November 5, 2021
SENT VIA EMAIL
foia@americanoversight.org

Mr. Austin Evers, Executive Director
American Oversight
1030 15th Street NW, Suite B255
Washington, DC 20005

Subject: Freedom of Information/Privacy Act Request [20-OIG-302]

Dear Mr. Evers:

This is a partial response to your July 24, 2020 Freedom of Information Act (FOIA) request to the Office of the Inspector General (OIG), seeking "[a]ll complaints submitted to the DOJ Office of the Inspector General (OIG) . . . containing allegations that concern the conduct of Attorney General William Barr." This partial response supplements responses made to you on January 22, 2021, February 25, 2021, March 31, 2021, and July 16, 2021.

As I indicated in the July 16, 2021 response, all that remained of OIG's processing of your request were 124 pages of records that were undergoing consultation. Consultation concerning ninety (90) of those pages has been completed. It has been determined that twenty-seven (27) pages should be withheld in full pursuant to FOIA, 5 U.S.C. § 552(b)(7)(A), while certain portions of the other sixty-three (63) pages that are being released to you today should be withheld from disclosure pursuant to FOIA, 5 U.S.C. § 552 (b)(6) and (b)(7)(C) as follows:

- 5 U.S.C. § 552(b)(6), protects personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- 5 U.S.C. § 552(b)(7)(A), protects records or information compiled for law enforcement purposes to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings; and
- 5 U.S.C. § 552(b)(7)(C), protects records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Please note that if circumstances change underlying our assertion of 5 U.S.C. § 552 (b)(7)(A) to information responsive to your request, we reserve the right to assert additional exemptions, including pursuant to FOIA, 5 U.S.C. § 552 (b)(6) and (b)(7)(C), over all or some portion of that information.

As for the remaining 34 pages (of the outstanding 124 pages), constituting one complete record, that material is still undergoing consultation. OIG will use its best efforts to work with those with whom it is consulting to finalize that process as expeditiously as possible and in compliance with all applicable court orders.

If you are not satisfied with OIG's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison, Deborah Waller at (202) 616-0646 for any further assistance of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at 1-877-684-6448.

OIG is aware this matter is currently the subject of litigation. Accordingly, please contact the trial attorney assigned to this case, Jonathan Kossak, at (202) 305-0612 or jonathan.kossak@usdoj.gov, with any questions related to this litigation.

Sincerely,

Jacqueline Lightle

Jacqueline Lightle
Office of the General Counsel

Attachment

(b)(6); (b)(7)(C) [redacted]

June 18, 2019

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COMPLAINT

DOJ-OPR responses regarding the recusal of AG Barr raise questions about whether it is addressing, applying and enforcing the Rules of Professional Responsibility?

Dear Sir or Madam:

This letter is a follow-up with additional information regarding my letter to you dated April 12, 2019.[1] Please see my letter to the DOJ Office of Professional Responsibility (OPR) dated June 14, 2019.[2] This is a simple[3], but serious[4] matter.

Mr. Barr's confirmation as AG inherently created *side-switching* with regard to the DOJ investigation of Caterpillar Inc. whom he was actively defending before becoming AG. The

[1] Letter dated April 12, 2019 (copy attached).

[2] Letter dated June 14, 2019 (copy attached).

[3] Simple, because side-switching is a common occurrence with new attorney's entering the DOJ from private practice. Where the incoming attorney is in a position to possibly have any input, influence or oversight over a matter he previously worked on in private practice, side-switching is present. Standard procedure "and practice" should and must require a permanent recusal from that specific matter with screening measures to ensure the recusal is effective. The DOJ has regulations in place in addition to the Rules of Professional Responsibility. Were they followed?

[4] This is due to: (1) the nature of the matter being larger than any reported criminal tax fraud case in U.S. history (see Footnote 16); (2) the egregious nature of side-switching as a patent conflict-of-interest that violates the very essence of our adversary legal system; and (3) the fact that it involves the Attorney General of the United States.

Rules of Professional Responsibility, Federal Case Law & DOJ Regulations regarding *side-switching* require AG Barr to *permanently* recuse himself *specifically* from *the investigation of Caterpillar Inc.* with *screening measures* implemented to ensure the recusal is effective. This is even consistent with AG Barr's written testimony to the Senate.[5] This has not been done.

I believe it is reasonable to expect that when the facts, rules, and remedy were brought to the attention of the OPR, it would address the facts and the legal authorities supporting these allegations. The OPR has simply not addressed my allegations nor the supporting authority. In both responses, the OPR has not even mentioned the words "Rules of Professional Responsibility" or "side-switching". I was told in the OPR response dated March 8, 2019[6] that conflicts-of-interest are limited only to those relationships that constitute a "friendship" or "familial relationship", and not the attorney-client relationship.[7] Plausible? Then I was told in the OPR Response email dated May 6, 2019,[8] that OPR concluded that AG Barr did not have to recuse himself for *side-switching*, because the JMD found that AG Barr had no *financial* conflicts-of-interest.[9] Plausible? And also, that AG Barr decided to "indirectly" recuse himself[10] even though the OPR concluded he didn't need to. Plausible? All of this is simply not credible.

- The OPR has not challenged that Mr. Barr's employment as AG constitutes *side-switching* in relation to the DOJ investigation of Caterpillar Inc. whom he was previously defending in the same investigation.
- The OPR has not challenged that AG Barr is subject to and required to follow *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* relevant to side-switching.
- The OPR has not challenged that the Rules of Professional Responsibility, Federal Case Law & DOJ Regulations require a *permanent recusal*, *specifically from the Caterpillar Inc. investigation* with *screening measures* to ensure the recusal is effective.
- The OPR has refused to mention, address or discuss side-switching and the relevant Rules of Professional Responsibility, Federal Case Law & DOJ Regulations.

AG Barr is NOT compliant with required ethical standards, and the OPR is NOT addressing the issue. As stated in my previous letter, given what has transpired I am calling on the Office of Inspector General (OIG) to investigate how and why DOJ programs, policies and procedures allowed the current situation to come about and, based on the responses I received, why this

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[5] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55). See attached letter dated June 14, 2019, page 5 for discussion.

[6] See email dated March 8, 2019 (copy attached).

[7] This reasoning would mean that no other types of relationships can create a conflict-of-interest. This reasoning is contrary to the Rules of Professional Conduct; federal case law, statutes and regulations; and the DOJ's internal information published as guidance for its attorneys regarding conflicts. Plausible?

[8] See email dated May 6, 2019 (copy attached).

[9] How can the lack of financial conflicts-of-interest justify a defense attorney becoming the prosecutor in the same matter (i.e. side-switching)? Plausible?

[10] The *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching* require AG Barr to *permanently* recuse himself *specifically* from *the investigation of Caterpillar Inc.* with *screening measures* implemented to ensure the recusal is effective. An indirect recusal based on who is representing a client is not a recusal from the specific matter as required for *side-switching*. See letter dated June 14, 2019 (copy attached), for discussion.

situation is being perpetuated when presented with a reasonable inquiry.

Further, I have attached a letter dated February 15, 2018,[11] to DOJ-OIG Special Agent [redacted] (b)(6); (b)(7)(C) [redacted] (b)(6); (b)(7)(C) detailing the investigative history of this matter including investigative interference. From the beginning, there was significant evidence of criminal conduct, including willfulness. This evidence included federal deposition testimony of the most senior tax experts in Caterpillar and Caterpillar executives; written admissions by the company filed in federal court; and key internal contemporaneous documents constituting evidence of willfulness. With such evidence in hand, several different groups of Special Agents began to investigate or sought permission to, BUT were stopped or not allowed to proceed.

- To support my claim about "*significant evidence*", I have attached a memorandum dated September 5, 2013, summarizing the issues, and evidence according to elements of criminal tax evasion as shown in the U.S. Attorney's manual.[12]

- In addition, two (2) "independent" government experts have rendered opinions supporting the investigation.[13] One expert opined:
    - *"Caterpillar did not comply with either U.S. tax law or U.S. financial reporting rules...I believe the company's noncompliance with these rules was deliberate and primarily with the intention of maintaining a higher share price. These actions were fraudulent rather than negligent."*[14]

- In addition, the evidence supported the issuance of search warrants publicly and simultaneously executed on company headquarters and two (2) data centers.

As explained in the letter dated February 15, 2018, Special Agents from various governmental agencies[15] tried to pursue this investigation based on the strength of the evidence in hand, but were told by management that they could not investigate based on no reason at all. Being a former government attorney myself, I find it unusual and alarming when Special Agents have unusually significant evidence in their hands and are not allowed to do their job for no stated reason. This means the evidence was not seriously considered by management. The evidence did not matter.

Also explained in the letter, when the Press began asking what I knew about Mr. Barr pressuring then acting U.S. Attorney for the Central District of Illinois I became very concerned. We all know when those being investigated cannot argue the facts or the law, they pressure or attack the investigators and prosecutor. A standard defense tactic, but that doesn't mean it's right, or legal, or should go unchecked or uninvestigated.

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11 See letter dated February 15, 2018 (copy attached).

12 See memorandum dated September 5, 2013 (copy attached). If you would like copies of the deposition testimony, admissions filed in federal court and internal contemporaneous documents cited in the memo; this evidence has been provided to the Grand Jury investigators, or you may request it from me.

13 [redacted] (b)(6); (b)(7)(C)

14 https://www.nytimes.com/2017/03/07/business/caterpillar-tax-fraud.html

15 IRS, [redacted] (b)(6); (b)(7)(C) FDIC, and Department of Commerce.

This case is larger than any reported criminal tax fraud case in U.S. history.[16] So, one can understand the motivation and determination of those being investigated. I believe that the Department of Justice is an institution that takes money and power out of the equation of justice. BUT, is that the case in this investigation?

This is simply a question of whether the investigators and prosecutors being allowed to pursue the evidence and the law, wherever it takes them, without influence or interference? AG Barr's refusal to *permanently* recuse himself *specifically* from *the investigation of Caterpillar Inc.* with *screening measures* to ensure his recusal is effective is a direct interference with the investigation and puts it at risk for claims of "taint" etc. His actual or possible participation or influence is prohibited by the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching*.

What has transpired to date indicates there has been interference in the past; and raises serious concerns about the present and future. If you have any question please contact me.

Sincerely,

(b)(6); (b)(7)(C)

[redacted]

[16] The IRS has already issued Revenue Agent Reports for only 6 of the 18 years involved assessing $2 billion of additional tax only, exclusive of interest and penalties. This is stated in many press reports and the company's Form 10-K.

ATTACHMENTS

[Non-record; Inserted by OIG for clarity]

(b)(6); (b)(7)(C) [redacted]

April 12, 2019

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COMPLAINT

Dear Sir or Madam:

With all due respect. There is a serious matter here that needs to be addressed. As a former government lawyer, I understand issues can go undetected by well intentioned, dedicated government employees. This matter reflects upon the Justice Department as a whole, so I believe it must addressed.

How did Department of Justice (DOJ) programs, policies, and procedures allow the Attorney General to engage in activity contrary to the law? I cannot imagine that an attorney representing a criminal defendant can *switch-sides* and join the DOJ in a position having influence over his former client's case without having to disclose this matter, permanently recuse himself, and effective screening measures put in place. This should happen with every rank and file DOJ attorney, and far more so for the AG. The Justice Department is putting itself and its investigation at great risk for ridicule, questions of taint, prosecutorial challenges, etc. *Is the DOJ unwittingly creating a defense for the defendant in this case that the AG taints the government's case*? The mere possibility of this cannot be permitted.

I believe this matter to be of significant importance given it involves the Attorney General and the largest tax evasion investigation in the history of the United States, in which the government has the defendants own deposition testimony and admissions in court filings to prove its case.

Please read on.

Federal courts have repeatedly ruled "*side-switching*" is forbidden and lawyers who engage in it must be disqualified. The D.C. Bar Association even amended the ABA Model Rules to codify the case law and state unequivocally that this conduct is prohibited and cannot be waived by anyone.[1] This complaint is not about the ethical conduct of the AG,[2] but rather how DOJ programs, policies and procedures produced a result so contrary to the law and legal norms. Thus, this issue falls under the jurisdiction of the Office of Inspector General, not the Office of Professional Responsibility.

Just four months ago AG Barr was defending Caterpillar Inc. in an ongoing DOJ criminal investigation. He now is sworn to investigate and prosecute Caterpillar Inc. in the *exact* same matter. His duty as the AG is directly adverse to his former representation of Caterpillar Inc. This is commonly known as *side-switching*. It is *absolutely prohibited* and *even with the informed consent of all involved clients.*[3] This conflict CANNOT be waived. Common sense should dictate that when the defense lawyer is allowed to switch sides and participate or be involved in the investigation and prosecution of his former client, something is amiss. This is alarming in any event, and more so when the lawyer is the highest law enforcement officer in the nation. Shouldn't DOJ programs, policies and procedures have prevented this? Or, even address it after the fact?

AG Barr has stated in both oral and written testimony he would comply with the Rules of Professional Conduct, and federal case law, statutes and regulations. However, I found that basic rules that should already have been complied with were not even a part of his Ethics Agreement submitted to the Office of Government Ethics. Nor were these issues and rules addressed in his oral and written testimony, even though the potential problem was noted. And based on a response I received from the Office of Professional Responsibility (OPR) discussed below, he has not complied with DOJ specific regulations directly addressing this situation.

I raised this issue to the OPR including support for my complaint in the DOJ regulations[4] confident that the OPR would investigate the matter as the conflict is apparent.[5] I indicated that AG Barr must permanently recuse himself from participating in the DOJ investigation of Caterpillar Inc. I received a response in which the OPR summarily dismissed this issue as not warranting an investigation.[6] The response indicates there has been no recusal,[7] nor will there be,

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[1] The D.C. Bar made specific changes to the ABA Model Rule 1.7 for the principal purpose of stating more clearly and unequivocally that there are circumstances in which representation is absolutely forbidden. This is a codification of the absolute prohibition that existed in case law. The D.C. Rule 1.7(a) mandates an absolute prohibition of multiple representation when the lawyer represents clients with *adverse positions* in the *same matter*. Client consent *cannot* cure such a conflict. Griva v. Davison, 637 A.2d 830, 843 (D.C. 1994).

[2] A complaint has been filed with the OPR regarding the employees conduct.

[3] See the letter dated April 9, 2019 (copy attached), for a detailed discussion and relevant authority supporting these statements and related issues.

[4] 28 C.F.R. § 45.2.

[5] See letter dated February 15, 2019 (copy attached).

[6] Email dated March 8, 2019 (copy attached).

[7] No permanent recusal pursuant to 28 C.F.R. § 45.2. While AG Barr's Ethics Agreement provides for a general one-year recusal, this is not relevant as the Rules of Professional Conduct, case law, statutes and regulations require **complete disqualification or permanent recusal**. See the letter dated April 9, 2019 (copy attached), for a detailed

nor were the DOJ regulations followed, and nor will this matter be addressed. I believe that response to be insincere.

The response states there was no basis for my assertions because I did not provide evidence that AG Barr had a "familial" or "friendship" relationship with Caterpillar Inc. The response dismissed the fact that AG Barr had a former attorney-client relationship with Caterpillar Inc., as apparently not relevant to the issue of conflicts-of-interest. This was surprising because one of the most common concerns regarding conflicts attorneys likely have upon entering the DOJ are the attorney-client relationships they had in private practice. A reasonable interpretation of this response is that DOJ programs, policies and procedures permit *side-switching* by the highest law enforcement officer in the nation. Surely this cannot be the intended outcome.

Upon more research, I found overwhelming support in the Rules of Professional Conduct and the federal case law that *side-switching*, even on matters of far less importance than here, is an *incurable conflict of interest that cannot be waived.*[8] Permanent recusal with effective screening measures are required. This is why Bar Association ethics attorneys with whom I have discussed side-switching matters have indicated, "That is a conflict-of-interest." So, I submitted another complaint to the OPR including my additional research.[9] While I am hopeful that the OPR will require and ensure compliance with all relevant laws through a permanent recusal and screening measures, I have deep concerns given the manner of the response I received and its substance.

Given what has transpired I am calling on the Office of Inspector General (OIG) to investigate how and why DOJ programs, policies and procedures allowed the current situation to come about and, based on the response I received, why this situation is being perpetuated when presented with a reasonable inquiry regarding its propriety.

I believe there to be serious questions about the DOJ programs, policies and procedures that the OIG should investigate. I propose you consider the following in your investigation.

- Aren't former client matters with the DOJ the most apparent and potentially damaging conflicts-of-interest?
- Are there programs, policies and procedures for disclosing former clients whom an incoming attorney represented in ongoing DOJ matters to identify conflicts?
    - Were these programs, policies and procedures followed?
    - For example, AG Barr was apparently aware of un-waivable conflicts-of-interest regarding Caterpillar Inc.[10]
    - 28 C.F.R. § 45.2(b) requires recusal and reporting.
- Should there have been follow-up on AG Barr's written comments to the Senate stating it's likely his representation of Caterpillar Inc. will present conflicts-of-interest and he knows certain conflicts cannot be waived?[11] Why didn't the notation of "un-waivable conflict-of-interest"

discussion and relevant authority supporting these statements and related issues.

[8] See the letter dated April 9, 2019 (copy attached), for a detailed discussion and relevant authority supporting these statements and related issues.

[9] See the letter dated April 9, 2019 (copy attached).

[10] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

[11] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see

initiate inquiry?

- Why is there no mention of "un-waivable conflicts-of-interest" regarding Caterpillar Inc. in the Ethics Agreement submitted to Office of Government Ethics by the Justice Management Division?
- Why does the Ethics Agreement focus on every possible financial interest, but makes no mention of the one noted "un-waivable conflict-of-interest"?
- How and why did DOJ programs, policies and procedures allow for an absolute, incurable conflict-of-interest to go undetected?
- Shouldn't DOJ programs, policies and procedures protect incoming attorneys like AG Barr and former clients from this very situation?
- Should AG Barr resign his position as Attorney General of the United States?
- Should AG Barr permanently recuse himself from participation in the Caterpillar investigation and the Deputy AG appoint a Special Counsel?[12]
- Should AG Barr permanently recuse himself from participation in the Caterpillar investigation and the DOJ immediately implements effective screening measures for the AG and any other appropriate personnel?
- Is the Justice Department sanctioning an apparent conflict-of-interest and creating at the very least an appearance of impropriety?

How does this situation promote overall DOJ Policy? It seems the DOJ has everything to lose, and nothing to gain, from this situation. What value or benefit does the DOJ gain from AG Barr's involvement? Quite honestly, it is simply unfair for the DOJ programs, policies and procedures to put AG Barr or any attorney, and former clients, in this position. **His actual or even perceived possible participation or involvement contradicts DOJ norms and puts the government's investigation at risk of Caterpillar claiming it is *"tainted"*.** This situation contradicts federal case law, statutes, and regulations. It contradicts the Rules of Professional Conduct. It contradicts Justice Department norms. It condones and permits a ***non-waivable conflict-of-interest***; and creates the ***appearance of either unfairness or favoritism toward Caterpillar Inc.***

How can DOJ programs, policies and procedures not lead to what should be a routine recusal and implementation of effective screening procedures when doing so creates no harm to anyone, and a positive outcome for everyone, including AG Barr and Caterpillar Inc.

Questions #55)

[12] See 28 CFR §600.1. A Special Counsel is appropriate because: there is already a criminal investigation underway; the AG has a conflict-of-interest; and it is always in the public interest (and legally required) for the Justice Department to avoid *even the appearance of impropriety* to maintain the public trust. Since effective screening measures are required here for an effective recusal of the AG and such measures were not deployed promptly, the disqualification could be imputed beyond the AG to other high-level DOJ officials. ("The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed—months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed or were not timely employed.") (emphasis added); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long).")

- Recusal with effective screening procedures
    - Safeguards AG Barr's former client, thereby protecting him.
    - Eliminates the appearance of a conflict-of-interest, bias, unfairness, etc.
    - Complies with the Rules of Professional Conduct, and federal law & regulation.
    - Eliminates a patent conflict-of-interest.
    - Is consistent with AG Barr's written comments to the Senate.

- Non-recusal
    - Puts everyone involved at-risk.
    - Could taint a 4-year multi-agency investigation.
    - Condones a patent conflict-of-interest, setting a terrible precedent.
    - Creates the appearance of a conflict-of-interest, which is prohibited by all relevant authority.

There are many good people involved here. Why have the DOJ programs, policies and procedures not prevented this situation nor addressed it in hind-sight? If you have any question please contact me.

Sincerely,

(b)(6); (b)(7)(C)
[redacted]

(b)(6); (b)(7)(C) [redacted]

June 14, 2019

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COMPLAINT

The *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching* require AG Barr to *permanently* recuse himself *specifically* from *the investigation of Caterpillar Inc.* with *screening measures* implemented to ensure the recusal is effective.
AG Barr is NOT compliant with required ethical standards.

Dear Sir or Madam:

With all due respect, the OPR has not addressed this allegation which was presented in my letters dated February 15th[1] and April 10th[2] of 2019. It is logical that to address this allegation the OPR must address *side-switching* and the relevant *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations*. Relying on documents that did not address, mention or discuss my allegation to come to a conclusion about my allegation is simply not logical, at best. This is a renewed Complaint. Again, with all due respect, please address this allegation. The public's confidence in the Department of Justice cannot be sustained if the AG does not comply with the same ethical standards required of and routinely followed by all rank-and-file attorneys at the DOJ. A significant federal investigation is needlessly being put at-risk and subjected to the claim of "taint" due to the

[1] See letter dated February 15, 2019 (copy attached), incorporated herein by reference.
[2] See letter dated April 10, 2019 (copy attached), incorporated herein by reference.

absence of AG Barr's *permanent* recusal *specifically* from the *Caterpillar Inc. investigation*, with *screening measures* to ensure the recusal is effective.

This is not a heavy lift. This issue arises regularly within the DOJ as new attorneys join and leave government service, to and from private practice. If a local attorney was defending someone who is being investigated by the DOJ, and then goes to work for the DOJ, I have every confidence that the local U.S. Attorney would require the incoming attorney to recuse him or herself from the investigation of their former client with screening measures to ensure there is no participation by the incoming attorney in that investigation. This protects the DOJ, the investigation, the incoming attorney, and the party being investigated. The local U.S. Attorney would do this to comply with the specific *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching*. The only difference in this case is the incoming attorney is the Attorney General of the United States. However, the Attorney General is subject to the same exact ethical standards, and should be held to an even higher standard given his position to avoid any appearance of impropriety.

Why doesn't the AG have to comply with *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching*? Why won't the OPR respond to my specific allegation? Compliance with the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* is NOT optional. This authority requires a *permanent* recusal *specifically* from the *Caterpillar Inc. investigation* with *screening measures* that ensure the recusal is effective. This should have been done upon AG Barr's swearing in. Is this not standard procedure throughout the Justice Department?

Allegation

The *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching* require AG Barr to *permanently* recuse himself *specifically* from *the investigation of Caterpillar Inc.* with *screening measures* implemented to ensure the recusal is effective.
AG Barr is NOT compliant with required ethical standards.

This allegation is specific to *side-switching* which is a *patent conflict of interest* that *CANNOT be waived*.[3] I submitted a 13-page analysis of side-switching and the relevant ethical standards in my letter dated April 10, 2019.[4] The OPR Response has been to simply ignore this allegation. I address the OPR Response dated May 6, 2019, below.

The OPR relies on AG Barr's Ethics Agreement/financial disclosure report to conclude that AG Barr does not have to recuse himself from the investigation of Caterpillar Inc. However, that document has NOTHING to do with the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching*.

How can an opinion from the Justice and Management Division (JMD) that AG Barr has no financial conflicts-of-interest justify side-switching that is strictly prohibited? The OPR Response email dated May 6, 2019,[5] has three paragraphs. The first paragraph restates a portion of AG Barr's Ethics Agreement. The second paragraph paraphrases the first paragraph, and then states:

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[3] See letter dated April 10, 2019 (copy attached).

[4] These ethical standards and authorities were analyzed in great detail in my letter dated April 10, 2019 (copy attached).

[5] See email dated May 6, 2019 (copy attached).

"The Justice and Management Division (JMD) conducted a thorough review of Mr. Barr's financial disclosure report and concluded that 'the report presents no conflict of interest under applicable law and regulations.' Based on the foregoing [a finding of no financial conflicts-of-interest], *OPR concluded that contrary to your allegations* [regarding conflicts-of-interest due to side-switching], *Attorney General Barr was not 'in violation of Department of Justice (DOJ) rules and regulations for not recusing himself from the investigation of Caterpillar Inc.'"* [comments added]

"Mr. Barr's financial disclosure report" was submitted by the JMD to the Director of the Office of Government Ethics in a letter dated January 11, 2019,[6] (a.k.a. AG Barr's Ethics Agreement). This Ethics Agreement is required to comply with Title I of the Ethics in Government Act of 1978. Title I requires certain financial disclosures to ensure certain government employees do not have financial conflicts-of-interest. Title I is limited to financial conflicts-of-interest. Title I has NOTHING to do with the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching*. It is a financial disclosure law.

This Ethics Agreement does not mention, raise, address or opine on the conflict-of-interest created by AG Barr's *side-switching*. It does not mention, raise, address or opine on the relevant *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching* that require a *permanent* recusal *specific to the investigation of Caterpillar Inc.* with *screening measures* that ensure an effective recusal.

Thus, how can the OPR rely on "Mr. Barr's financial disclosure report"/Ethics Agreement to conclude that AG Barr's *side-switching* does not violate the relevant *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* when that document does not address this?[7]

A *permanent* recusal *specifically* from the *investigation of Caterpillar Inc.* with *screening measures* that ensure an effective recusal is required by the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* relevant to *side-switching*. An indirect recusal from matters in which "Caterpillar is represented by Kirkland & Ellis" is NOT compliant.

To recuse oneself means "*to disqualify (oneself)...in a particular case broadly: to remove (oneself) from participation to avoid a conflict of interest.*"[8] Disqualify means one is "*ineligible...because of violations of the rules*".[9] So recusal means one removes themselves broadly from participation in a particular case because they are ineligible due to some violation of rules. A recusal is not a partial removal that allows for some participation in the particular case. A recusal is not an indirect removal that may allow for any possible subsequent participation in the particular case. A recusal due to *side-switching* must be a complete, total disqualification.[10]

Side-switching is a patent conflict-of-interest violating federal, state and District of Colombia ethical standards

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[6] Ethics Agreement letter from JMD to the U.S. Office of Government Ethics, dated January 11, 2019. This report is primarily, if not totally, focused on potential financial conflicts of interest. It does not raise, mention or opine on *side-switching* or the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations*.

[7] Furthermore, the OPR Response mentions the short recusal period that is in the Ethics Agreement/financial disclosure report as if it is relevant. It is not. And it provides for AG Barr's participation in recused matters if he first gets approval. *Side-switching* requires a complete, absolute recusal and disqualification from any participation in the matter - period. See letter dated April 10, 2019 (copy attached).

[8] https://www.merriam-webster.com/dictionary/recuse

[9] https://www.merriam-webster.com/dictionary/disqualify

[10] See letter dated April 10, 2019 (copy attached).

that is NOT waivable.[11] However, public policy is served by private attorney's entering government service. This is why the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* strictly prohibit *side-switching*, but not the movement of attorneys into government service, if there is a permanent recusal specific to the matter in question with screening measures to ensure the recusal is effective. These requirements, when effectively implemented, negate the potential for harm caused by side-switching. AG Barr is not prohibited from being Attorney General. However, AG Barr is required by the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* to *permanently* recuse himself *specifically* from the *investigation of Caterpillar Inc.* and the implementation of *screening measures* that ensure his recusal is effective.

The third paragraph of the OPR Response email dated May 6, 2019,[12] states:

> *"Nothing...persuades us to alter our conclusion that Attorney General Barr has acted, and continues to act, in strict compliance with applicable rules and regulations governing his participation in any matter in which Caterpillar is represented by Kirkland & Ellis. Moreover, ...we were advised that he has formally recused himself from any matter in which Kirkland & Ellis represents a party, which includes the criminal tax investigation in which the firm represents Caterpillar."* (emphasis added)

The responses states that AG Barr has recused himself from any matter in which "Kirkland & Ellis represents a party", as if this meets the required ethical standard.[13] It does NOT meet the required ethical standard. The *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching* require that AG Barr *permanently* recuse himself *specifically* from the *investigation of Caterpillar Inc.*, and put in place *screening measures* that ensure the recusal is effective. AG Barr is obligated to permanently recuse himself specifically from the investigation of Caterpillar Inc. and have the DOJ implement screening measures that ensure his recusal is effective. Recall, side-switching is a non-waivable conflict-of-interest.[14] This obligation cannot be fulfilled indirectly in a manner that enables Caterpillar to simply hire new counsel and the recusal becomes meaningless. Caterpillar has had several notable law firms previously defending it in this matter, but personally sought out Mr. Barr to defend it[15] after multiple federal agencies publicly executed search warrants at company headquarters and data centers.[16] Caterpillar did not seek out Kirkland & Ellis,[17] it sought out Mr. Barr. AG Barr engaged in the most direct form of side-switching and, therefore, is obligated to permanently recuse himself specifically from the investigation of Caterpillar Inc. and have the DOJ implement screening measures that ensure his recusal is effective.

In addition, Kirkland & Ellis has a significant conflict-of-interest in the Caterpillar investigation which makes it

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[11] See letter dated April 10, 2019 (copy attached).

[12] See letter dated May 6, 2019 (copy attached).

[13] Oddly this raises the question as to why AG Barr recently recused himself for something when the OPR has concluded he was not in violation of any rules and, thus, had no reason to recuse. Presumably the OPR had informed AG Barr that he was not in violation of any rules. So why would recusal even enter his mind, particularly when he is dealing with all the matters related to the President including Congressional subpoenas for his testimony and threats of contempt. Under these circumstances how could this issue have gotten to his desk.

[14] See letter dated April 10, 2019 (copy attached).

[15] See https://www.caterpillar.com/en/news/corporate-press-releases/h/new-caterpillar-ceo-asks-former-us-attorney-general-to-assess-and-help-address-ongoing-government-investigation.html . Only later did Mr. Barr associate himself with Kirkland & Ellis.

[16] See https://www.forbes.com/sites/antoinegara/2017/03/02/caterpillars-headquarters-raided-by-federal-authorities-including-doj-and-irs/#33a4e3976f3a and https://www.nytimes.com/2017/03/02/business/caterpillar-raid-tax-practices.html and https://www.chicagotribune.com/business/ct-law-enforcement-search-caterpillar-0303-biz-20170302-story.html .

[17] See https://www.forbes.com/sites/antoinegara/2017/03/02/caterpillars-headquarters-raided-by-federal-authorities-including-doj-and-irs/#33a4e3976f3a and https://www.nytimes.com/2017/03/02/business/caterpillar-raid-tax-practices.html and https://www.chicagotribune.com/business/ct-law-enforcement-search-caterpillar-0303-biz-20170302-story.html .

likely it will not be able to continue representing Caterpillar. Kirkland & Ellis previously represented PriceWaterhouseCoopers (PwC) in a Sarbanes-Oxley lawsuit against Caterpillar Inc. pertaining to the particular tax matter being criminally investigated by the DOJ.[18] Kirkland & Ellis has represented PwC in many matters and does so on a continual basis.[19] PwC is Caterpillar's public auditor and the primary architect, implementer and overseer of the tax matter that is the subject of the investigation.[20] The interests of PwC and Caterpillar Inc. are directly adverse to one another in this matter. This conflict of interest was and is public knowledge.[21]

AG Barr's written testimony to the Senate is consistent with my allegation. My allegation only demands that he comply with his written commitment to the Senate.

On January 15 & 16, 2019, Mr. Barr testified before the Senate Judiciary Committee. Mr. Barr was sent written questions by members of the Senate following his testimony which he answered.[22]

> (Q) "Will you commit to recusing yourself from any matters relating to Caterpillar?"
>
> (A) "It is likely that *my representation of Caterpillar will present conflicts*, and it is my understanding that certain types of conflicts *cannot be waived*. If confirmed, I commit to following all applicable laws, regulations, and rules with respect to my prior representation of Caterpillar and, if necessary, recusing from *any matters relating to the company*." (emphasis added)
>
> (Q) "While representing Caterpillar, did you take any formal or informal actions to challenge the basis for the search warrants executed by the government or to challenge the documents collected during the search?"
>
> (A) "Other than information that is publicly available, I am unable to provide further details regarding the nature and specifics of my work for Caterpillar due to the applicable privileges and confidentiality obligations."[23]

Side-switching is perhaps the most egregious conflict-of-interest there is.[24] *"I will no longer defend you and instead will join the prosecution of your case,"* is simply untenable. The entire basis for our adversary legal system crumbles if side-switching were to be allowed without proper recusals, which is why the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* strictly forbid it.[25] When answering these questions from the Senate, it is apparent Mr. Barr knew what side-switching is and knew it is NOT waivable. He specifically told the Senate he would follow all laws, regulations and rules, and if they require, he would recuse himself from *"any*

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[18] Schlicksup vs. Caterpillar, Inc., PACER case No. 09-cv-1208. U.S. District Court, C.D. Illinois, Peoria Division, document #92, appearance of counsel filed Monday, 16 May, 2011. Mark Nomellini of Kirkland & Ellis appearing on behalf of PricewaterhouseCoopers LLP.

[19] See https://www.kirkland.com/lawyers/b/becker-whitney-l and https://www.law.com/therecorder/almID/1202758297218/Kirkland-amp-Ellis-to-Defend-PricewaterhouseCoopers-in-Discrimination-Suit/?slreturn=20190109163554 and https://www.leagle.com/decision/infdco20170505a48 .

[20] See https://www.pjstar.com/news/20170320/firm-retained-by-caterpillar-after-raids-has-links-to-tax-strategy

[21] See https://www.pjstar.com/news/20170320/firm-retained-by-caterpillar-after-raids-has-links-to-tax-strategy

[22] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

[23] How can the interactions an attorney has with law enforcement be privileged or confidential with regard to his client as the interaction is with a third-party?

[24] See letter dated April 10, 2019 (copy attached).

[25] See letter dated April 10, 2019 (copy attached).

matters relating to the company" (Caterpillar Inc.) He did not commit to recusing himself from matters in which Kirkland & Ellis is representing a party. He committed to recusing himself from *any matters relating to Caterpillar Inc.*, which is even broader than recusing himself from the *specific investigation of Caterpillar Inc.*

The *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching* require that AG Barr *permanently* recuse himself *specifically* from the *investigation of Caterpillar Inc.*, and put in place *screening measures* that ensure the recusal is effective. He must do so now.

Conclusion

- The OPR has not challenged that Mr. Barr's employment as AG constitutes *side-switching* in relation to the DOJ investigation of Caterpillar Inc. who he was previously defending in the same investigation.
- The OPR has not challenged that AG Barr is subject to and required to follow *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* relevant to side-switching.
- The OPR has not challenged that the Rules of Professional Responsibility, Federal Case Law & DOJ Regulations require a *permanent recusal*, *specifically from the Caterpillar Inc. investigation* with *screening measures* to ensure the recusal is effective.
- The OPR has refused to mention, address or discuss side-switching and the relevant Rules of Professional Responsibility, Federal Case Law & DOJ Regulations.

In fact, in both responses the Office of *Professional Responsibility* has not mentioned the words "Rules of Professional Responsibility" or "side-switching", which are the very basis of my allegations. I believe reasonable persons will conclude from the OPR responses that it has not considered the "Rules of Professional Responsibility" or "side-switching" and, therefore, the OPR has not addressed my allegation. I do not believe it is optional for the OPR to address my allegation.

First, I was told in the OPR response dated March 8, 2019[26] that conflicts-of-interest are limited only to those relationships that constitute a "friendship" or "familial relationship".[27] Then I was told in the OPR Response email dated May 6, 2019,[28] that OPR concluded that AG Barr did not have to recuse himself for *side-switching*, the most egregious conflict-of-interest, because the JMD found that AG Barr had no *financial* conflicts-of-interest.[29] And also, that AG Barr decided to recuse himself [30] even though the OPR concluded he didn't need to.

I am a bit dismayed at the apparent resistance to apply common, routine, yet very significant, ethical standards to the Attorney General, and the accompanying obfuscation and dismissiveness. This is particularly true given the importance of the issue to the DOJ in avoiding the appearance of impropriety, the nature of this particular investigation, the obvious conflict-of-interest, and the simple remedy. What I am asking for is the minimum response to contain the damage caused by *side-switching*, which will avoid a serious ethical violation, not do harm to or burden anyone, and preserve the notion in the minds of the public that the DOJ avoids even the appearance of impropriety. The Courts do not tolerate delays in implementing screening measures. Doing so will

[26] See email dated March 8, 201. (copy attached).

[27] This reasoning would mean that no other types of relationships can create a conflict-of-interest. This reasoning is contrary to the Rules of Professional Conduct; federal case law, statutes and regulations; and the DOJ's internal information published as guidance for its attorneys regarding conflicts. Plausible?

[28] See email dated May 6, 2019 (copy attached).

[29] How can the lack of financial conflicts-of-interest justify a defense attorney becoming the prosecutor in the same matter (i.e. side-switching)? Plausible?

[30] The recusal is inadequate as discussed above.

avoid less simple measures.

If the OPR believes that my allegations are unfounded based upon the application of the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching* by the U.S. Attorney General; then please explain why my allegations are unfounded based upon the *Rules of Professional Responsibility, Federal Case Law & DOJ Regulations* regarding *side-switching*. I believe this to be a fair request. Everyone wins and no one loses by doing what is required in a case of side-switching.

(b)(6); (b)(7)(C) [redacted]

(b)(6); (b)(7)(C) [redacted]

February 15, 2019

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COMPLAINT

William Barr is legally required to recuse himself from the investigation of Caterpillar Inc.

Dear Sir/Madam:

I am filing this complaint with the Office of Professional Responsibility (OPR) and the Office of Inspector General (OIG) calling on your Offices to promptly conduct an investigation into whether Attorney General William Barr is in violation of Department of Justice (DOJ) rules and regulations for not recusing himself from the investigation of Caterpillar Inc. He was asked by the Senate in written questions to confirm his recusal, but he did not even though he noted there is likely to be conflicts regarding this matter, and that certain conflicts cannot be waived.[1] This is one of those conflicts. He was required to report the matter and all attendant facts and circumstances[2] to the OPR, but there is no indication he has done so. Instead, he has provided vague promises to recuse himself from former client matters for *a short period of time* and *follow all rules and regulations*, yet the rules and regulations require his recusal which he did not provide to the Senate. Caterpillar Inc. is his only former client matter[3] and at the center of the investigation, which is larger than any reported case of this kind.[4]

To put this in the broader context of Attorney General Barr's confirmation, there was much said about him recusing himself from the investigations of President Trump. Imagine if President Trump had nominated Rudy Giuliani for Attorney General. Would Giuliani have to recuse himself because he was defense counsel for the President in the investigation? Giuliani's relationship with President Trump as his lawyer is by definition, and by law, more partial than Jeff Sessions relationship with President Trump as a political advisor. In the Caterpillar Inc. case, having their defense lawyer appointed as Attorney General is tantamount to President Trump appointing Giuliani as Attorney General in his case. A lawyer's obligation to his client includes total partiality with ongoing obligations to the client even after the representation has ended.

When the defense attorney in a criminal case becomes top prosecutor overseeing the case, there is a conflict.

On January 8, 2015, the U.S. Attorney's Office for the Central District of Illinois issued Grand Jury Subpoenas to Caterpillar Inc. commencing a criminal investigation.[5] This investigation led to the production of evidence, expert opinions,[6] and circumstances that supported the issuance of search warrants for a highly publicized multi-agency raid by over 100 Special Agents. On March 2, 2017, the FDIC, IRS, & Department of Commerce raided Caterpillar

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[1] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

[2] 28 CFR § 45.2(a)&(b)

[3] Barr stated in his Senate testimony that he only had one client. Caterpillar Inc. is the only source of legal fees shown on his financial disclosure. Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, with financial disclosure. https://extapps2.oge.gov/201/Presiden.nsf/D4CD873798AD3D1F85258381002E4CEL/$FILE/Barr,%20William%20P.%20%20finalEA%20.pdf .

[4] Caterpillar has disclosed in its Form 10-K for several years that the IRS has assessed $2 billion of additional tax only for the years 2007-2012, and that it continues to report its federal tax using scheme at the heart of the investigation. For all years involved the tax amount exceeds $5 billion through 2017, and exceeds $10 billion if you include penalties and interest.

[5] See page 22 of Caterpillar Annual Report for year ended December 31, 2014. https://www.sec.gov/Archives/edgar/data/18230/000001823015000061/cat_10-kx12312014.htm . See also, http://www.cfo.com/tax/2015/02/caterpillar-discloses-grand-jury-probe/

[6] https://www.nytimes.com/2017/03/07/business/caterpillar-tax-fraud.html . Expert witness report states, "Caterpillar did not comply with either U.S. tax law or U.S. financial reporting rules…I believe the company's noncompliance with these rules was deliberate and primarily with the intention of maintaining a higher share price. These actions were fraudulent rather than negligent."

Inc.'s global headquarters and data centers.[7] Immediately following the raid, Caterpillar Inc.'s CEO personally asked Mr. Barr to provide legal representation regarding the matter.[8] Mr. Barr then associated himself with the law firm Kirkland & Ellis. Mr. Barr has personally been paid significant sums for this representation which exceed $1.2 million for 2018 alone.

Your investigation should take into account the conflict of interest created by Mr. Barr's employment by Kirkland & Ellis[9] which routinely represents PriceWaterhouseCoopers (PwC).[10] PwC is Caterpillar's public auditor and the primary architect, implementer and overseer of the tax scheme that is the subject of the investigation.[11] Kirkland & Ellis entered its appearance[12] as the attorney for PwC in a Sarbanes-Oxley lawsuit against Caterpillar Inc. pertaining to this particular tax matter.[13] The interests of PwC and Caterpillar Inc. are directly adverse to one another in this matter. This conflict of interest was and is public knowledge.[14]

If warranted by the results of OPR's and OIG's investigations, the OPR and OIG should issue public findings that Attorney General Barr is violating DOJ regulations and that he is required by DOJ regulations to recuse himself "*permanently*" from all matters regarding Caterpillar Inc., and from any consideration and decisions dealing with these matters.

OPR has jurisdiction to investigate allegations of professional misconduct against attorneys of the Department of Justice that relate to the exercise of their authority to investigate, litigate or provide legal advice.[15] The OIG's mission also includes the detection and deterrence of misconduct by DOJ personnel. It is clear, as well, that this jurisdiction and responsibility includes investigating Attorney General Barr and any apparent violation of DOJ regulations by him. In 2017, in response to a complaint filed by Democracy 21, then Attorney General Jeff Sessions recused himself on the advice of the OPR.[16] In 1988, OPR, in response to a complaint filed by Common Cause, exercised its jurisdiction to investigate Edwin Meese to determine if

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[7] See https://www.forbes.com/sites/antoinegara/2017/03/02/caterpillars-headquarters-raided-by-federal-authorities-including-doj-and-irs/#33a4e3976f3a and https://www.nytimes.com/2017/03/02/business/caterpillar-raid-tax-practices.html and https://www.chicagotribune.com/business/ct-law-enforcement-search-caterpillar-0303-biz-20170302-story.html .

[8] See https://www.caterpillar.com/en/news/corporate-press-releases/h/new-caterpillar-ceo-asks-former-us-attorney-general-to-assess-and-help-address-ongoing-government-investigation.html

[9] While Mr. Barr describes his relationship with Kirkland & Ellis, he is paid a salary by this firm. See page 4 of Nominee Report, Public Financial Disclosure of Mr. Barr signed December 28, 2018.

[10] See https://www.kirkland.com/lawyers/b/becker-whitney-l and https://www.law.com/therecorder/almID/1202758297218/Kirkland-amp-Ellis-to-Defend-PricewaterhouseCoopers-in-Discrimination-Suit/?slreturn=20190109163554 and https://www.leagle.com/decision/infdco20170505a48 .

[11] See https://www.pjstar.com/news/20170320/firm-retained-by-caterpillar-after-raids-has-links-to-tax-strategy

[12] Schlicksup vs. Caterpillar, Inc., PACER case No. 09-cv-1208, U.S. District Court, C.D. Illinois, Peoria Division, document #92, appearance of counsel filed Monday, 16 May, 2011. Mark Nomellini of Kirkland & Ellis appearing on behalf of PricewaterhouseCoopers LLP.

[13] Schlicksup vs. Caterpillar, Inc., PACER case No. 09-cv-1208, U.S. District Court, C.D. Illinois, Peoria Division.

[14] See https://www.pjstar.com/news/20170320/firm-retained-by-caterpillar-after-raids-has-links-to-tax-strategy

[15] 28 C.F.R. 45.12

[16] See https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself-from-russia-investigation/2017/03/02/148c07ac-ff4b-11e6-8ebe-6e0dbe4f2bca_story.html?noredirect=on&utm_term=.41563410e171 .

he had violated administrative rules and provisions of the Code of Ethics for Government Service that barred executive branch officials from using their public positions for private gain.[17] OPR found that Meese as Attorney General had violated these rules as they applied to Justice Department officials.[18]

Mr. Barr has stated the following with regard to the current matter. And although he has committed to some limited recusal for a short period of time which is subject to waiver, he would not commit to Senate questions asking specifically for his recusal in this specific matter as required by the DOJ regulations and explained below.

> On January 11, 2019, Mr. Barr submitted his Ethics Agreement in a letter to the U.S. Office of Government Ethics.[19] He committed that upon confirmation he "will resign from his position with the law firm Kirkland & Ellis LLP."[20] He also committed that:
>
> 1. "For a period of *one year* after his resignation, he will not participate personally and substantially in any particular matter involving specific parties in which he knows the firm is a party or represents a party, unless he is first authorized to participate, pursuant to 5 C.F.R. Sec. 2635.502(d);[21] (emphasis added)
> 2. "He will not participate personally and substantially in any particular matter involving specific parties in which he knows that a former client is a party or represents a party, for a period of *one year* after he last provided service to that client, unless he is first authorized to participate, pursuant to 5 C.F.R. Sec. 2635.502(d);[22] (emphasis added) and
> 3. "I (Mr. Barr) agree to *comply with the conflict of interest statutes and regulations*, ..."[23] (emphasis added)
>
> On January 15 & 16, 2019, Mr. Barr testified before the Senate Judiciary Committee. Mr. Barr was sent written questions by members of the Senate following his testimony.[24]
>
> (Q) "Will you commit to recusing yourself from any matters relating to Caterpillar?"
>
> (A) "It is likely that my representation of Caterpillar will present conflicts, and it is my understanding that certain types of conflicts cannot be waived. If

[17] "Meese's Department Probes Him," *New York Times News Service* (July 20, 1988).

[18] "Justice Department Rips Meese," *New York Times*, (January 18, 1989).

[19] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019. https://extapps2.oge.gov/201/Presiden.nsf/D4CD873798AD3D1F85258381002F4CEE/$FILE/Barr,%20William%20P.%20%20finalEA%20.pdf .

[20] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, page 1.

[21] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, page 2.

[22] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, page 2.

[23] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, Nominee Statement attached to the letter.

[24] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

> **confirmed, I commit to *following all applicable laws, regulations, and rules* with respect to my prior representation of Caterpillar and, if necessary, recusing from any matters relating to the company." (emphasis added)**
>
> **(Q) "While representing Caterpillar, did you take any formal or informal actions to challenge the basis for the search warrants executed by the government or to challenge the documents collected during the search?"**
>
> **(A) "Other than information that is publicly available, I am unable to provide further details regarding the nature and specifics of my work for Caterpillar due to the applicable privileges and confidentiality obligations."**

We believe that the failure of Attorney General Barr to recuse himself from the matters set forth above is a violation of DOJ regulations, and that with a Grand Jury investigation already underway and the execution of search warrants in a multi-agency raid by over 100 Special Agents, his recusal has to take place immediately. Therefore, we are calling on you to exercise your responsibility and promptly make clear that Barr must comply with DOJ regulations and *"permanently"* recuse himself from these matters. The grounds for why DOJ regulations require Attorney General Barr to recuse himself in these matters are set forth below.

DOJ Regulations Require Reporting & Recusal
Waiver NOT Possible

The applicable DOJ recusal regulation, 28 CFR § 45.2, applies to all employees of the Department of Justice and provides:

> **45.2(a) Unless authorized under paragraph (b) of this section, 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.**
>
> **45.2(b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section *shall* report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he *shall* relieve the employee from participation unless he determines further, *in writing*, after full consideration of all the facts and circumstances, that: (emphasis added)**
>
> **(1) The relationship will not have the effect of rendering the employee's service less than full impartial and professional; and**

> (2) The employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

> 45.2(c).... For the purposes of this section:
> (2) Personal relationship means a close and substantial connection of the type normally viewed as likely to induce partiality....

Mr. Barr was hired as the attorney for Caterpillar Inc. at the personal request of its Chief Executive Officer.[25] Mr. Barr was paid more than $1.2 million by Kirkland & Ellis for representing Caterpillar in 2018 alone.[26] By definition, an attorney is partial to his client as the attorney is required by the Rules of Professional Conduct to zealously represent his client to the exclusion of the interests of all other parties. An attorney cannot be impartial with regard to client matters. He is ethically bound to be partial in favor of his client.

Mr. Barr has a personal relationship with Caterpillar Inc. and individuals within the organization that are substantially involved in the conduct that is the subject of the current criminal investigation being conducted by multiple federal agencies. Mr. Barr knows Caterpillar Inc. and individuals within the organization have a specific and substantial interest that will be directly affected by the outcome of the investigation or prosecution. Mr. Barr is ethically bound to be partial in the favor of his clients and has ongoing obligations to them under the Rules of Professional Conduct even after withdrawing his representation. Mr. Barr is now the chief law enforcement officer in the United States sworn to uphold the rule of law, and to investigate and prosecute those who violate the law. Mr. Barr's obligations as Attorney General of the United States are in direct conflict with his past and ongoing obligations to Caterpillar Inc. This direct conflict and adverse interests preclude any possibility of Attorney General Barr avoiding a conflict of interest or the appearance of a conflict.

The DOJ regulation states that Mr. Barr *shall* report this matter and all attendant facts and circumstances to the OPR. The DOJ regulation states that Mr. Barr *shall* be relieved from participation in the investigation of Caterpillar Inc. unless the OPR determines, *in writing*, that Mr. Barr can be impartial and that Mr. Barr's participation will not create *even the appearance* of a conflict of interest that is *even likely* to affect the public perception of the integrity of the investigation or prosecution. This is not possible! This complaint is evidence that any participation by Mr. Barr in the investigation of Caterpillar Inc. is already considered to be a conflict of interest, not merely likely to create an appearance of a conflict.

While Attorney General Barr has previously stated he will comply with DOJ regulations, to date there is no public indication that he has taken any steps to report this matter or recuse himself from the ongoing investigation by the DOJ and three other government agencies. His failure to do so is

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[25] https://www.caterpillar.com/en/news/corporate-press-releases/h/new-caterpillar-ceo-asks-former-us-attorney-general-to-assess-and-help-address-ongoing-government-investigation.html

[26] Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e), page 4-5. https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/FE446AE51F24A21D6852583810 02F483C/$FILE/Barr,%20William%20P.%20%20final278%20.pdf . Mr. Barr indicated in his oral testimony before the Senate that he only had one client. Caterpillar Inc. is the only client listed as a source of income from providing legal service; see page 7.

in violation of the applicable Departmental regulation at 28 C.F.R. § 45.2(a). Attorney General Barr told the Senate, "It is likely that my representation of Caterpillar will present conflicts, and it is my understanding that certain types of conflicts cannot be waived."[27] He knows there is a conflict and he knows it cannot be waived.

We call on OPR and OIG to undertake an investigation into the Attorney General's failure to comply with Departmental regulations that require his recusal from the Department's and other agencies, investigation of Caterpillar Inc. If the results of the investigation show, as we believe, that Attorney General Barr has failed to recuse himself from this matter as required by DOJ regulations, OPR and OIG should make public findings to that effect, impose appropriate sanctions on Attorney General Barr and take whatever additional steps are required to ensure that all DOJ attorneys, including the Attorney General, comply with Justice Department rules.

This is a matter of urgent public importance that is vital to ensure ongoing public confidence in the impartiality and fairness of the Justice Department. This is an important matter for the DOJ by all of its published measurements. There are few greater public policies then the enforcement of our tax laws. Without revenue to run the government, there can be no government and no democracy. The precedential impact of this matter is far reaching and dramatic with a material impact upon tax revenues.

Sincerely,

(b)(6); (b)(7)(C)
[redacted]

[27] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

DOJ-20-1871-H-000024

(b)(6); (b)(7)(C) [redacted]

April 10, 2019

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COMPLAINT

AG Barr is legally required to recuse himself from the investigation of Caterpillar Inc.

The Rules of Professional Conduct, case law, statutes & regulations prohibit his involvement.
Side-switching is a patent conflict-of-interest that is _NOT waivable_.
Screening measures are required for an effective recusal.

Dear Sir or Madam:

With all due respect; when the defense attorney becomes the top law enforcement officer overseeing the investigation of that very same case; there is a conflict-of-interest. No situation is more so. This is commonly referred to in federal case law as "*side-switching*". Disqualification is required when lawyers change sides.[1] The Rules of Professional Conduct consider this to be a patent conflict-of-interest that *cannot* be waived. This is why Bar Association ethics attorneys with whom I have discussed side-switching matters have indicated, "That is a conflict-of-interest."

Side-switching violates the core of the attorney-client relationship: the duties of confidentiality and loyalty, to avoid conflicts-of-interest. The courts do not require that it be proved the lawyer actually acquired confidential information in the former representation,[2] or that he actually disclosed confidential information in the subsequent representation.[3] The mere possibility these duties may be breached is prohibited.[4] Where there is a substantial relationship between the subject matter of the former representation and that of a subsequent representation, the latter representation will be prohibited.[5] In this case it is the *exact same matter*. For a lawyer to represent one client today, and the client's adversary tomorrow in the same matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the public — or for that matter the bench and bar.[6]

In response to my letter to you dated February 15, 2019,[7] I received an email dated March 8, 2019.[8] The email indicates there has been no recusal, nor will there be, and nor will this matter be addressed. I was surprised the Office of Professional Responsibility (OPR) summarily dismissed this issue as not warranting an investigation. This response is tantamount to a statement by the Department of Justice (DOJ) that *side-switching* by the highest law enforcement officer in the nation is OK. Surely this cannot be what you intend.

AG Barr states in his written comments to the Senate that it's likely his representation of Caterpillar Inc. will present conflicts-of-interest and he knows certain conflicts cannot be waived.[9]

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[1] Trone v. Smith, 621 F.2d 994, 1001 (9th Cir. 1980).

[2] The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. TC Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). A complainant need only show access confidential information and the inference that the lawyer received these confidences will follow. Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37, 43-44 (D.C. 1984). It matters not whether confidences were in fact imparted to the lawyer by the client. Trone v. Smith, 621 F.2d 994, 1000 (9th Cir. 1980).

[3] It is not appropriate for the court to inquire into whether actual confidences were disclosed. Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983). The test does not require the former client to show that actual confidences were disclosed. Disqualification does not depend upon proof of the abuse of confidential information. Trone v. Smith, 621 F.2d 994, 999-1001 (9th Cir. 1980). We agree that when an attorney engages in a conflict of interest on the same matter, he or she is in a position to act on the confidential information learned from the relationship with the first client, whether or not that information is actually disclosed or acted upon in advising the new client. Damron v. Herzog, 67 F.3d 211, 339 (9th Cir. 1995).

[4] Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980). It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.

[5] Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37, 42 (D.C. 1984).

[6] Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983).

[7] Copy attached.

[8] Copy attached.

[9] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

It would appear he was referring to his *side-switching* as few conflicts cannot be waived, and *side-switching* is one of them. Shouldn't this issue have been in AG Barr's Ethics Agreement? Wouldn't it be natural for the OPR to follow-up on his written comments to the Senate that are inconsistent with his Ethics Agreement; and the JMD's opinion given, on that agreement?

The reasoning stated in the email response[10] I received is that a DOJ employee can only have a conflict-of-interest in the context of a personal relationship that constitutes a "friendship" or "familial relationship". Therefore, without evidence of a friendship or familial relationship my allegations are without foundation and do not warrant further inquiry. This reasoning would mean that no other types of relationships can create a conflict-of-interest. This reasoning is contrary to the Rules of Professional Conduct; federal case law, statutes and regulations; and the DOJ's internal information published as guidance for its attorneys regarding conflicts.

I hereby submit this *new* complaint calling on the OPR to promptly conduct an investigation into whether AG Barr is in violation of the Rules of Professional Conduct, and federal case law, statutes and regulations for not "*permanently*" recusing himself from the investigation of Caterpillar Inc. and putting screening measures in place.

I *respectfully* submit the following reasons why this matter should be investigated, and urgently. I shall start with the Rules of Professional Conduct because these rules state clearly that all ethics rules, case law, statutes and regulations apply to government attorneys.[11] This includes AG Barr.

Rules of Professional Conduct

The District of Colombia (D.C.) Rules of Professional Conduct related to Successive Government and Private Employment details specific ethical prohibitions applicable to lawyers who leave public service and enter private practice. There is not a specific rule regarding lawyers entering government service.[12] However, although there is no parallel D.C. rule addressing lawyer movement from private practice to government employment, the D.C. Rules of Professional Conduct address this subject more generally and provide guidance on the ethical constraints that apply when a lawyer leaves private practice to enter public service.[13] In other words, the ethical obligations and constraints that apply to a lawyer moving from government service to private practice, also apply to a lawyer moving from private practice to government service. For example, a lawyer who is investigating a case is prohibited from leaving the government to then defend that same case. And likewise, a lawyer who is defending a case is prohibited from then entering the

[10] The email discussed the issue of financial conflict-of-interest. I have not raised that issue so it is not relevant to this discussion. The email also raised the issue of AG Barr's Ethics Agreement which outlines his compliance with general executive branch ethics rules including a one-year recusal. However, this ignores the **permanent recusal** required by the Rules of Professional Conduct, case law, and 28 CFR § 45.2, which were not addressed at all in the Ethics Agreement. A one-year recusal does NOT compliant with all the relevant rules.

[11] District of Colombia Rules of Professional Conduct: Rule 1.11—Successive Government and Private Employment, Comment [2].

[12] There is a specific rule for this matter in ABA Model Rules of Professional Conduct; Rule 1.11(d).

[13] District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service. Additional regulations include the DOJ specific regulation 28 CFR § 45.2.

government to investigate that same case. Both examples involve the same lawyer, arguing both sides, of the same exact matter, for opposing clients.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations concerning conflicts-of-interest.[14] Thus, AG Barr must comply with Rule 1.7, Rule 1.9, and Rule 1.11. These rules provide guidance on the ethical constraints that apply when a lawyer *leaves private practice to enter public service*. These rules disqualify AG Barr from participating in any matter related to the investigation of Caterpillar Inc. He must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

Rule 1.7: This rule states that, "A lawyer shall not advance two or more adverse positions in the same matter."[15] This rule sets out the limited circumstances in which representation of conflicting interests is "*absolutely prohibited*", and "*even with the informed consent of all involved clients*".[16] The institutional interests in preserving confidence in the adversary process and in the administration of justice preclude permitting a lawyer to represent adverse positions in the same matter.[17] The same lawyer should not espouse adverse positions in the same matter during the course of any type of representation.[18] This is an *absolute conflict-of-interest* that *cannot be waived* by anyone.[19]

AG Barr formerly defended Caterpillar Inc. in an ongoing DOJ investigation. Subsequently, he now is sworn to investigate Caterpillar Inc. in the *exact* same matter. This is *side-switching*. Any participation or involvement by AG Barr in the Caterpillar investigation is the advancement of an adverse position in the same matter. AG. Barr's participation or involvement in the Caterpillar investigation is prohibited. He must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

Before discussing Rule 1.9 and Rule 1.11 it is important to re-emphasize that *side-switching* is an absolute conflict-of-interest that CANNOT be waived, even with the consent of all parties involved. So, although Rule 1.9 and Rule 1.11 provide for the waiver of certain conflicts by obtaining client consent, such waiver applies to less direct, less egregious conflicts. It is axiomatic that a reasonable person would never consent to their lawyer *switching-sides* to represent the other party against them in the same matter, particularly a DOJ investigation. To even allow

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14 District of Colombia Rules of Professional Conduct: Rule 1.11—Successive Government and Private Employment, Comment [2]. See also, ABA Model Rules of Professional Conduct; Rule 1.11(d).

15 District of Colombia Rules of Professional Conduct: Rule 1.7(a)—Conflict of Interest: General.

16 District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [1]. Rule 1.7(b) references less egregious situations which may be waived.

17 District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [2].

18 District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [3].

19 The D.C. Bar made specific changes to the ABA Model Rule 1.7 for the principal purpose of stating more clearly and unequivocally that there are circumstances in which representation is absolutely forbidden. This is a codification of the absolute prohibition that existed in case law. The D.C. Rule 1.7(a) mandates an absolute prohibition of multiple representation when the lawyer represents clients with *adverse positions* in the *same matter*. Client consent *cannot* cure such a conflict. Griva v. Davison, 637 A.2d 830, 843 (D.C. 1994).

clients to do so, no matter how unthinkable, would destroy the legal adversary system. So, although waiver by consent may be allowed in Rule 1.9 and Rule 1.11 for lesser conflicts, it is forbidden in a *side-switching* case such as this pursuant to Rule 1.7(a).

Rule 1.9: This rule states that "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." However, when a lawyer has been directly involved in a specific matter, subsequent representation of other clients with materially adverse interests is clearly prohibited.[20] The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a ***changing-of-sides*** in the matter in question.[21] "Where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter representation will be prohibited."[22] Courts considering *side-switching* from a former client to a subsequent client have consistently followed this formula,[23] and prohibited the subsequent representation. There is no waiver in this situation.[24]

This is a prophylactic rule to prevent even the *potential* that a former client's confidences and secrets *may* be used against him.[25] The rule is important for the maintenance of the public confidence in the integrity of the bar.[26] Former client conflicts most often arise where the conflicted attorney is litigating against his former client which is invariably adverse.[27] The same is true for investigations against former clients. AG Barr formerly defended Caterpillar Inc. in an ongoing investigation. Subsequently, he now is sworn to investigate Caterpillar Inc. in the *exact* same matter. AG Barr's subsequent representation is prohibited. He must permanently recuse himself.[28] The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

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[20] District of Colombia Rules of Professional Conduct: Rule 1.9—Conflict of Interest: Former Client, Comment [2]. District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service.

[21] District of Colombia Rules of Professional Conduct: Rule 1.9—Conflict of Interest: Former Client, Comment [2]; District of Columbia Ethics Opinion 308–Ethical Constraints on Lawyers Who Leave Private Employment for Government Service, *citing Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984).

[22] *See Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984).

[23] *See Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 43 (D.C. 1984), and its progeny.

[24] District of Colombia Rules of Professional Conduct: Rule 1.9—Conflict of Interest: Former Client. District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service; requires if a matter is the same as work done for the former client, a lawyer may not proceed without written consent from both the current and the former client. Even so, the courts have not permitted such a direct conflict. Rule 1.7 is an absolute prohibition on conflicting representation in the same matter, even with the consent of both the current and former client.

[25] See discussion above on pages 1 and 2.

[26] United States Attorney's Bulletin, September 2009, p.9.

[27] United States Attorney's Bulletin, September 2009, p.9.

[28] Although Rule 1.9 mentions the possibility of client consent, the Comment to Rule 1.9 makes clear that subsequent adverse representation is prohibited where there is a "substantial relationship" between the subject matter of the former and subsequent adverse relationship. In this case there is a "direct relationship" as the subject matter of the former and subsequent representations is exactly the same. This Comment is consistent with Rule 1.7 which divides conflicts into "direct" conflicts which CANNOT be waived, and lesser indirect

Rule 1.11: The DOJ has referred to this rule as the *side-switching* rule.[29] This rule states that "A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee."[30] Or in this case, while in private practice.[31] This rule flatly forbids a lawyer to accept other employment (much less direct adverse representation) in a matter in which the lawyer participated personally and substantially.[32] There is no provision for waiver of the lawyer's disqualification.[33] The Rule 1.11 absolute disqualification of a lawyer from matters in which the lawyer participated personally and substantially carries forward a policy of avoiding both *actual impropriety* and the *appearance of impropriety* that is expressed in the federal conflict-of-interest statutes and in the Code of Professional Responsibility.[34] Screening procedures are required.[35]

This rule does not state that the subsequent employment must even be adverse. It does not.[36] This rule is written broadly to disqualify an attorney from participating in the subsequent matter even when that matter is not adverse to their former client.[37] All aspects of this rule are interpreted broadly by the courts.[38] *Side-switching* is simply forbidden. *Side-switching* is inherently adverse, and particularly when it occurs in the *same matter*. There is an inherent, self-evident conflict-of-interest.

AG Barr participated personally and substantially as the attorney for Caterpillar Inc. in the matter of the ongoing investigation.[39] He formerly defended Caterpillar Inc. in the ongoing

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conflicts which can be waived. See, District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [1].

[29] United States Attorney's Bulletin, September 2009, p.4.

[30] District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment.

[31] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service: Although there is no parallel rule addressing lawyer movement from private practice to government employment, the D.C. Rules of Professional Conduct address this subject more generally and provide guidance on the ethical constraints that apply when a lawyer *leaves private practice to enter public service.*

[32] District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment, Comment [3].

[33] District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment, Comment [3].

[34] District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment, Comment [5].

[35] District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment, Comment [5].

[36] United States Attorney's Bulletin, September 2009, p.4.

[37] United States Attorney's Bulletin, September 2009, p.5.

[38] United States Attorney's Bulletin, September 2009, see generally the discussion on p.4,5 & 6 where the key terms in this rule are interpreted in a very broad manner.

[39] In 2018 alone, AG Barr was paid more than $1.2 million by Kirkland & Ellis for legal service to Caterpillar Inc. He stated in his oral testimony that he only had one client and no other clients are listed as sources of income on his financial disclosure. Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e), page 4-5 & 7. https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/FE446AE51F24A2D685258381002E483C/$FILE/Barr,%20William%20P.%20%20final278%20.pdf . AG Barr indicated in his oral testimony before the Senate that he only had one client. Caterpillar Inc. is the only client listed as a source of income from providing

investigation. Subsequently, he now is sworn to investigate Caterpillar Inc. in the *exact* same matter. Courts have found that an attorney is involved in a matter even where he is only supervising other lawyers who are in charge of an investigation and only attends high-level meetings about the case.[40] AG Barr cannot have any supervisory authority over the investigation of Caterpillar Inc. His subsequent participation or involvement in any capacity[41] is prohibited. He must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

DOJ Specific Regulation

"A lawyer representing a government agency, whether employed or specially retained by the government, is subject to…statutes and government regulations concerning conflict-of-interest."[42] Thus, AG Barr is subject to 28 C.F.R. § 45.2.

28 C.F.R. § 45.2, applies to all employees of the Department of Justice and provides:

45.2(a) Unless authorized under paragraph (b) of this section, 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.

45.2(b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section ***shall*** report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he ***shall*** relieve the employee from participation unless he determines further, ***in writing***, after full consideration of all the facts and

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legal service; see page 7.

40 United States Attorney's Bulletin, September 2009, p.6. "Although the term "substantially" might suggest that an attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. See, e.g., United States v. Smith, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high-level meetings about the case, and signed an immunity agreement for one of the government's witnesses); Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and a trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case")." The same is true with regard to the subsequent representation.

41 TC Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 271 (S.D.N.Y. 1953). When the lawyer's subsequent representation deals with matters as to which his former client reposed confidence in him, he is disqualified from acting as counsel for the plaintiff in the subsequent representation, "in any capacity".

42 District of Colombia Rules of Professional Conduct: Rule 1.11—Successive Government and Private Employment, Comment [2].

circumstances, that: (emphasis added)

(1) The relationship will not have the effect of rendering the employee's service less than full impartial and professional; and

(2) The employee's participation would not create an appearance of a conflict of interest "likely" to affect the public perception of the integrity of the investigation or prosecution. (emphasis added)

45.2(c).... For the purposes of this section:

(2) *Personal relationship means* a close and substantial connection of the type normally viewed as likely to induce partiality. (emphasis added) An employee is presumed to have a personal relationship with his father, mother, brother, sister, child and spouse. Whether relationships (including friendships) of an employee to other persons or organizations are "personal" must be judged on an individual basis with due regard given to the subjective opinion of the employee. (emphasis added)

Section 45.2(c)(2) defines a "*Personal relationship*" to mean **the existence of "*a close and substantial connection of the type viewed as likely to induce partiality.*"** The second sentence then creates a presumption of partiality with regard to familial relationships. It presumes that with regard to one's relationship with their family there exists "*a close and substantial connection of the type viewed as likely to induce partiality.*" The third sentence states that other relationships of an employee, other than those familial relationships specifically stated, must be judged on an individual basis to determine if the relationship constitutes "*a close and substantial connection of the type viewed as likely to induce partiality.*" There is no language that limits the definition of "*Personal relationship*" to only those relationships that are familial or personal friendships. The regulation specifically contemplates employee relationships with "*organizations*" which cannot possibly be familial or personal friendships. "*Personal relationship*" as defined in the regulation includes all relationships of an employee with "people or organizations" where there exists "*a close and substantial connection of the type viewed as likely to induce partiality.*" The determinative factor is the presence of "*a close and substantial connection of the type viewed as likely to induce partiality.*"

By law, a lawyer's relationship with his client is one where there exists "*a close and substantial connection of the type viewed as likely to induce partiality.*" The Rules of Professional Conduct require a relationship whereby the attorney is "*in-fact partial*" to his client,[43] not just "*likely to*" be partial. A lawyer's partiality to his client is required by law and is the essence of the relationship. It is a "*fiduciary*" relationship. The evidence provided in my previous letter[44] and publicly available records establish that AG Barr had an attorney-client relationship with Caterpillar Inc. This relationship is legally defined and there is no further evidence necessary to establish that this relationship constitutes "*a close and substantial connection of the type viewed as likely to induce partiality.*" In the federal case law regarding *side-switching*[45] the courts do not request or require evidence that an attorney-client relationship constitutes "*a close and substantial*

[43] For example, District of Columbia Rule 1.3 (duty of diligent and zealous representation), Rule 1.6 (duty of confidentiality), 1.7 & 1.8 (duty to avoid conflicts-of-interest), Rule 1.9 (duty to avoid conflicts-of-interest re former clients), etc.

[44] Copy attached.

[45] Note that 28 CFR §45.2 applies to an entire realm of conflicts that are lesser, and more indirect, than the self-evident conflict-of-interest inherent in *side-switching*.

connection of the type viewed as likely to induce partiality" because this is simply self-evident. As such, 28 CFR §45.2(a) precludes AG Barr from participating in the investigation of Caterpillar Inc. because he had an attorney-client relationship with the company which by law required a level of partiality that far exceeded the "***close and substantial connection of the type viewed as likely to induce partiality***" that is required by the regulation.

AG Barr's written response to Senate questions[46] demonstrates that he believes he "may" have a conflict in this matter and that it "may" be one that cannot be waived. As such, he has a legal responsibility[47] to report the matter and all attendant facts and circumstances. AG Barr must be relieved from participation.[48] A waiver from the DOJ is not possible here. The Rules of Professional Conduct and federal case law are resolute that *side-switching* not only "*create(s) an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation*",[49] but that it is a forbidden conflict-of-interest that CANNOT be waived. Therefore, the waiver provision provided in 28 CFR §45.2(b) cannot apply. AG Barr must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

Policy

The DOJ is putting its own investigation at-risk.

It seems the DOJ has everything to lose, and nothing to gain, by not requiring a simple recusal of the Attorney General from an investigation he was defending 4 months ago for which he was paid $1-2 million over less than 22 months. This investigation has been ongoing since January 2015, involves several federal agencies, and resulted in the execution of search warrants that lead to AG Barr's representation of Caterpillar.[50]

What value or benefit does the DOJ gain from AG Barr's involvement? Any additional value he could bring would inherently include his past representation of and the knowledge he gained defending Caterpillar, which is exactly the type of contribution that is prohibited by the Rules of Professional Conduct, and federal case law, statutes and regulations. Quite honestly, it is simply unfair to put Mr. Barr or any attorney in this position. **His actual or even perceived possible participation or involvement puts the government's investigation at risk of Caterpillar claiming it is "*tainted*".** It contradicts federal case law, statutes, and regulations. It contradicts the Rules of Professional Conduct. It contradicts Justice Department norms. It condones and permits a ***non-waivable conflict-of-interest***; and creates the ***appearance of either unfairness or favoritism toward Caterpillar Inc.***

I believe it is fair to say that if the DOJ requires recusal and implements effective screening procedures in this case, there is no harm to anyone, and a positive outcome for everyone, including

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46 https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

47 28 CFR §45.2(b).

48 28 CFR §45.2(b).

49 28 CFR §45.2(b).

50 See https://www.caterpillar.com/en/news/corporate-press-releases/h/new-caterpillar-ceo-asks-former-us-attorney-general-to-assess-and-help-address-ongoing-government-investigation.html

AG Barr and Caterpillar Inc.

<u>Recusal with effective screening procedures</u>

- Safeguards AG Barr's former client, thereby protecting him.
- Eliminates the appearance of a conflict-of-interest, bias, unfairness, etc.
- Complies with the Rules of Professional Conduct, and federal law & regulation.
- Eliminates a patent conflict-of-interest.
- Is consistent with AG Barr's written comments to the Senate.

<u>Non-recusal</u>

- Puts everyone involved at-risk.
- Could taint a 4-year multi-agency investigation.
- Condones a patent conflict-of-interest, setting a terrible precedent.
- Creates the appearance of a conflict-of-interest, which is prohibited by all relevant authority.

Conclusion

The District of Colombia has stated that, "Lawyers who leave private practice to enter government service must be vigilant to protect the interests of former clients while representing their new clients with diligence and zeal. A government lawyer owes continuing obligations to her former clients to protect client confidences and secrets both from disclosure to others and from use by the lawyer to the disadvantage of the former clients. A government lawyer may not (shall not in the case of *side-switching*) undertake work that is the same as or substantially related to work done for a former client.... While disqualification of a government lawyer from a matter due to work done for a prior client is not imputed to other lawyers in the government agency or entity, screening measures should be considered in appropriate cases (required in this case)."[51]

The Attorney General is the head of the Department of Justice.[52] Congress has "vested" in the Attorney General virtually "[a]ll functions of other officers of the Department,"[53] and has empowered the Attorney General to authorize other Department officials to perform the functions of the Attorney General.[54] The Attorney General is responsible for all functions and actions of the DOJ. The Attorney General has supervisory authority for the entire DOJ. Courts have found that an attorney is involved in a matter even where he is only supervising other lawyers who are in charge of an investigation and only attends high-level meetings about the case.[55] In this case in

[51] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service.

[52] 28 U.S.C. § 503.

[53] 28 U.S.C. § 509.

[54] 28 U.S.C. § 510.

[55] United States Attorney's Bulletin, September 2009, p.6. "Although the term "substantially" might suggest that an attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. See, e.g., United States v. Smith, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's

which the lawyer involved is the Attorney General of the United States, the inherent ethical issues cannot be resolved by merely moving the investigation of his former client to a peer within the DOJ for which he has no responsibility. All of the DOJ and its employees are encompassed within the responsibility, purview and authority of the Attorney General. There are four options.

1. AG Barr resigns his position as Attorney General of the United States; or
2. AG Barr permanently recuses himself from participation in the Caterpillar investigation and the Deputy AG appoints a Special Counsel;[56] or
3. AG Barr permanently recuses himself from participation in the Caterpillar investigation and the DOJ immediately implements effective screening measures; or
4. AG Bar is in violation of the Rules of Professional Responsibility and federal case law, statutes and regulations, which is sanctioned by the Justice Department.

The apparent remedy is the *immediate permanent recusal* and the *immediate implementation of effective screening measures* such as those in the Rules of Professional Conduct.[57] While disclosures and screening measures are not required per-se, as a practical matter they are to comply with the Rules.[58] The D.C. Bar Association suggests consideration and

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involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high-level meetings about the case, and signed an immunity agreement for one of the government's witnesses); Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and a trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case")." The same is true with regard to the subsequent representation. TC Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 271 (S.D.N.Y. 1953). When the lawyer's subsequent representation deals with matters as to which his former client reposed confidence in him, he is disqualified from acting as counsel for the plaintiff in the subsequent representation, "in any capacity".

[56] See 28 CFR §600.1. A Special Counsel is appropriate because: there is already an investigation underway; the AG has a conflict-of-interest; and it is always in the public interest (and legally required) for the Justice Department to avoid *even the appearance of impropriety* to maintain the public trust. Since effective screening measures are required here for an effective recusal of the AG and such measures were not deployed promptly, the disqualification could be imputed beyond the AG to other high-level DOJ officials. ("The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed—months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed or were not timely employed.") (emphasis added); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long).")

[57] See, District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment, and Comments. If a Special Counsel is not going to be appointed, the OPR should recommend an investigation by the Office of Inspector General to determine who in addition to the AG may be required to be screened from the investigation.

[58] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service: Due to the draconian effects of imputed disqualification on the ability of the government to obtain legal services, however, the principles of imputed disqualification do not apply to disqualify government lawyers who practice in a government agency with a lawyer who is disqualified

implementation of these procedures to insulate the disqualified lawyer from the ongoing matter, to provide important assurances to the lawyer's former client that he is meeting his ethical obligations which protects the lawyer, and to signal a recognition by the DOJ of the importance of these ethical obligations, thereby avoiding the appearance of anything less than full compliance with the law in-fact and in-appearance, beyond question.[59] The public is generally more concerned about government improprieties than private ones and, thus, the appearance problem is more severe because the public is likely to be more critical of the potential misuse of information.[60] Effective screening measures are required in this case to meet these objectives.

In a case such as this involving direct *side-switching* in the *exact same matter* by the highest law enforcement officer in the nation who speaks and acts for the entire DOJ, screening measures are essential for an effective recusal. Screening measures should be erected ***promptly***.[61] Where there are no screening measures, one cannot argue that a former client's confidences were not violated.[62] So without effective screening measures, the DOJ cannot argue that AG Barr will not violate his former client's confidences. *SCREENING MEASURES MUST BE IMPLEMENTED!*

Additionally, Mr. Barr's Ethics Agreement should be amended and republished setting forth his immediate ***permanent recusal***, and the immediate implementation of ***effective screening measures***, including the nature of these measures.

Recusal and effective screening measures harm nobody nor anything, and yet protect everybody and everything; particularly AG Barr, Caterpillar Inc., and the public's confidence in

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because of prior client representation. Rule 1.10, Comment [1] ("For purposes of the Rules of Professional Conduct, the term 'firm' . . . does not include a government agency or other government entity."). Thus, unlike the situation in private practice where all lawyers associated in a law firm with a lawyer disqualified under Rule 1.9 also are disqualified through imputation under Rule 1.10, in the government context, the lawyers in a government office, agency, or department who work with a personally disqualified lawyer are not barred from representation adverse to the lawyer's former client.

[59] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service: While our Rules do not expressly require such screening in the government context for a lawyer who is disqualified by a prior client relationship under Rule 1.9, consideration and implementation by the government agency of voluntary screening measures that effectively insulate the lawyer from ongoing contact with the matter from which she is disqualified should be considered. Such measures provide important assurances to the lawyer's former clients that the lawyer's ethical obligations under Rules 1.6 and 1.9 are being met and signal an appropriate recognition by the government agency of the importance of these obligations.

[60] United States Attorney's Bulletin, September 2009, p.4.

[61] United States Attorney's Bulletin, September 2009, p.6. "The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed—months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed or were not timely employed.") (emphasis added); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long)."

[62] Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267-1268 (7th Cir. 1983).

the DOJ. To not do so is problematic to say the least. The fact that Caterpillar Inc. is not demanding this recusal is itself significant. Recusal and effective screening measures avoid serious problems and create none. If there is any doubt, it is to be resolved in favor of disqualification (i.e. recusal with screening measures).[63]

This is a matter of urgent public importance that is vital to ensure ongoing public confidence in the impartiality and fairness of the Justice Department. The ongoing investigation is an important matter for the DOJ by all of its published measurements. There are few greater public policies then the enforcement of our tax laws. Without revenue to run the government, there can be no government, and no democracy.

(b)(6); (b)(7)(C) [redacted]

[63] Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37, 42 (D.C. 1984).

(b)(6); (b)(7)(C) [redacted]

February 15, 2019

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COMPLAINT

William Barr is legally required to recuse himself from the investigation of Caterpillar Inc.

Dear Sir/Madam:

I am filing this complaint with the Office of Professional Responsibility (OPR) and the Office of Inspector General (OIG) calling on your Offices to promptly conduct an investigation into whether Attorney General William Barr is in violation of Department of Justice (DOJ) rules and regulations for not recusing himself from the investigation of Caterpillar Inc. He was asked by the Senate in written questions to confirm his recusal, but he did not even though he noted there is likely to be conflicts regarding this matter, and that certain conflicts cannot be waived.[1] This is one of those conflicts. He was required to report the matter and all attendant facts and circumstances[2] to the OPR, but there is no indication he has done so. Instead, he has provided vague promises to recuse himself from former client matters for *a short period of time* and *follow all rules and regulations*, yet the rules and regulations require his recusal which he did not provide to the Senate. Caterpillar Inc. is his only former client matter[3] and at the center of the investigation, which is larger than any reported case of this kind.[4]

To put this in the broader context of Attorney General Barr's confirmation, there was much said about him recusing himself from the investigations of President Trump. Imagine if President Trump had nominated Rudy Giuliani for Attorney General. Would Giuliani have to recuse himself because he was defense counsel for the President in the investigation? Giuliani's relationship with President Trump as his lawyer is by definition, and by law, more partial than Jeff Sessions relationship with President Trump as a political advisor. In the Caterpillar Inc. case, having their defense lawyer appointed as Attorney General is tantamount to President Trump appointing Giuliani as Attorney General in his case. A lawyer's obligation to his client includes total partiality with ongoing obligations to the client even after the representation has ended.

When the defense attorney in a criminal case becomes top prosecutor overseeing the case, there is a conflict.

On January 8, 2015, the U.S. Attorney's Office for the Central District of Illinois issued Grand Jury Subpoenas to Caterpillar Inc. commencing a criminal investigation.[5] This investigation led to the production of evidence, expert opinions,[6] and circumstances that supported the issuance of search warrants for a highly publicized multi-agency raid by over 100 Special Agents. On March 2, 2017, the FDIC, IRS, & Department of Commerce raided Caterpillar

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[1] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

[2] 28 CFR § 45.2(a)&(b)

[3] Barr stated in his Senate testimony that he only had one client. Caterpillar Inc. is the only source of legal fees shown on his financial disclosure. Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, with financial disclosure. https://extapps2.oge.gov/201/Presiden.nsf/D4CD873798AD3D1F85258381002E4CEE/$FILE/Barr,%20William%20P.%20%20finalEA%20.pdf .

[4] Caterpillar has disclosed in its Form 10-K for several years that the IRS has assessed $2 billion of additional tax only for the years 2007-2012, and that it continues to report its federal tax using scheme at the heart of the investigation. For all years involved the tax amount exceeds $5 billion through 2017, and exceeds $10 billion if you include penalties and interest.

[5] See page 22 of Caterpillar Annual Report for year ended December 31, 2014. https://www.sec.gov/Archives/edgar/data/18230/000001823015000061/cat_10-kx12312014.htm . See also, http://www.cfo.com/tax/2015/02/caterpillar-discloses-grand-jury-probe/ .

[6] https://www.nytimes.com/2017/03/07/business/caterpillar-tax-fraud.html . Expert witness report states, "Caterpillar did not comply with either U.S. tax law or U.S. financial reporting rules…I believe the company's noncompliance with these rules was deliberate and primarily with the intention of maintaining a higher share price. These actions were fraudulent rather than negligent."

Inc.'s global headquarters and data centers.[7] Immediately following the raid, Caterpillar Inc.'s CEO personally asked Mr. Barr to provide legal representation regarding the matter.[8] Mr. Barr then associated himself with the law firm Kirkland & Ellis. Mr. Barr has personally been paid significant sums for this representation which exceed $1.2 million for 2018 alone.

Your investigation should take into account the conflict of interest created by Mr. Barr's employment by Kirkland & Ellis[9] which routinely represents PriceWaterhouseCoopers (PwC).[10] PwC is Caterpillar's public auditor and the primary architect, implementer and overseer of the tax scheme that is the subject of the investigation.[11] Kirkland & Ellis entered its appearance[12] as the attorney for PwC in a Sarbanes-Oxley lawsuit against Caterpillar Inc. pertaining to this particular tax matter.[13] The interests of PwC and Caterpillar Inc. are directly adverse to one another in this matter. This conflict of interest was and is public knowledge.[14]

If warranted by the results of OPR's and OIG's investigations, the OPR and OIG should issue public findings that Attorney General Barr is violating DOJ regulations and that he is required by DOJ regulations to recuse himself "*permanently*" from all matters regarding Caterpillar Inc., and from any consideration and decisions dealing with these matters.

OPR has jurisdiction to investigate allegations of professional misconduct against attorneys of the Department of Justice that relate to the exercise of their authority to investigate, litigate or provide legal advice.[15] The OIG's mission also includes the detection and deterrence of misconduct by DOJ personnel. It is clear, as well, that this jurisdiction and responsibility includes investigating Attorney General Barr and any apparent violation of DOJ regulations by him. In 2017, in response to a complaint filed by Democracy 21, then Attorney General Jeff Sessions recused himself on the advice of the OPR.[16] In 1988, OPR, in response to a complaint filed by Common Cause, exercised its jurisdiction to investigate Edwin Meese to determine if

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[7] See https://www.forbes.com/sites/antoinegara/2017/03/02/caterpillars-headquarters-raided-by-federal-authorities-including-doj-and-irs/#33a4e3976f3a and https://www.nytimes.com/2017/03/02/business/caterpillar-raid-tax-practices.html and https://www.chicagotribune.com/business/ct-law-enforcement-search-caterpillar-0303-biz-20170302-story.html .

[8] See https://www.caterpillar.com/en/news/corporate-press-releases/h/new-caterpillar-ceo-asks-former-us-attorney-general-to-assess-and-help-address-ongoing-government-investigation.html

[9] While Mr. Barr describes his relationship with Kirkland & Ellis, he is paid a salary by this firm. See page 4 of Nominee Report, Public Financial Disclosure of Mr. Barr signed December 24, 2018.

[10] See https://www.kirkland.com/lawyers/b/becker-whitney-l and https://www.law.com/therecorder/almID/1202758297218/Kirkland-amp-Ellis-to-Defend-PricewaterhouseCoopers-in-Discrimination-Suit/?slreturn=20190109163554 and https://www.leagle.com/decision/infdco20170505a48 .

[11] See https://www.pjstar.com/news/20170320/firm-retained-by-caterpillar-after-raids-has-links-to-tax-strategy

[12] Schlicksup vs. Caterpillar, Inc., PACER case No. 09-cv-1208, U.S. District Court, C.D. Illinois, Peoria Division, document #92, appearance of counsel filed Monday, 16 May, 2011, Mark Nomellini of Kirkland & Ellis appearing on behalf of PricewaterhouseCoopers LLP.

[13] Schlicksup vs. Caterpillar, Inc., PACER case No. 09-cv-1208, U.S. District Court, C.D. Illinois, Peoria Division.

[14] See https://www.pjstar.com/news/20170320/firm-retained-by-caterpillar-after-raids-has-links-to-tax-strategy

[15] 28 C.F.R. 45.12

[16] See https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself-from-russia-investigation/2017/03/02/148c07ac-ff46-11e6-8ebe-6e0dbe4f2bca_story.html?noredirect=on&utm_term=.41563410ef71 .

he had violated administrative rules and provisions of the Code of Ethics for Government Service that barred executive branch officials from using their public positions for private gain.[17] OPR found that Meese as Attorney General had violated these rules as they applied to Justice Department officials.[18]

Mr. Barr has stated the following with regard to the current matter. And although he has committed to some limited recusal for a short period of time which is subject to waiver, he would not commit to Senate questions asking specifically for his recusal in this specific matter as required by the DOJ regulations and explained below.

> On January 11, 2019, Mr. Barr submitted his Ethics Agreement in a letter to the U.S. Office of Government Ethics.[19] He committed that upon confirmation he "will resign from his position with the law firm Kirkland & Ellis LLP."[20] He also committed that:
>
> 1. "For a period of _one year_ after his resignation, he will not participate personally and substantially in any particular matter involving specific parties in which he knows the firm is a party or represents a party, unless he is first authorized to participate, pursuant to 5 C.F.R. Sec. 2635.502(d);[21] (emphasis added)
> 2. "He will not participate personally and substantially in any particular matter involving specific parties in which he knows that a former client is a party or represents a party, for a period of _one year_ after he last provided service to that client, unless he is first authorized to participate, pursuant to 5 C.F.R. Sec. 2635.502(d);[22] (emphasis added) and
> 3. "I (Mr. Barr) agree to _comply with the conflict of interest statutes and regulations_, ..."[23] (emphasis added)
>
> On January 15 & 16, 2019, Mr. Barr testified before the Senate Judiciary Committee. Mr. Barr was sent written questions by members of the Senate following his testimony.[24]
>
> (Q) "Will you commit to recusing yourself from any matters relating to Caterpillar?"
>
> (A) "It is likely that my representation of Caterpillar will present conflicts, and it is my understanding that certain types of conflicts cannot be waived. If

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[17] "Meese's Department Probes Him," *New York Times News Service* (July 20, 1988).

[18] "Justice Department Rips Meese," *New York Times*, (January 18, 1989).

[19] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019. https://extapps2.oge.gov/201/Presiden.nsf/D4CD873798AD3D1F85258381002E4CEE/$FILE/Barr,%20William%20P.%20%20finalEA%20.pdf .

[20] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, page 1.

[21] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, page 2.

[22] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, page 2.

[23] Ethics Agreement letter to the U.S. Office of Government Ethics, dated January 11, 2019, Nominee Statement attached to the letter.

[24] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

confirmed, I commit to *following all applicable laws, regulations, and rules* with respect to my prior representation of Caterpillar and, if necessary, recusing from any matters relating to the company." (emphasis added)

(Q) "While representing Caterpillar, did you take any formal or informal actions to challenge the basis for the search warrants executed by the government or to challenge the documents collected during the search?"

(A) "Other than information that is publicly available, I am unable to provide further details regarding the nature and specifics of my work for Caterpillar due to the applicable privileges and confidentiality obligations."

We believe that the failure of Attorney General Barr to recuse himself from the matters set forth above is a violation of DOJ regulations, and that with a Grand Jury investigation already underway and the execution of search warrants in a multi-agency raid by over 100 Special Agents, his recusal has to take place immediately. Therefore, we are calling on you to exercise your responsibility and promptly make clear that Barr must comply with DOJ regulations and "*permanently*" recuse himself from these matters. The grounds for why DOJ regulations require Attorney General Barr to recuse himself in these matters are set forth below.

DOJ Regulations Require Reporting & Recusal
Waiver NOT Possible

The applicable DOJ recusal regulation, 28 CFR § 45.2, applies to all employees of the Department of Justice and provides:

45.2(a) Unless authorized under paragraph (b) of this section, 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.

45.2(b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section ***shall*** report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he ***shall*** relieve the employee from participation unless he determines further, ***in writing***, after full consideration of all the facts and circumstances, that: (emphasis added)

(1) The relationship will not have the effect of rendering the employee's service less than full impartial and professional; and

(2) The employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

45.2(c).... For the purposes of this section:

(2) Personal relationship means a close and substantial connection of the type normally viewed as likely to induce partiality....

Mr. Barr was hired as the attorney for Caterpillar Inc. at the personal request of its Chief Executive Officer.[25] Mr. Barr was paid more than $1.2 million by Kirkland & Ellis for representing Caterpillar in 2018 alone.[26] By definition, an attorney is partial to his client as the attorney is required by the Rules of Professional Conduct to zealously represent his client to the exclusion of the interests of all other parties. An attorney cannot be impartial with regard to client matters. He is ethically bound to be partial in favor of his client.

Mr. Barr has a personal relationship with Caterpillar Inc. and individuals within the organization that are substantially involved in the conduct that is the subject of the current criminal investigation being conducted by multiple federal agencies. Mr. Barr knows Caterpillar Inc. and individuals within the organization have a specific and substantial interest that will be directly affected by the outcome of the investigation or prosecution. Mr. Barr is ethically bound to be partial in the favor of his clients and has ongoing obligations to them under the Rules of Professional Conduct even after withdrawing his representation. Mr. Barr is now the chief law enforcement officer in the United States sworn to uphold the rule of law, and to investigate and prosecute those who violate the law. Mr. Barr's obligations as Attorney General of the United States are in direct conflict with his past and ongoing obligations to Caterpillar Inc. This direct conflict and adverse interests preclude any possibility of Attorney General Barr avoiding a conflict of interest or the appearance of a conflict.

The DOJ regulation states that Mr. Barr ***shall*** report this matter and all attendant facts and circumstances to the OPR. The DOJ regulation states that Mr. Barr ***shall*** be relieved from participation in the investigation of Caterpillar Inc. unless the OPR determines, ***in writing***, that Mr. Barr can be impartial and that Mr. Barr's participation will not create ***even the appearance*** of a conflict of interest that is ***even likely*** to affect the public perception of the integrity of the investigation or prosecution. This is not possible! This complaint is evidence that any participation by Mr. Barr in the investigation of Caterpillar Inc. is already considered to be a conflict of interest, not merely likely to create an appearance of a conflict.

While Attorney General Barr has previously stated he will comply with DOJ regulations, to date there is no public indication that he has taken any steps to report this matter or recuse himself from the ongoing investigation by the DOJ and three other government agencies. His failure to do so is

[25] https://www.caterpillar.com/en/news/corporate-press-releases/h/new-caterpillar-ceo-asks-former-us-attorney-general-to-assess-and-help-address-ongoing-government-investigation.html .

[26] Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e), page 4-5. https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/FE446AE51F24A2D68525838100 2E483C/$FILE/Barr,%20William%20P.%20%20final278%20.pdf . Mr. Barr indicated in his oral testimony before the Senate that he only had one client. Caterpillar Inc. is the only client listed as a source of income from providing legal service; see page 7.

in violation of the applicable Departmental regulation at 28 C.F.R. § 45.2(a). Attorney General Barr told the Senate, "It is likely that my representation of Caterpillar will present conflicts, and it is my understanding that certain types of conflicts cannot be waived." [27] He knows there is a conflict and he knows it cannot be waived.

We call on OPR and OIG to undertake an investigation into the Attorney General's failure to comply with Departmental regulations that require his recusal from the Department's and other agencies, investigation of Caterpillar Inc. If the results of the investigation show, as we believe, that Attorney General Barr has failed to recuse himself from this matter as required by DOJ regulations, OPR and OIG should make public findings to that effect, impose appropriate sanctions on Attorney General Barr and take whatever additional steps are required to ensure that all DOJ attorneys, including the Attorney General, comply with Justice Department rules.

This is a matter of urgent public importance that is vital to ensure ongoing public confidence in the impartiality and fairness of the Justice Department. This is an important matter for the DOJ by all of its published measurements. There are few greater public policies then the enforcement of our tax laws. Without revenue to run the government, there can be no government and no democracy. The precedential impact of this matter is far reaching and dramatic with a material impact upon tax revenues.

Sincerely,

(b)(6); (b)(7)(C)

[redacted]

[27] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

From: Birney, William J (OPR)
To: (b)(6); (b)(7)(C)
Subject: FW: New Incoming Regarding AG William P. Barr
Date: Friday, March 8, 2019 2:25:23 PM

(b)(6); (b)(7)(C)

This is in response to your letter to the Department of Justice Office of Professional Responsibility (OPR), asserting that Attorney General William P. Barr is in violation of Department regulations that require him to immediately and permanently recuse himself from all matters regarding Caterpillar Inc. on the ground that before becoming Attorney General, Mr. Barr represented Caterpillar in connection with an ongoing criminal tax investigation. Based on a careful review of your letter, OPR concluded that your allegations are without foundation and do not warrant further inquiry by OPR.

As your letter acknowledges, the Justice Management Division (JMD) has advised the Office of Government Ethics (OGE) that it conducted a thorough review of Mr. Barr's financial disclosure report and concluded that "the report presents no conflicts of interest under applicable laws and regulations." JMD noted that Mr. Barr would resign from his positon with the law firm of Kirkland & Ellis, LLP, and that for a period of one year after his resignation, he would not participate personally and substantially in any particular matter involving specific parties in which knows the firm is a party or represents a party, without first obtaining authorization under 5 C.F.R. § 2635.502(d). JMD also noted that Mr. Barr would not participate personally and substantially in any particular matter involving specific parties in which he knows that a former client of his is a party or represents a party, for a period of one year after he has provided service to that client.

Under 18 U.S.C. § 208, Mr. Barr is required to recuse himself from participating personally and substantially in any particular matter in which he knows that he has a financial interest directly and predictably affected by the matter, or in which he knows that a person whose interests are imputed to him has a financial interest directly and predictably affected by the matter. JMD noted that Mr. Barr will consult Department ethics officials in determining whether a particular matter has a direct and predictable effect on his financial interests or on those of any other person whose interests are imputed to him, including his spouse and minor children.

There is no basis for your assertion that Mr. Barr is required by 28 C.F.R. § 45.2 to permanently recuse himself from all matters involving Caterpillar. Section 45.2 provides that "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 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 of prosecution." (Emphasis added.) A "personal relationship" is understood to mean a close friendship or a familial relationship. Your allegation that Mr. Barr has a "personal relationship" with Caterpillar that requires him to immediately and permanently recuse himself from any criminal investigation or prosecution involving Caterpillar is wholly unsubstantiated. There is no indication that Mr. Barr had anything other than an attorney client relationship with Caterpillar, and your letter contains no facts supporting the conclusion that he has a conflict of interest that requires him to recuse himself from all matters involving Caterpillar pursuant to 28 C.F.R. § 45.2.

OPR concluded that your allegations do not warrant further inquiry, and we consider this matter to be closed.

William J. Birney
Deputy Director
Office of Professional Responsibility
U.S. Department of Justice
Washington, D.C. 20530

From: Robertson, Jacqueline T (OPR) <Jacqueline.T.Robertson@opr.usdoj.gov>
Sent: Wednesday, March 6, 2019 10:41 AM
To: Birney, William J (OPR) <William.J.Birney@opr.usdoj.gov>
Subject: New Incoming Regarding AG William P. Barr - LM #201900290

Bill,

Please see attached new incoming correspondence regarding AG Barr. Thanks.

Jacqueline Robertson
Program Analyst
Office of Professional Responsibility
Department of Justice
Washington, D.C. 20530
(b)(6); (b)(7)(C) [redacted]

(b)(6); (b)(7)(C) [redacted]

April 10, 2019

To:
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The Honorable Sheldon Whitehouse
U.S. Senator for Rhode Island
Hart Senate Office Bldg., Rm 530
Washington, D.C. 20510

(b)(6); (b)(7)(C) [redacted]
Assistant United States Attorney
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Federal Deposit Insurance Corp.
Special Agent, (b)(6); (b)(7)(C) [redacted]
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(b)(6); (b)(7)(C) [redacted]

William J. Birney
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COMPLAINT

AG Barr is legally required to recuse himself from the investigation of Caterpillar Inc.

The Rules of Professional Conduct, case law, statutes & regulations prohibit his involvement.
***Side-switching* is a patent conflict-of-interest that is *NOT waivable*.**
Screening measures are required for an effective recusal.

Dear Sir or Madam:

With all due respect; when the defense attorney becomes the top law enforcement officer overseeing the investigation of that very same case; there is a conflict-of-interest. No situation is more so. This is commonly referred to in federal case law as "*side-switching*". Disqualification is required when lawyers change sides.[1] The Rules of Professional Conduct consider this to be a patent conflict-of-interest that *cannot* be waived. This is why Bar Association ethics attorneys with whom I have discussed side-switching matters have indicated, "That is a conflict-of-interest."

Side-switching violates the core of the attorney-client relationship: the duties of confidentiality and loyalty, to avoid conflicts-of-interest. The courts do not require that it be proved the lawyer actually acquired confidential information in the former representation,[2] or that he actually disclosed confidential information in the subsequent representation.[3] The mere possibility these duties may be breached is prohibited.[4] Where there is a substantial relationship between the subject matter of the former representation and that of a subsequent representation, the latter representation will be prohibited.[5] In this case it is the *exact same matter*. For a lawyer to represent one client today, and the client's adversary tomorrow in the same matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the public — or for that matter the bench and bar.[6]

In response to my letter to you dated February 15, 2019,[7] I received an email dated March 8, 2019.[8] The email indicates there has been no recusal, nor will there be, and nor will this matter be addressed. I was surprised the Office of Professional Responsibility (OPR) summarily dismissed this issue as not warranting an investigation. This response is tantamount to a statement by the Department of Justice (DOJ) that *side-switching* by the highest law enforcement officer in the nation is OK. Surely this cannot be what you intend.

AG Barr states in his written comments to the Senate that it's likely his representation of Caterpillar Inc. will present conflicts-of-interest and he knows certain conflicts cannot be waived.[9]

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[1] Trone v. Smith, 621 F.2d 994, 1001 (9th Cir. 1980).

[2] The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. TC Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). A complainant need only show access confidential information and the inference that the lawyer received these confidences will follow. Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37, 43-44 (D.C. 1984). It matters not whether confidences were in fact imparted to the lawyer by the client. Trone v. Smith, 621 F.2d 994, 1000 (9th Cir. 1980).

[3] It is not appropriate for the court to inquire into whether actual confidences were disclosed. Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983). The test does not require the former client to show that actual confidences were disclosed. Disqualification does not depend upon proof of the abuse of confidential information. Trone v. Smith, 621 F.2d 994, 999-1001 (9th Cir. 1980). We agree that when an attorney engages in a conflict of interest on the same matter, he or she is in a position to act on the confidential information learned from the relationship with the first client, whether or not that information is actually disclosed or acted upon in advising the new client. Damron v. Herzog, 67 F.3d 211, 339 (9th Cir. 1995).

[4] Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980). It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.

[5] Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37, 42 (D.C. 1984).

[6] Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983).

[7] Copy attached.

[8] Copy attached.

[9] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

It would appear he was referring to his ***side-switching*** as few conflicts cannot be waived, and ***side-switching*** is one of them. Shouldn't this issue have been in AG Barr's Ethics Agreement? Wouldn't it be natural for the OPR to follow-up on his written comments to the Senate that are inconsistent with his Ethics Agreement; and the JMD's opinion given, on that agreement?

The reasoning stated in the email response[10] I received is that a DOJ employee can only have a conflict-of-interest in the context of a personal relationship that constitutes a "friendship" or "familial relationship". Therefore, without evidence of a friendship or familial relationship my allegations are without foundation and do not warrant further inquiry. This reasoning would mean that no other types of relationships can create a conflict-of-interest. This reasoning is contrary to the Rules of Professional Conduct; federal case law, statutes and regulations; and the DOJ's internal information published as guidance for its attorneys regarding conflicts.

I hereby submit this *new* complaint calling on the OPR to promptly conduct an investigation into whether AG Barr is in violation of the Rules of Professional Conduct, and federal case law, statutes and regulations for not "*permanently*" recusing himself from the investigation of Caterpillar Inc. and putting screening measures in place.

I *respectfully* submit the following reasons why this matter should be investigated, and urgently. I shall start with the Rules of Professional Conduct because these rules state clearly that all ethics rules, case law, statutes and regulations apply to government attorneys.[11] This includes AG Barr.

Rules of Professional Conduct

The District of Colombia (D.C.) Rules of Professional Conduct related to Successive Government and Private Employment details specific ethical prohibitions applicable to lawyers who leave public service and enter private practice. There is not a specific rule regarding lawyers entering government service.[12] However, although there is no parallel D.C. rule addressing lawyer movement from private practice to government employment, the D.C. Rules of Professional Conduct address this subject more generally and provide guidance on the ethical constraints that apply when a lawyer leaves private practice to enter public service.[13] In other words, the ethical obligations and constraints that apply to a lawyer moving from government service to private practice, also apply to a lawyer moving from private practice to government service. For example, a lawyer who is investigating a case is prohibited from leaving the government to then defend that same case. And likewise, a lawyer who is defending a case is prohibited from then entering the

[10] The email discussed the issue of financial conflict-of-interest. I have not raised that issue so it is not relevant to this discussion. The email also raised the issue of AG Barr's Ethics Agreement which outlines his compliance with general executive branch ethics rules including a one-year recusal. However, this ignores the permanent recusal required by the Rules of Professional Conduct, case law, and 28 CFR § 45.2, which were not addressed at all in the Ethics Agreement. A one-year recusal does NOT compliant with all the relevant rules.

[11] District of Colombia Rules of Professional Conduct: Rule 1.11—Successive Government and Private Employment, Comment [2].

[12] There is a specific rule for this matter in ABA Model Rules of Professional Conduct; Rule 1.11(d).

[13] District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service. Additional regulations include the DOJ specific regulation 28 CFR § 45.2.

government to investigate that same case. Both examples involve the same lawyer, arguing both sides, of the same exact matter, for opposing clients.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations concerning conflicts-of-interest.[14] Thus, AG Barr must comply with Rule 1.7, Rule 1.9, and Rule 1.11. These rules provide guidance on the ethical constraints that apply when a lawyer *leaves private practice to enter public service*. These rules disqualify AG Barr from participating in any matter related to the investigation of Caterpillar Inc. He must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

Rule 1.7: This rule states that, "A lawyer shall not advance two or more adverse positions in the same matter."[15] This rule sets out the limited circumstances in which representation of conflicting interests is "*absolutely prohibited*", and "*even with the informed consent of all involved clients*".[16] The institutional interests in preserving confidence in the adversary process and in the administration of justice preclude permitting a lawyer to represent adverse positions in the same matter.[17] The same lawyer should not espouse adverse positions in the same matter during the course of any type of representation.[18] This is an *absolute conflict-of-interest* that *cannot be waived* by anyone.[19]

AG Barr formerly defended Caterpillar Inc. in an ongoing DOJ investigation. Subsequently, he now is sworn to investigate Caterpillar Inc. in the *exact* same matter. This is *side-switching*. Any participation or involvement by AG Barr in the Caterpillar investigation is the advancement of an adverse position in the same matter. AG. Barr's participation or involvement in the Caterpillar investigation is prohibited. He must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

Before discussing Rule 1.9 and Rule 1.11 it is important to re-emphasize that *side-switching* is an absolute conflict-of-interest that CANNOT be waived, even with the consent of all parties involved. So, although Rule 1.9 and Rule 1.11 provide for the waiver of certain conflicts by obtaining client consent, such waiver applies to less direct, less egregious conflicts. It is axiomatic that a reasonable person would never consent to their lawyer *switching-sides* to represent the other party against them in the same matter, particularly a DOJ investigation. To even allow

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[14] District of Colombia Rules of Professional Conduct: Rule 1.11—Successive Government and Private Employment, Comment [2]. See also, ABA Model Rules of Professional Conduct; Rule 1.11(d).

[15] District of Colombia Rules of Professional Conduct: Rule 1.7(a)—Conflict of Interest: General.

[16] District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [1]. Rule 1.7(b) references less egregious situations which may be waived.

[17] District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [2].

[18] District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [3].

[19] The D.C. Bar made specific changes to the ABA Model Rule 1.7 for the principal purpose of stating more clearly and unequivocally that there are circumstances in which representation is absolutely forbidden. This is a codification of the absolute prohibition that existed in case law. The D.C. Rule 1.7(a) mandates an absolute prohibition of multiple representation when the lawyer represents clients with *adverse positions* in the *same matter*. Client consent *cannot* cure such a conflict. Griva v. Davison, 637 A.2d 830, 843 (D.C. 1994).

clients to do so, no matter how unthinkable, would destroy the legal adversary system. So, although waiver by consent may be allowed in Rule 1.9 and Rule 1.11 for lesser conflicts, it is forbidden in a *side-switching* case such as this pursuant to Rule 1.7(a).

Rule 1.9: This rule states that "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." However, when a lawyer has been directly involved in a specific matter, subsequent representation of other clients with materially adverse interests is clearly prohibited.[20] The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a ***changing-of-sides*** in the matter in question.[21] "Where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter representation will be prohibited."[22] Courts considering *side-switching* from a former client to a subsequent client have consistently followed this formula,[23] and prohibited the subsequent representation. There is no waiver in this situation.[24]

This is a prophylactic rule to prevent even the *potential* that a former client's confidences and secrets *may* be used against him.[25] The rule is important for the maintenance of the public confidence in the integrity of the bar.[26] Former client conflicts most often arise where the conflicted attorney is litigating against his former client which is invariably adverse.[27] The same is true for investigations against former clients. AG Barr formerly defended Caterpillar Inc. in an ongoing investigation. Subsequently, he now is sworn to investigate Caterpillar Inc. in the *exact* same matter. AG Barr's subsequent representation is prohibited. He must permanently recuse himself.[28] The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

[20] District of Colombia Rules of Professional Conduct: Rule 1.9—Conflict of Interest: Former Client, Comment [2]. District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service.

[21] District of Colombia Rules of Professional Conduct: Rule 1.9—Conflict of Interest: Former Client, Comment [2]; District of Columbia Ethics Opinion 308–Ethical Constraints on Lawyers Who Leave Private Employment for Government Service, *citing Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984).

[22] *See Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984).

[23] *See Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 43 (D.C. 1984), and its progeny.

[24] District of Colombia Rules of Professional Conduct: Rule 1.9—Conflict of Interest: Former Client. District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service; requires if a matter is the same as work done for the former client, a lawyer may not proceed without written consent from both the current and the former client. Even so, the courts have not permitted such a direct conflict. Rule 1.7 is an absolute prohibition on conflicting representation in the same matter, even with the consent of both the current and former client.

[25] See discussion above on pages 1 and 2.

[26] United States Attorney's Bulletin, September 2009, p.9.

[27] United States Attorney's Bulletin, September 2009, p.9.

[28] Although Rule 1.9 mentions the possibility of client consent, the Comment to Rule 1.9 makes clear that subsequent adverse representation is prohibited where there is a "substantial relationship" between the subject matter of the former and subsequent adverse relationship. In this case there is a "direct relationship" as the subject matter of the former and subsequent representations is exactly the same. This Comment is consistent with Rule 1.7 which divides conflicts into "direct" conflicts which CANNOT be waived, and lesser indirect

Rule 1.11: The DOJ has referred to this rule as the *side-switching* rule.[29] This rule states that "A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee."[30] Or in this case, while in private practice.[31] This rule flatly forbids a lawyer to accept other employment (much less direct adverse representation) in a matter in which the lawyer participated personally and substantially.[32] There is no provision for waiver of the lawyer's disqualification.[33] The Rule 1.11 absolute disqualification of a lawyer from matters in which the lawyer participated personally and substantially carries forward a policy of avoiding both *actual impropriety* and the *appearance of impropriety* that is expressed in the federal conflict-of-interest statutes and in the Code of Professional Responsibility.[34] Screening procedures are required.[35]

This rule does not state that the subsequent employment must even be adverse. It does not.[36] This rule is written broadly to disqualify an attorney from participating in the subsequent matter even when that matter is not adverse to their former client.[37] All aspects of this rule are interpreted broadly by the courts.[38] *Side-switching* is simply forbidden. *Side-switching* is inherently adverse, and particularly when it occurs in the *same matter*. There is an inherent, self-evident conflict-of-interest.

AG Barr participated personally and substantially as the attorney for Caterpillar Inc. in the matter of the ongoing investigation.[39] He formerly defended Caterpillar Inc. in the ongoing

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conflicts which can be waived. See, District of Colombia Rules of Professional Conduct: Rule 1.7—Conflict of Interest: General, Comment [1].

[29] United States Attorney's Bulletin, September 2009, p.4.

[30] District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment.

[31] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service: Although there is no parallel rule addressing lawyer movement from private practice to government employment, the D.C. Rules of Professional Conduct address this subject more generally and provide guidance on the ethical constraints that apply when a lawyer *leaves private practice to enter public service.*

[32] District of Colombia Rules of Professional Conduct: Rule 1.11(a)–Successive Government and Private Employment, Comment [3].

[33] District of Colombia Rules of Professional Conduct: Rule 1.11(a)–Successive Government and Private Employment, Comment [3].

[34] District of Colombia Rules of Professional Conduct: Rule 1.11(a)–Successive Government and Private Employment, Comment [5].

[35] District of Colombia Rules of Professional Conduct: Rule 1.11(a)–Successive Government and Private Employment, Comment [5].

[36] United States Attorney's Bulletin, September 2009, p.4.

[37] United States Attorney's Bulletin, September 2009, p.5.

[38] United States Attorney's Bulletin, September 2009, see generally the discussion on p.4,5 & 6 where the key terms in this rule are interpreted in a very broad manner.

[39] In 2018 alone, AG Barr was paid more than $1.2 million by Kirkland & Ellis for legal service to Caterpillar Inc. He stated in his oral testimony that he only had one client and no other clients are listed as sources of income on his financial disclosure. Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e), page 4-5 & 7. https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/FE446AE51F24A2D68525838100 2E483C/$FILE/Barr,%20William%20P.%20%20final278%20.pdf . AG Barr indicated in his oral testimony before the Senate that he only had one client. Caterpillar Inc. is the only client listed as a source of income from providing

investigation. Subsequently, he now is sworn to investigate Caterpillar Inc. in the *exact* same matter. Courts have found that an attorney is involved in a matter even where he is only supervising other lawyers who are in charge of an investigation and only attends high-level meetings about the case.[40] AG Barr cannot have any supervisory authority over the investigation of Caterpillar Inc. His subsequent participation or involvement in any capacity[41] is prohibited. He must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

DOJ Specific Regulation

"A lawyer representing a government agency, whether employed or specially retained by the government, is subject to...statutes and government regulations concerning conflict-of-interest."[42] Thus, AG Barr is subject to 28 C.F.R. § 45.2.

28 C.F.R. § 45.2, applies to all employees of the Department of Justice and provides:

45.2(a) Unless authorized under paragraph (b) of this section, 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.

45.2(b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section ***shall*** report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he ***shall*** relieve the employee from participation unless he determines further, ***in writing***, after full consideration of all the facts and

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legal service; see page 7.

[40] United States Attorney's Bulletin, September 2009, p.6. "Although the term "substantially" might suggest that an attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. See, e.g., United States v. Smith, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high-level meetings about the case, and signed an immunity agreement for one of the government's witnesses); Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and a trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case")." The same is true with regard to the subsequent representation.

[41] TC Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 271 (S.D.N.Y. 1953). When the lawyer's subsequent representation deals with matters as to which his former client reposed confidence in him, he is disqualified from acting as counsel for the plaintiff in the subsequent representation, "in any capacity".

[42] District of Colombia Rules of Professional Conduct: Rule 1.11—Successive Government and Private Employment, Comment [2].

circumstances, that: (emphasis added)

(1) The relationship will not have the effect of rendering the employee's service less than full impartial and professional; and

(2) The employee's participation *would not create an appearance of a conflict of interest "likely" to affect the public perception* of the integrity of the investigation or prosecution. (emphasis added)

45.2(c).... For the purposes of this section:

(2) *Personal relationship means a close and substantial connection of the type normally viewed as likely to induce partiality*. (emphasis added) An employee is presumed to have a personal relationship with his father, mother, brother, sister, child and spouse. Whether relationships (including friendships) of an employee to other persons or organizations are "personal" must be judged on an individual basis with due regard given to the subjective opinion of the employee. (emphasis added)

Section 45.2(c)(2) defines a "*Personal relationship*" to mean **the existence of "*a close and substantial connection of the type viewed as likely to induce partiality.*"** The second sentence then creates a presumption of partiality with regard to familial relationships. It presumes that with regard to one's relationship with their family there exists "*a close and substantial connection of the type viewed as likely to induce partiality.*" The third sentence states that other relationships of an employee, other than those familial relationships specifically stated, must be judged on an individual basis to determine if the relationship constitutes "*a close and substantial connection of the type viewed as likely to induce partiality.*" There is no language that limits the definition of "*Personal relationship*" to only those relationships that are familial or personal friendships. The regulation specifically contemplates employee relationships with "*organizations*" which cannot possibly be familial or personal friendships. "*Personal relationship*" as defined in the regulation includes all relationships of an employee with "people or organizations" where there exists "*a close and substantial connection of the type viewed as likely to induce partiality.*" The determinative factor is the presence of "*a close and substantial connection of the type viewed as likely to induce partiality.*"

By law, a lawyer's relationship with his client is one where there exists "*a close and substantial connection of the type viewed as likely to induce partiality.*" The Rules of Professional Conduct require a relationship whereby the attorney is "*in-fact partial*" to his client,[43] not just "*likely to*" be partial. A lawyer's partiality to his client is required by law and is the essence of the relationship. It is a "*fiduciary*" relationship. The evidence provided in my previous letter[44] and publicly available records establish that AG Barr had an attorney-client relationship with Caterpillar Inc. This relationship is legally defined and there is no further evidence necessary to establish that this relationship constitutes "*a close and substantial connection of the type viewed as likely to induce partiality.*" In the federal case law regarding *side-switching*[45] the courts do not request or require evidence that an attorney-client relationship constitutes "*a close and substantial*

[43] For example, District of Columbia Rule 1.3 (duty of diligent and zealous representation), Rule 1.6 (duty of confidentiality), 1.7 & 1.8 (duty to avoid conflicts-of-interest), Rule 1.9 (duty to avoid conflicts-of-interest re former clients), etc.

[44] Copy attached.

[45] Note that 28 CFR §45.2 applies to an entire realm of conflicts that are lesser, and more indirect, than the self-evident conflict-of-interest inherent in *side-switching*.

connection of the type viewed as likely to induce partiality" because this is simply self-evident. As such, 28 CFR §45.2(a) precludes AG Barr from participating in the investigation of Caterpillar Inc. because he had an attorney-client relationship with the company which by law required a level of partiality that far exceeded the "***close and substantial connection of the type viewed as likely to induce partiality***" that is required by the regulation.

AG Barr's written response to Senate questions[46] demonstrates that he believes he "may" have a conflict in this matter and that it "may" be one that cannot be waived. As such, he has a legal responsibility[47] to report the matter and all attendant facts and circumstances. AG Barr must be relieved from participation.[48] A waiver from the DOJ is not possible here. The Rules of Professional Conduct and federal case law are resolute that *side-switching* not only "*create(s) an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation*",[49] but that it is a forbidden conflict-of-interest that CANNOT be waived. Therefore, the waiver provision provided in 28 CFR §45.2(b) cannot apply. AG Barr must permanently recuse himself. The DOJ must implement screening procedures to ensure such recusal is in-fact effective.

Policy

The DOJ is putting its own investigation at-risk.

It seems the DOJ has everything to lose, and nothing to gain, by not requiring a simple recusal of the Attorney General from an investigation he was defending 4 months ago for which he was paid $1-2 million over less than 22 months. This investigation has been ongoing since January 2015, involves several federal agencies, and resulted in the execution of search warrants that lead to AG Barr's representation of Caterpillar.[50]

What value or benefit does the DOJ gain from AG Barr's involvement? Any additional value he could bring would inherently include his past representation of and the knowledge he gained defending Caterpillar, which is exactly the type of contribution that is prohibited by the Rules of Professional Conduct, and federal case law, statutes and regulations. Quite honestly, it is simply unfair to put Mr. Barr or any attorney in this position. **His actual or even perceived possible participation or involvement puts the government's investigation at risk of Caterpillar claiming it is "*tainted*".** It contradicts federal case law, statutes, and regulations. It contradicts the Rules of Professional Conduct. It contradicts Justice Department norms. It condones and permits a ***non-waivable conflict-of-interest***; and creates the ***appearance of either unfairness or favoritism toward Caterpillar Inc.***

I believe it is fair to say that if the DOJ requires recusal and implements effective screening procedures in this case, there is no harm to anyone, and a positive outcome for everyone, including

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[46] https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20Whitehouse%20QFRs.pdf (see Questions #55)

[47] 28 CFR §45.2(b).

[48] 28 CFR §45.2(b).

[49] 28 CFR §45.2(b).

[50] See https://www.caterpillar.com/en/news/corporate-press-releases/h/new-caterpillar-ceo-asks-former-us-attorney-general-to-assess-and-help-address-ongoing-government-investigation.html

AG Barr and Caterpillar Inc.

Recusal with effective screening procedures

- Safeguards AG Barr's former client, thereby protecting him.
- Eliminates the appearance of a conflict-of-interest, bias, unfairness, etc.
- Complies with the Rules of Professional Conduct, and federal law & regulation.
- Eliminates a patent conflict-of-interest.
- Is consistent with AG Barr's written comments to the Senate.

Non-recusal

- Puts everyone involved at-risk.
- Could taint a 4-year multi-agency investigation.
- Condones a patent conflict-of-interest, setting a terrible precedent.
- Creates the appearance of a conflict-of-interest, which is prohibited by all relevant authority.

Conclusion

The District of Colombia has stated that, "Lawyers who leave private practice to enter government service must be vigilant to protect the interests of former clients while representing their new clients with diligence and zeal. A government lawyer owes continuing obligations to her former clients to protect client confidences and secrets both from disclosure to others and from use by the lawyer to the disadvantage of the former clients. A government lawyer may not (shall not in the case of *side-switching*) undertake work that is the same as or substantially related to work done for a former client.... While disqualification of a government lawyer from a matter due to work done for a prior client is not imputed to other lawyers in the government agency or entity, screening measures should be considered in appropriate cases (required in this case)."[51]

The Attorney General is the head of the Department of Justice.[52] Congress has "vested" in the Attorney General virtually "[a]ll functions of other officers of the Department,"[53] and has empowered the Attorney General to authorize other Department officials to perform the functions of the Attorney General.[54] The Attorney General is responsible for all functions and actions of the DOJ. The Attorney General has supervisory authority for the entire DOJ. Courts have found that an attorney is involved in a matter even where he is only supervising other lawyers who are in charge of an investigation and only attends high-level meetings about the case.[55] In this case in

[51] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service.

[52] 28 U.S.C. § 503.

[53] 28 U.S.C. § 509.

[54] 28 U.S.C. § 510.

[55] United States Attorney's Bulletin, September 2009, p.6. "Although the term "substantially" might suggest that an attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. See, e.g., United States v. Smith, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's

which the lawyer involved is the Attorney General of the United States, the inherent ethical issues cannot be resolved by merely moving the investigation of his former client to a peer within the DOJ for which he has no responsibility. All of the DOJ and its employees are encompassed within the responsibility, purview and authority of the Attorney General. There are four options.

1. AG Barr resigns his position as Attorney General of the United States; or
2. AG Barr permanently recuses himself from participation in the Caterpillar investigation and the Deputy AG appoints a Special Counsel;[56] or
3. AG Barr permanently recuses himself from participation in the Caterpillar investigation and the DOJ immediately implements effective screening measures; or
4. AG Bar is in violation of the Rules of Professional Responsibility and federal case law, statutes and regulations, which is sanctioned by the Justice Department.

The apparent remedy is the ***immediate permanent recusal*** and the ***immediate implementation of effective screening measures*** such as those in the Rules of Professional Conduct.[57] While disclosures and screening measures are not required per-se, as a practical matter they are to comply with the Rules.[58] The D.C. Bar Association suggests consideration and

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involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high-level meetings about the case, and signed an immunity agreement for one of the government's witnesses); Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and a trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case")." The same is true with regard to the subsequent representation. TC Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 271 (S.D.N.Y. 1953). When the lawyer's subsequent representation deals with matters as to which his former client reposed confidence in him, he is disqualified from acting as counsel for the plaintiff in the subsequent representation, "in any capacity".

[56] See 28 CFR §600.1. A Special Counsel is appropriate because: there is already an investigation underway; the AG has a conflict-of-interest; and it is always in the public interest (and legally required) for the Justice Department to avoid *even the appearance of impropriety* to maintain the public trust. Since effective screening measures are required here for an effective recusal of the AG and such measures were not deployed promptly, the disqualification could be imputed beyond the AG to other high-level DOJ officials. ("The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed—months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed or were not timely employed.") (emphasis added); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long).")

[57] See, District of Colombia Rules of Professional Conduct: Rule 1.11(a)—Successive Government and Private Employment, and Comments. If a Special Counsel is not going to be appointed, the OPR should recommend an investigation by the Office of Inspector General to determine who in addition to the AG may be required to be screened from the investigation.

[58] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service: Due to the draconian effects of imputed disqualification on the ability of the government to obtain legal services, however, the principles of imputed disqualification do not apply to disqualify government lawyers who practice in a government agency with a lawyer who is disqualified

implementation of these procedures to insulate the disqualified lawyer from the ongoing matter, to provide important assurances to the lawyer's former client that he is meeting his ethical obligations which protects the lawyer, and to signal a recognition by the DOJ of the importance of these ethical obligations, thereby avoiding the appearance of anything less than full compliance with the law in-fact and in-appearance, beyond question.[59] The public is generally more concerned about government improprieties than private ones and, thus, the appearance problem is more severe because the public is likely to be more critical of the potential misuse of information.[60] Effective screening measures are required in this case to meet these objectives.

In a case such as this involving direct *side-switching* in the *exact same matter* by the highest law enforcement officer in the nation who speaks and acts for the entire DOJ, screening measures are essential for an effective recusal. Screening measures should be erected ***promptly***.[61] Where there are no screening measures, one cannot argue that a former client's confidences were not violated.[62] So without effective screening measures, the DOJ cannot argue that AG Barr will not violate his former client's confidences. *SCREENING MEASURES MUST BE IMPLEMENTED!*

Additionally, Mr. Barr's Ethics Agreement should be amended and republished setting forth his immediate ***permanent recusal***, and the immediate implementation of ***effective screening measures***, including the nature of these measures.

Recusal and effective screening measures harm nobody nor anything, and yet protect everybody and everything; particularly AG Barr, Caterpillar Inc., and the public's confidence in

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because of prior client representation. Rule 1.10, Comment [1] ("For purposes of the Rules of Professional Conduct, the term 'firm' . . . does not include a government agency or other government entity."). Thus, unlike the situation in private practice where all lawyers associated in a law firm with a lawyer disqualified under Rule 1.9 also are disqualified through imputation under Rule 1.10, in the government context, the lawyers in a government office, agency, or department who work with a personally disqualified lawyer are not barred from representation adverse to the lawyer's former client.

[59] See, District of Columbia Ethics Opinion 308 – Ethical Constraints on Lawyers Who Leave Private Employment for Government Service: While our Rules do not expressly require such screening in the government context for a lawyer who is disqualified by a prior client relationship under Rule 1.9, consideration and implementation by the government agency of voluntary screening measures that effectively insulate the lawyer from ongoing contact with the matter from which she is disqualified should be considered. Such measures provide important assurances to the lawyer's former clients that the lawyer's ethical obligations under Rules 1.6 and 1.9 are being met and signal an appropriate recognition by the government agency of the importance of these obligations.

[60] United States Attorney's Bulletin, September 2009, p.4.

[61] United States Attorney's Bulletin, September 2009, p.6. "The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed—months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed or were not timely employed.") (emphasis added); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long)."

[62] Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267-1268 (7th Cir. 1983).

the DOJ. To not do so is problematic to say the least. The fact that Caterpillar Inc. is not demanding this recusal is itself significant. Recusal and effective screening measures avoid serious problems and create none. If there is any doubt, it is to be resolved in favor of disqualification (i.e. recusal with screening measures).[63]

This is a matter of urgent public importance that is vital to ensure ongoing public confidence in the impartiality and fairness of the Justice Department. The ongoing investigation is an important matter for the DOJ by all of its published measurements. There are few greater public policies then the enforcement of our tax laws. Without revenue to run the government, there can be no government, and no democracy.

(b)(6); (b)(7)(C)

[63] Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37, 42 (D.C. 1984).

From: Birney, William J (OPR)
To: (b)(6); (b)(7)(C) [redacted]
Subject: FW: New Incoming Regarding AG William P. Barr
Date: Friday, March 8, 2019 2:25:23 PM

(b)(6); (b)(7)(C) [redacted]

This is in response to your letter to the Department of Justice Office of Professional Responsibility (OPR), asserting that Attorney General William P. Barr is in violation of Department regulations that require him to immediately and permanently recuse himself from all matters regarding Caterpillar Inc. on the ground that before becoming Attorney General, Mr. Barr represented Caterpillar in connection with an ongoing criminal tax investigation. Based on a careful review of your letter, OPR concluded that your allegations are without foundation and do not warrant further inquiry by OPR.

As your letter acknowledges, the Justice Management Division (JMD) has advised the Office of Government Ethics (OGE) that it conducted a thorough review of Mr. Barr's financial disclosure report and concluded that "the report presents no conflicts of interest under applicable laws and regulations." JMD noted that Mr. Barr would resign from his positon with the law firm of Kirkland & Ellis, LLP, and that for a period of one year after his resignation, he would not participate personally and substantially in any particular matter involving specific parties in which knows the firm is a party or represents a party, without first obtaining authorization under 5 C.F.R. § 2635.502(d). JMD also noted that Mr. Barr would not participate personally and substantially in any particular matter involving specific parties in which he knows that a former client of his is a party or represents a party, for a period of one year after he has provided service to that client.

Under 18 U.S.C. § 208, Mr. Barr is required to recuse himself from participating personally and substantially in any particular matter in which he knows that he has a financial interest directly and predictably affected by the matter, or in which he knows that a person whose interests are imputed to him has a financial interest directly and predictably affected by the matter. JMD noted that Mr. Barr will consult Department ethics officials in determining whether a particular matter has a direct and predictable effect on his financial interests or on those of any other person whose interests are imputed to him, including his spouse and minor children.

There is no basis for your assertion that Mr. Barr is required by 28 C.F.R. § 45.2 to permanently recuse himself from all matters involving Caterpillar. Section 45.2 provides that "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 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 of prosecution." (Emphasis added.) A "personal relationship" is understood to mean a close friendship or a familial relationship. Your allegation that Mr. Barr has a "personal relationship" with Caterpillar that requires him to immediately and permanently recuse himself from any criminal investigation or prosecution involving Caterpillar is wholly unsubstantiated. There is no indication that Mr. Barr had anything other than an attorney-client relationship with Caterpillar, and your letter contains no facts supporting the conclusion that he has a conflict of interest that requires him to recuse himself from all matters involving Caterpillar pursuant to 28 C.F.R. § 45.2.

OPR concluded that your allegations do not warrant further inquiry, and we consider this matter to be closed.

William J. Birney
Deputy Director
Office of Professional Responsibility
U.S. Department of Justice
Washington, D.C. 20530

From: Robertson, Jacqueline T (OPR) <Jacqueline.T.Robertson@opr.usdoj.gov>
Sent: Wednesday, March 6, 2019 10:41 AM
To: Birney, William J (OPR) <William.J.Birney@opr.usdoj.gov>
Subject: New Incoming Regarding AG William P. Barr - LM #201900290

Bill,

Please see attached new incoming correspondence regarding AG Barr. Thanks,

Jacqueline Robertson
Program Analyst
Office of Professional Responsibility
Department of Justice
Washington, D.C. 20530
(b)(6); (b)(7)(C) [redacted]

(b)(6); (b)(7)(C) [redacted]

From: Ragsdale, Jeffrey (OPR) <Jeffrey.Ragsdale@usdoj.gov>
Sent: Monday, May 6, 2019 1:13 PM
To: (b)(6); (b)(7)(C) [redacted]
Cc: Birney, William J (OPR)
Subject: FW: 20190410 AG Barr Complaint.pdf

(b)(6); (b)(7)(C) [redacted]

As we previously advised you, Attorney General Barr's Ethics Agreement specifically states that upon his confirmation, he would resign from his positon with the law firm of Kirkland & Ellis, and that for a period of one year after his resignation, he would not participate in any matter in which Kirkland & Ellis represents a party, unless he is first authorized to participate pursuant to 5 C.F.R. § 2635.502(d)(providing that participation may be allowed under certain circumstances). In addition, the Ethics Agreement states that Mr. Barr would not participate in any matter in which a former client is a party (which would include Caterpillar), for a period of one year after he last provided service to that client, unless he is first authorized to participate pursuant to 5 C.F.R. § 2635.502(d).

Thus, upon his confirmation, for at least one year thereafter, Attorney General Barr was recused from: (1) any matter in which Kirkland & Ellis represents a party, including the criminal tax investigation in which the firm represents Caterpillar; and (2) any matter in which a former client is a party (including the criminal tax investigation in which Caterpillar is a putative defendant). The Justice Management Division (JMD) conducted a thorough review of Mr. Barr's financial disclosure report and concluded that "the report presents no conflict of interest under applicable law and regulations." Based on the foregoing, OPR concluded that contrary to your allegations, Attorney General Barr was not "in violation of Department of Justice (DOJ) rules and regulations for not recusing himself from the investigation of Caterpillar Inc."

Nothing in your renewed complaint persuades us to alter our conclusion that Attorney General Barr has acted, and continues to act, in strict compliance with applicable rules and regulations governing his participation in any matter in which Caterpillar is represented by Kirkland & Ellis. Moreover, after we responded to your initial complaint, well before the passage of one year after Attorney General Barr's confirmation, we were advised that he has formally recused himself from any matter in which Kirkland & Ellis represents a party, which includes the criminal tax investigation in which the firm represents Caterpillar. Accordingly, OPR has concluded that your renewed complaint is unfounded, and we consider this matter to be closed. We regret that we can be of no further assistance to you.

Jeffrey R. Ragsdale
Principal Deputy Director
Office of Professional Responsibility
U.S. Department of Justice
Washington, D.C. 20530
(b)(6); (b)(7)(C) [redacted]
jeffrey.ragsdale@usdoj.gov

(b)(6); (b)(7)(C) [redacted]
Sent: Wednesday, April 10, 2019 6:09 PM
To: Birney, William J (OPR) <William.J.Birney@opr.usdoj.gov>
Subject: FW: 20190410 AG Barr Complaint.pdf

Please find attached a letter/complaint that was mailed today to the Department of Justice, Office of Professional Responsibility with respect Attorney General Barr and his relationship to Caterpillar Inc., a former client. This is a follow up to the February 15, 2019 letter issued by this office and the March 8, 2019 email response from the Department of Justice, Office of Professional Responsibility.

(b)(6); (b)(7)(C) [redacted]

DOJ-FASS

Tracking No: (b)(6); (b)(7)(C) [redacted]

OIG/MAIN 4706
OIG - MAIN - -

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Dept: OIG
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INSPECTED 4

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(b)(6); (b)(7)(C)
[redacted]

INSPECTED 5

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