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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
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November 14, 2018

Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Ranking Member Feinstein:

This letter responds to your two letters, both dated November 13, 2018, regarding former Attorney General Sessions and Acting Attorney General Matthew Whitaker.

First, every Attorney General works only at the will of the President. Former Attorney General Sessions submitted his resignation last week at President Trump's request. President Trump is entitled to nominate an Attorney General of his choosing. While the Senate is never a rubber stamp for any president, the Senate historically gives more deference to a president on Cabinet picks. I look forward to working with the President on the confirmation effort for whomever the President nominates. As is the case with all executive nominations that come to the Judiciary Committee, a confirmation hearing will be announced after the President makes his nomination. At that point, the nominee can answer any questions to the Department of Justice ("DOJ") that may be outstanding. Until then, any hearing would be premature.

With regard to Acting Attorney General Whitaker's appointment, I am sure you are well aware that under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345-3349c ("Vacancies Act"), the President may direct a senior official of the agency in which the vacancy occurs to serve as the acting officer as long as that senior official served at the agency for at least 90 days prior to the appointment. Acting Attorney General Whitaker had been former Attorney General Sessions' Chief of Staff since August 2017. Moreover, a September 2007 legal opinion from DOJ's Office of Legal Counsel ("OLC") confirmed that the President has the authority to appoint an agency official under the Vacancies Act. President Bush used this authority to name Peter Keisler the Acting Attorney General in 2007, although the Solicitor General at the time, Paul Clement, was "next in line" of succession. In 2003, OLC reached a similar conclusion when opining on whether President Bush could designate the Executive Associate Director of the Office of Management and Budget at the time as Director under the Vacancies Act. The Executive Associate Director was not in the line of succession under the OMB statute, and was not Senate-confirmed. Today, the Office of Legal Counsel issued another legal opinion concluding that President Trump had the authority to designate Acting Attorney General Whitaker under the Vacancies Act, consistent with the prior opinions. By statute, Acting Attorney General Whitaker generally can serve in his acting role for up to 210 days. If the

President nominates an Attorney General candidate during Acting Attorney General Whitaker's service, Acting Attorney General Whitaker may remain in his acting role until the nomination is confirmed.

With regard to the Special Counsel's investigation, I have said a number of times that Special Counsel Mueller should be allowed to proceed with the investigation to its prompt conclusion. I have confidence that whoever oversees that investigation will do so with the best interests of the investigation in mind. As a champion of transparency, I am also looking forward to a full accounting of the investigation and its conclusions.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, flowing style.

Charles E. Grassley
Chairman
Committee on the Judiciary