

WHAT OLC SAYS HAPPENED WITH MATT WHITAKER'S APPOINTMENT

DOJ has released the memo they say justifies the appointment of Matt Whitaker to be their boss. I'll have some things to say about the legal arguments later (and smarter people who have JDs will surely weigh in as well).

I'd like to look at four things the OLC memo says about what happened with the Whitaker appointment, because they're at least as important as the legal argument.

Never in the history of DOJ has someone attempted this stunt

Much of the memo reviews the history of appointments, purporting to find analogous appointments to this one. But it only cites one example where someone who wasn't Senate confirmed served as Acting Attorney 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.

The Department of Justice didn't exist in 1866. It was only authorized – significantly, for the purpose of giving the Attorney General supervision over the US Attorneys – in 1870.

In 1861, Congress finally agreed that the Attorney General should have supervisory powers over the work of the United States Attorneys, although at

first this role was shared with the Solicitor of the Treasury.

While there had been earlier calls for the creation of a separate legal department that would supervise the work of federal lawyers, it was not until after the end of the Civil War that Congress began to give serious consideration to the matter. In late 1867, the Senate Committee on the Judiciary asked Attorney General Henry Stanbery to respond to several questions concerning the efficiency of the government's legal departments. Stanbery replied that a solicitor general was needed to argue the government's cases before the Supreme Court, and that the centralization of the government's legal business under one department would improve the quality of the work. In 1868, after the House Judiciary Committee asked Stanbery to respond to a similar inquiry, Representative Thomas Jenckes of Rhode Island introduced a bill to establish a department of justice. This bill was referred to the Joint Select Committee on Retrenchment, a committee impaneled to consider legislation to reduce the size and cost of government. In addition, the Chairman of the House Judiciary Committee, Representative William Lawrence of Ohio, introduced a similar bill which was referred to that committee.

As I'll return to when I get to the legal issues, the distinction between this appointment, which gives Whitaker supervisory authority over SDNY and Mueller, and that one, may be very important.

But for now, suffice it to say that even OLC admits that this has almost never happened before.

The White House asked for this opinion

I've been harping on this line of the CNN report describing Jeff Sessions and those who would like to protect the Mueller investigation a lot.

At least one Justice official in the room mentioned that there would be legal questions about whether Whitaker's appointment as acting attorney general is constitutional.

Steven Engel, the guy who signed this memo, was in that room, along with Sessions, Deputy Attorney General Rod Rosenstein, Solicitor General Noel Francisco, and Rosenstein's deputy Ed O'Callaghan. The story suggests that Engel hadn't considered the question yet, and I've been wondering since that report whether one of those men asked for the memo.

They didn't – at least not according to this memo.

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.

It is addressed to the "Counsel to the President," which strongly implies that person asked for the memo. It doesn't say, however, when the Counsel to the President asked for this memorandum.

Emmet Flood is the Counsel to the President who asked for

this opinion

More specifically, the memo is addressed to Emmet T. Flood Counsel to the President.

Emmet Flood has two roles in the White House now. Until Pat Cipollone is installed as White House Counsel, Flood is Acting White House Counsel (or, as addressed here, Counsel to the President, which is how OLC addresses the White House Counsel).

But he's also the lawyer in the White House Counsel's office in charge of defending the President in investigations by (among others) Robert Mueller.

Legally, that's interesting but (because the President can appoint whoever the fuck he wants as White House Counsel) not all that important. But it does answer the question I keep asking – given what a clusterfuck this appointment is, was Emmet Flood, who is eminently competent, involved? Yes – at least by the time the White House realized they needed some legal cover for it.

So maybe Flood really was hoping to create a legal morass.

Jeff Sessions resigned, probably

Finally, the memo answers a question that the House Judiciary Committee has already raised some doubt about: whether Sessions resigned, or was fired. The memo explains,

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).

But it doesn't seem so sure (or at least recognizes that someone, and probably not just HJC, will challenge this legally). It continues:

Even if the Attorney General 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 I'll return to in the legal analysis, the remainder of the footnote, which claims the Vacancies Reform Act still would have permitted the appointment of Whitaker, is one of the most problematic parts of the memo.

Which is why it is notable that the memo dodges most analysis of whether a forced resignation really is legally a resignation.