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November 12, 2018

VIA ELECTRONIC AND U.S. MAIL

Chad Readler  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Chad.Readler@usdoj.gov

Re: Legality of Presidential Appointment of Acting Attorney General  
Matthew Whitaker

Dear Mr. Readler:

I am writing to question the legality of the appointment of Acting Attorney General Matthew Whitaker.

As you know, San Francisco has four cases pending against the Attorney General.<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 25(d), Attorney General Sessions' resignation triggers a need to substitute in the new Attorney General as a defendant. Yet, San Francisco has concerns about the legality of the appointment of the Acting Attorney General. Specifically, San Francisco is concerned that Acting Attorney General Whitaker's appointment was not done in accordance with 28 U.S.C. §508 and runs afoul of the Appointments Clause of the United States Constitution.

28 U.S.C. §508 provides a detailed succession plan when vacancies occur within the Attorney General's Office. The President's appointment of Acting Attorney General Whitaker is not in compliance with Section 508. Rather the President's actions appear to be premised on provisions of the Federal Vacancies Reform Act, 5 U.S.C. §3345 *et seq.*

The question of whether the President can bypass the provisions of 28 U.S.C. §508 to fill an Attorney General vacancy has been examined by the Office of Legal Counsel ("OLC"). On

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<sup>1</sup> *City and County of San Francisco v. Donald J. Trump, et al.*, Case No. 3:17-cv-00485 (N.D.Cal.); *City and County of San Francisco v. Jefferson B. Sessions III, et al.*, Case No. 3:17-cv-04642 (N.D.Cal.); *City and County of San Francisco v. Jefferson B. Sessions III, et al.*, Case No. 3:18-cv-02068 (N.D.Cal.); *City and County of San Francisco v. Jefferson B. Sessions III, et al.*, Case No. 3:18-cv-05146 (N.D.Cal.).

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September 17, 2007, the OLC issued a memorandum titled, "Authority of the President to Name and Acting Attorney General." At the time, President Bush wanted to promote Assistant Attorney General for the Civil Division, Peter Keisler, to the position of Attorney General, after the resignation of Alberto R. Gonzales. Keisler's appointment would have been contrary to the terms of 28 U.S.C. §508, as others at the Department of Justice were entitled by that section to succeed him in the event of an Attorney General vacancy. The OLC concluded that the President *could* use the Federal Vacancies Reform Act "even when there is an official serving in one of the designated positions under section 508."

However, the OLC Memorandum is clearly unavailing here. It is premised on distinct facts and fails to address the constitutional tensions present in Acting Attorney General Whitaker's appointment. Peter Keisler was confirmed by the Senate in June 2003 when he was promoted to Assistant Attorney General for the Civil Division. Therefore, when he became Acting Attorney General in 2007, he already held a Senate-confirmed position within the Department of Justice. Acting Attorney General Whitaker is not similarly situated. His previous position within the Department of Justice was not one of the positions enumerated in 28 U.S.C. §508 nor did his previous position carry the obligation and imprimatur of Senate confirmation. The OLC's 2007 Memorandum never directly considered the validity of appointing an Acting Attorney General who was not Senate confirmed.

In addition, the OLC's 2007 Memorandum also failed to consider the tension between the Federal Vacancy Reform Act and the Appointments Clause of the United States Constitution. The Appointments Clause, Article 2, Section 2, of the United States Constitution, provides the President the power to appoint "Officers of the United States" upon "Advice and Consent of the Senate." In appointing Acting Attorney General Whitaker, San Francisco is concerned that the President is using the Federal Vacancies Reform Act to undermine the constitutional protections of Article 2, Section 2. A similar disregard was criticized by Justice Clarence Thomas in his concurring opinion in *National Labor Relations Board v. SW General, Inc.* Justice Thomas stressed that "[t]he Appointments Clause is not an empty formality" and counseled against using the Federal Vacancies Reform Act as an "end-run" around the Appointments Clause.

Given that Attorney General Sessions' resignation will affect San Francisco's pending litigation, I ask that you provide legal justification for the appointment of Acting Attorney General Whitaker; otherwise, San Francisco may be forced to move the court to obtain additional guidance.

Sincerely,

  
DENNIS J. HERRERA  
City Attorney

Cc: Acting Attorney General Matthew Whitaker