



December 19, 2018

VIA CERTIFIED MAIL

The Honorable Michael J. Missal
Inspector General
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Dear Inspector General Missal:

In correspondence to Senators Tammy Duckworth and Maggie Hassan on September 17, 2018, your office declined to investigate reports that three individuals connected to President Trump through their respective membership at the Mar-a-Lago Club—the so-called “Mar-a-Lago Crowd”—were exercising undue influence over official Department of Veterans Affairs (“VA”) duties and policies.¹ As part of the justification for declining to take action, you cited the filing of a private lawsuit.² We represent Plaintiff VoteVets Action Fund (“VoteVets”) in a lawsuit alleging that the Mar-a-Lago Crowd constitutes a *de facto* advisory committee that is operating in violation of the Federal Advisory Committee Act (“FACA”).³ For the reasons set forth below, we do not believe that the *VoteVets* matter should stand in the way of your office carrying out its statutory obligation to investigate and report on matters affecting the programs and operations of the VA.

The Mar-a-Lago Crowd

In January 2017, President-elect Trump announced that he intended to enlist the assistance of Isaac “Ike” Perlmutter, Bruce Moskowitz, and Marc Sherman “to help” the Secretary “straighten out the VA.”⁴ While none of these men has notable experience with issues affecting veterans, all three do maintain personal relationships with President Trump that were formed or cemented through their affiliation with Mar-a-Lago, the President’s golf and social club, where they are all members. And yet, since the beginning of the Trump Administration, the

¹ See Letter from Michael J. Missal, Inspector Gen., Dep’t of Veterans Affairs, to Tammy Duckworth, Sen. (Sept. 17, 2018) (“September 17 Letter”).

² *Id.*

³ *VoteVets Action Fund v. U.S. Dep’t of Veterans Affairs*, No. 1:18-cv-1925 (D.D.C. filed Aug. 16, 2018).

⁴ Natalia Wojcik et al., *Transcript of President-elect Trump’s News Conference*, CNBC, Jan. 11, 2017, <https://www.cnbc.com/2017/01/11/transcript-of-president-elect-donald-j-trumps-news-conference.html>.

Mar-a-Lago Crowd has worked closely with the VA's senior leadership in order to advise on a variety of matters, including the development of a mobile application for veterans and the VA's \$10 billion electronic health record modernization contract with the Cerner Corporation.

Although some of the Mar-a-Lago Crowd's influence has come into view through public reporting and records released by the VA, the full extent of their work remains hidden from public view. In part, a full understanding of the Mar-a-Lago Crowd's influence has been impeded by the VA's refusal to provide "unredacted communications between VA officials and Mar-a-Lago members," as members of the House Committee on Veterans Affairs have requested on several occasions.⁵

Obligations of the Inspector General Relating to Programs and Operations of the Agency

Under the Inspector General Act of 1978, Congress declared that "[i]t *shall be the duty and responsibility of each Inspector General . . . to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of*" the agency within which the Inspector General's office is established.⁶ The Office of Inspector General ("OIG") is also tasked with "keep[ing] the head of [the VA] and the Congress fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment[.]"⁷ While some degree of discretion over which actions the OIG will pursue is owed to the OIG out of deference to its independent status, the existence of parallel litigation should not, and as a practice, has not deterred Inspectors General from investigating a particular matter within their statutory purview.

For example:

- In September 2018, the Department of Homeland Security ("DHS") OIG issued a report on DHS' zero tolerance and family separation policies.⁸ This report included multiple findings of DHS fault. During the period in which the DHS OIG would have been conducting the review that produced the report—and prior to its publication—a number of well-publicized lawsuits directly implicating or challenging the legality of the zero tolerance policy, the family separation policy, and/or the resulting reunification issues were being actively litigated.⁹

⁵ See Press Release, H. Comm. on Veterans' Affairs, *Ranking Member Walz Renews Call For Transparency After VA Confirms Influence Of Mar-a-Lago Shadow Rulers* (Dec. 10, 2018), <https://democrats-veterans.house.gov/news/press-releases/ranking-member-walz-renews-call-transparency-after-va-confirms-influence-mar>.

⁶ 5 U.S.C. app. 3 § 4(a)(1) (emphasis added).

⁷ *Id.* § 4(a)(5).

⁸ U.S. Dep't of Homeland Security Off. of Inspector Gen., OIG-18-84, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

⁹ See, e.g., *K.O. v. Sessions*, No. 4:18-cv-40149, ECF No. 1 at * 2 (D. Mass. filed Sept. 5, 2018) (seeking "damages and the establishment of a fund for the mental health treatment of all class members to remedy the harm caused by the Defendants' forcible separation of well over 2,500 children from their parents"); *Ms. L. v. U.S. Immigration & Customs Enforcement*, No. 3:18-cv-0428 (S.D. Cal. filed Feb. 26, 2018) (seeking re-unification of asylum-seeking mother with her young daughter after their forced separation); *Flores v. Sessions*, No. 85-cv-4544 (C.D. Cal. filed July 11, 1985).

- In May 2016, the State Department Inspector General released a report on, among other things, former-Secretary Hillary Clinton’s “use of non-Departmental [email] systems to conduct official business, records preservation requirements, and Freedom of Information Act (FOIA) compliance.”¹⁰ The report, which was initiated in April 2015, was the result of an investigation into a matter of widespread public interest and attention, and subject to immense public scrutiny. The issues under investigation also overlapped with at least one lawsuit brought by Judicial Watch, the filing of which predated the State Department’s decision to initiate an inquiry.¹¹ Despite this pending litigation, the State Department OIG nevertheless initiated an inquiry.
- For fiscal year 2016, the Department of Labor Inspector General announced that it would initiate a new review of the Occupational Safety and Health Administration’s (“OSHA”) rulemaking practices, including its use of guidance and policy memos.¹² This review was prompted by OSHA’s decision to issue a guidance memorandum in July 2015, which eliminated exemptions to hazardous waste regulations previously claimed by certain “retail facilities.”¹³ At the time the Department of Labor Inspector General announced it was initiating an audit, however, two trade associations that had once benefited from the exemptions had already initiated litigation against the OSHA memorandum, alleging it had been unlawfully promulgated without undergoing proper notice and comment procedures.¹⁴ Though litigation preceded the initiation of the audit, and covered substantially related legal issues, the Department of Labor Inspector General has pressed forward with its audit of these practices.¹⁵

Request for an Investigation

In addition to the OIG’s claim in the September 17 Letter that “it would be prudent” to wait for pending litigation to conclude before considering an investigation—a justification that, as illustrated above, does not square with the practice of Inspectors General across the federal government—the September 17 Letter also claims that “[t]he authorities and remedies available under the Inspector General Act do not provide an efficient means to resolve” the issue of whether the Mar-a-Lago Crowd’s influence constitutes a violation of the FACA. But an OIG inquiry into the Mar-a-Lago Crowd’s influence need not draw a legal conclusion about the applicability of the FACA. Indeed, an OIG inquiry can serve the valuable purpose of establishing the factual record where much of that record has been shrouded in secrecy by the VA. Such a

¹⁰ See U.S. Dep’t of State Off. of Inspector Gen., ESP-16-103, *Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements*, 1 (May 2016), <https://www.oversight.gov/sites/default/files/oig-reports/esp-16-03.pdf>.

¹¹ See, e.g., *Judicial Watch v. U.S. Dep’t of State*, No. 1:14-cv-1242 (D.D.C. filed July 21, 2014).

¹² See U.S. Dep’t of Labor, Off. of Inspector Gen., *Office of Audit: Fiscal Year 2016 Workplan 5* (2015), <https://www.oig.dol.gov/public/reports/oa/2016/FY-2016-Audit-Workplan.pdf>; see also Memorandum from Elliot P. Lewis, Assistant Inspector Gen. for Audit, to David Michaels, Assistant Sec’y for Occupational Safety and Health (Dec. 18, 2015), https://www.oig.dol.gov/public/oaprojects/OSHARuleMakingEngLtr_121815.pdf.

¹³ *Agric. Retailers Ass’n v. U.S. Dep’t of Labor*, No. 15-1326, ECF No. 1573446 (D.C. Cir. filed Sept. 16, 2015) (attaching the memorandum at Appendix A).

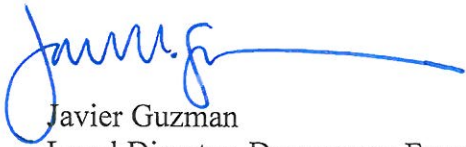
¹⁴ *Id.*

¹⁵ See, e.g., U.S. Dep’t of Labor Off. of Inspector Gen., *Office of Audit: Fiscal Year 2018 Workplan 6* (2017), <https://www.oig.dol.gov/public/reports/oa/2018/FY-2018-Audit-Workplan.pdf> (describing its audit of the “OSHA Rulemaking Process” as “In Progress”).

report might aid the public, and respond to the Congress, by establishing a timeline and accounting of, among other things, the contact between the Mar-a-Lago Crowd and VA officials, the nature of the Crowd's influence, the policies and decisions they were permitted to weigh in on, and the steps taken by the VA (if any) to ensure their input was not motivated by opportunities for personal profit.

Ultimately, the public seeks, and deserves, transparency about the Mar-a-Lago Crowd's influence over policies affecting America's veterans. VoteVets's lawsuit is one mechanism that serves that end, but it cannot and should not stand in the way of other efforts—especially by your office, given its statutory responsibilities—to understand and tell the full story of the Mar-a-Lago Crowd's access and activities. Your office has special authority to shed light on matters of significant interest to the public and to America's veterans. We encourage you to exercise that authority here.

Respectfully,



Javier Guzman
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Counsel for VoteVets Action Fund