

May 12, 2017

Robin C. Ashton
Counsel
Office of Professional Responsibility
U.S. Department of Justice
Suite 3529
950 Pennsylvania Ave. NW
Washington, DC 20530

Dear Ms. Ashton:

Democracy 21 is writing to file a third complaint against Attorney General Jeff Sessions for violating both his public commitment to recuse himself “from any matters arising from the campaigns for President of the United States,” and for violating a Department of Justice (DOJ) regulation that requires his recusal from any participation in the ongoing investigation into alleged Russian interference in the 2016 presidential election.

The complaint arises from the Attorney General’s direct participation in the firing of FBI Director James Comey on May 9, 2017, in violation of his recusal commitment and the Justice Department recusal regulation.

Our first two complaints, filed with your office on February 27, 2017 and March 2, 2017, stated that Attorney General Sessions had violated the applicable DOJ recusal regulation by failing to recuse himself from the Russia investigation.

On March 2, 2017, the Attorney General issued a statement through the DOJ Office of Public Affairs and said that he would recuse himself “from any matters arising from the campaigns for President of the United States.”¹ Based on the Attorney General’s recusal, Deputy Attorney General Rod Rosenstein is now responsible for overseeing the Russia investigation.

Until his abrupt termination on May 9, Director Comey was leading an ongoing FBI investigation into the alleged Russian interference in the 2016 presidential election, including the question of whether there was any collusion between Russian actors and the Trump presidential campaign and Trump associates.

¹ Department of Justice Office of Public Affairs, “Attorney General Statement on Recusal” (March 2, 2017).

The recommendation that Attorney General Sessions made to President Trump to fire FBI Director Comey related to a matter “arising from the campaigns for President of the United States,” because it involved firing the person leading the FBI investigation into alleged interference in the 2016 presidential campaigns. The Attorney General’s participation in the firing of Director Comey therefore was squarely within the scope of his recusal commitment and violated that commitment.

The Attorney General’s recommendation to fire Director Comey also violated the applicable DOJ recusal regulation in light of the Attorney General’s personal involvement in the Trump presidential campaign and the fact that he is a potential subject of the Russia investigation.

Furthermore the Attorney General’s reported current participation in the naming of an interim FBI Director who will take charge of the Russia investigation violates both his recusal commitment and the DOJ recusal regulation. The Attorney General is similarly prohibited from any participation in selecting a new permanent Director for the FBI.

We call on the Office of Professional Responsibility (OPR) to investigate these matters, make public findings and take all appropriate steps to hold Attorney General Sessions accountable for his violations of the Department’s recusal regulation, and for his failure to comply with the recusal commitments he has made.

We also call on OPR to take all necessary steps to ensure that Attorney General Sessions complies with his personal recusal commitment and with the DOJ recusal regulation by not participating in the Russia investigation in any way.

Most immediately, we call on OPR to take all necessary steps to ensure that the Attorney General withdraws from any participation in the selection of an interim or permanent Director of the FBI.

i.

In a letter addressed to President Trump dated May 9, 2017, Attorney General Sessions recommended that FBI Director James Comey be removed from office, an action the President took later that day. As grounds for his recommendation, the Attorney General cited a memorandum of the same date written by Deputy Attorney General Rod Rosenstein, that criticized several aspects of Director Comey’s “handling of the conclusion of the investigation of Secretary Clinton’s emails. . . ,” and said that “[a]lmost everyone agrees that the Director made serious mistakes. . . ” with regard to that investigation.

The President, in his letter of dismissal to Director Comey, referred to the letter from the Attorney General and the memorandum from the Deputy Attorney General and said, “I have

accepted their recommendations and you are hereby terminated and removed from office, effective immediately.”

ii.

The Attorney General’s direct participation in the firing of Director Comey violated his commitment to recuse himself “from any matters arising from the campaigns for President of the United States.”

The Attorney General recommended the firing of Director Comey at a time when the Director was leading a major FBI investigation into alleged Russian interference in the 2016 presidential campaign.

The Russia investigation—and Director Comey’s leadership of this investigation—is a “matter[] arising from the campaigns for President of the United States.” Attorney General Sessions committed to recusing himself from any such matter and by his direct involvement in the firing of Director Comey, the Attorney General violated his stated recusal obligation.

It might be claimed that the Attorney General’s recommendation to fire Director Comey was grounded on the Clinton email investigation, not on the Russia investigation, and therefore was not a “matter arising from the campaigns for President of the United States.”

Even if this claim were correct, it is irrelevant to the fact that he participated in firing the person leading the Russia investigation, in contravention of his commitment not to participate in matters “arising from” the 2016 presidential campaigns.

But the claim in any event is incorrect, for three reasons. First, in his letter terminating Director Comey, the President noted that he was firing Director Comey based on the Attorney General’s recommendation, and the President then referenced three alleged prior statements by Director Comey “that I am not under investigation. . . .” Thus, the President himself made the connection between the Attorney General’s recommendation and the status of the Russian investigation. (The President has subsequently made clear that his firing of Director Comey was directly related to the Russia investigation.)

Second, even apart from the Russia investigation, the Clinton email investigation was itself a matter directly intertwined with and arising from Secretary Clinton’s presidential campaign. It was thus within the scope of the Attorney General’s commitment to recuse himself from “any matters arising from the campaigns for President of the United States.”

Finally, Attorney General Sessions had made an earlier and separate commitment to the Senate Judiciary Committee to recuse himself from “any Clinton issues.” According to a published report, the Attorney General at his Senate confirmation hearing said he would recuse himself, *inter alia*, from “any investigations into Hillary Clinton’s emails”:

Judiciary Committee Chairman Chuck Grassley asked Sessions if he could be impartial in any investigations into Hillary Clinton’s emails or foundation, given

his role in Donald Trump’s campaign. Sessions said no, and that he would recuse himself if any Clinton issues were to arise with him as attorney general. “I do believe that that could place my objectivity in question,” he said of statements he made during the campaign. “I believe the proper thing for me to do would be to recuse myself.”²

Thus, even if the Attorney General’s actions relating to the firing of Director Comey were to be viewed as based solely on the Deputy Attorney General’s comments about the email investigation, and not on the Russia investigation, Attorney General Sessions still violated his own public commitment to recuse himself from such matters.

iii.

The Attorney General’s direct participation in the firing of Director Comey violated his recusal obligation as required by a Department of Justice regulation.

The DOJ recusal regulation, 28 C.F.R. §45.2(a), applies to all employees of the Justice Department and provides:

(a) no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:

(1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

(2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

Attorney General Sessions is himself a potential subject of the Russia investigation. In our March 2 complaint, we noted then-newly published reports that Attorney General Sessions had met twice with the Russian Ambassador during the presidential campaign. We further stated:

Sessions’ meeting with the Russian Ambassador means that Sessions himself is a potential subject of the FBI investigation currently taking place. These are new and additional grounds that require Sessions to immediately recuse himself from any involvement in any investigation and actions dealing with the involvement of Russians in the 2016 presidential campaign.

The fact that the Attorney General is himself a potential subject of the Russia investigation gives him a direct and personal stake in the conduct of the investigation. As a potential subject of the investigation being conducted by the FBI, he has “a specific and substantial interest that would be directly affected by the outcome of the investigation or

² “Jeff Sessions Says He Would Recuse Himself from Any Investigations into Hillary Clinton,” *TIME* (Jan. 10, 2017).

prosecution,” 28 C.F.R. § 45.2(a)(2), and accordingly “shall not participate” in the investigation. *Id.*

Furthermore, and as explained at length in our February 27 complaint, Attorney General Sessions was a principal campaign surrogate for the Trump presidential campaign and a key member of the Trump transition effort. During the campaign, he participated in multiple campaign rallies and events, and made numerous press appearances on behalf of the candidate. During the transition, he was “a daily presence at Trump Tower in New York, mapping out the policy agenda and making personnel decisions.”³

Accordingly, Attorney General Sessions plainly has a “political relationship” with individuals in the Trump campaign who are “involved in the conduct that is the subject of the investigation. . . .” 28 C.F.R. § 45.2(a)(1).⁴ Based on that, under the Justice Department regulation, the Attorney General “shall not participate” in the investigation of whether the Trump campaign colluded with Russian actors to influence the 2016 election. *Id.*

The Attorney General’s active role in the firing of Director Comey constitutes prohibited “participat[ion]” in the Russia investigation, under the DOJ recusal regulation.

A recommendation to the President that he terminate the FBI Director leading the Russia investigation constitutes an improper effort to “participate” in the investigation. Indeed, to recommend terminating the person in charge of conducting an investigation, for whatever reason, is the most direct and blatant possible form of intervening or “participat[ing]” in an investigation, and the one that could most easily disrupt or impede the investigation.

In short, firing the lead investigator is the most extreme form of interfering with an investigation. It would be contrary to common sense to conclude that a person with a disqualifying conflict of interest would be recused from “participating” in an investigation in which he has the conflict, but nonetheless could play an active role in the firing of the person in charge of the investigation.

Accordingly, the Attorney General’s direct involvement in the firing of Director Comey violated the Department’s recusal regulation that requires the Attorney General to recuse himself from participating in the Russia investigation because he has a personal interest as a potential subject, and because he has a “political relationship” with individuals who also have a substantial interest in the investigation.

³ Philip Rucker and Robert Costa, “Trump’s hard-line actions have an intellectual godfather: Jeff Sessions,” *The Washington Post*, January 30, 2017. https://www.washingtonpost.com/politics/trumps-hard-line-actions-have-an-intellectual-godfather-jeff-sessions/2017/01/30/ac393f66-e4d4-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.c2677f874965.

⁴ 28 CFR §45.2(c)(1) defines “political relationship” to mean “a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof.”

iv.

According to a published report, “Attorney General Jeff Sessions and Deputy Attorney General Rod Rosenstein are interviewing four potential interim FBI directors Wednesday, according to a Justice Department official.”⁵ The article further noted that “Sessions and Rosenstein are looking for someone with significant law enforcement experience.”

For the same reasons that it violated the Attorney General’s recusal obligations for him to participate in the firing of the FBI Director leading the Russia investigation, it also violates his recusal obligations for him to participate in the hiring of an FBI Director to lead the Russia investigation, on either an interim or permanent basis.

This is simply the other side of the same coin. Selecting the person to lead an investigation, like firing that person, is an extreme form of “participating” in the investigation, and it presents an obvious risk of exerting improper influence on the conduct of the investigation.

The Attorney General is prohibited by the Justice Department regulation and by his own recusal commitment from playing any role in choosing the person who will lead the FBI Russia investigation, in which he is a potential subject and in which he has a “political relationship,” within the scope of the DOJ recusal regulation, with individuals who are or may be the subject of the investigation.

v.

We reiterate our previous requests that you give your immediate attention to this critically important matter and that you make public findings and take all appropriate steps to hold Attorney General Sessions accountable for his violations of the Department’s recusal regulation, and for his failure to comply with the recusal commitments he has made.

We also request that you take all necessary steps to ensure that Attorney General Sessions takes no further action to participate in the Russia investigation and does not participate in any way in the selection of an interim or permanent new FBI Director.

As we stated in our March 2 letter, the integrity and public credibility of the Justice Department is at stake.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
President

⁵ L. Jarrett, “Sessions, Rosenstein interviewing potential interim FBI directors Wednesday,” *CNN* (May 10, 2017).