last week, I take some consolation in the fact that Mr. Whitaker appears never to have taken official action to intervene in the Southern District of New York. I am willing to take his testimony at face value when he says that he never provided the White House with “any promises or commitments concerning the Special Counsel’s investigation or any other investigation.”¹⁸ But Mr. Whitaker is not the only concern of our Committee, and his guarantee that he never took actions to interfere in these proceedings is not an answer to the questions that were asked.

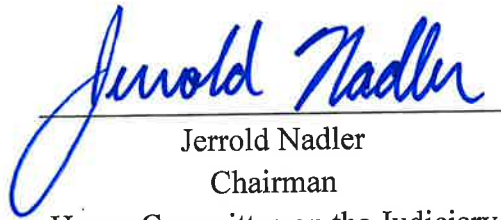
The Committee has a fundamental obligation to investigate whether the President has sought to undermine the integrity of the Department and the rule of law. If President Trump

¹⁸ *Oversight of the U.S. Department of Justice*, hearing before the H. Comm. on the Judiciary, Feb. 8, 2019 (statement of Acting Attorney General Matthew Whitaker).

called his hand-picked Acting Attorney General to discuss an ongoing criminal case—a case in which the President is, in the best-case scenario, not the target of a criminal investigation and merely an unindicted co-conspirator—then the Committee’s concerns may extend well beyond the propriety of Mr. Whitaker’s conduct.

I look forward to your response to my questions by March 29.

Sincerely,



Handwritten signature of Jerrold Nadler in blue ink, written over a horizontal line.

Jerrold Nadler

Chairman

House Committee on the Judiciary

cc: Rep. Doug Collins, Ranking Member, House Committee on the Judiciary