

United States Senate

March 12, 2020

COMMITTEES
APPROPRIATIONS
BANKING, HOUSING, AND URBAN
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Mark Paoletta
General Counsel
Office of Management and Budget
725 17th Street, NW
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Dear Mr. Paoletta,

Recent revelations show a lack of candor in your response to the Government Accountability Office (GAO) inquiry into the withholding of funds for the Department of Defense (DOD) Ukraine Security Assistance Initiative. I am writing to request that you recuse yourself from ongoing inquiries into the Trump Administration's withholding of aid to Ukraine, including GAO's ongoing inquiry into the hold on State Department funding for Ukraine. Furthermore, it would be appropriate for you to resign your role as the Designated Agency Ethics Official for the Office of Management and Budget (OMB).

In an independent decision, GAO found that the OMB violated the Impoundment Control Act by withholding funds from Ukraine that Congress had appropriated for the DOD Ukraine Security Assistance Initiative.¹ During the course of GAO's inquiry, you asserted to GAO in writing that, "In fact, at no point during the pause in obligations did DOD [Office of General Counsel] indicate to OMB that, as a matter of law, the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year."²

Recent reporting by Just Security reveals that this statement, at best, was highly misleading. The DOD Office of General Counsel emailed you personally to raise concerns about the hold jeopardizing the ability of DOD to obligate Ukraine Security Assistance Initiative funds before they expired. This message stated that its purpose was to "underscore" the discussions between OMB official Michael Duffey and DOD official Elaine McCusker, who repeatedly raised concerns about the hold preventing timely obligation of the Ukraine aid.³

Furthermore, you appear to have willfully disregarded DOD warnings about this. In a different email revealed by Just Security, Elaine McCusker stated, "OMB lawyers continue to consistently mischaracterize the process — and the information we have provided. They keep repeating that this pause will not impact DOD's ability to execute on time."⁴ The withdrawal of Ms. McCusker's nomination to be Under Secretary of Defense (Comptroller) raises further concerns about sidelining those who provide facts that Trump Administration officials such as yourself do not want to hear.⁵

¹ Government Accountability Office. 2020. *Office of Management and Budget—Withholding of Ukraine Security Assistance*.

² Mark Paoletta. 2019. *RE: B-331564, Office of Management and Budget- Withholding of Ukraine Security Assistance*.

³ Kate Brannen. 2020. *Exclusive: New Unredacted Emails Show How Deeply OMB Misled Congress on Ukraine*.

⁴ Kate Brannen. 2020. *Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns*.

⁵ Politico. 2019. *White House withdraws nomination of Defense official who questioned Ukraine aid freeze*.

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To date, the Trump Administration has blocked DOD from providing any information in response to GAO's inquiry, with DOD informing GAO that it could not provide a substantive response, "In light of the interagency equities at issue." While GAO was able to determine that withholding DOD Ukraine Security Assistance Initiative funding was illegal even without a response from DOD, all of the facts still have not come to light on this matter.

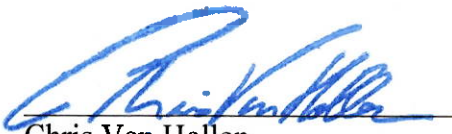
You also stonewalled the ongoing GAO inquiry into whether the Trump Administration violated the Impoundment Control Act by withholding other funds for Ukraine that Congress appropriated to the State Department for Foreign Military Financing. According to GAO, "OMB and State have failed, as of yet, to provide the information we need to fulfill our duties under the ICA regarding potential impoundments of FMF funds," a delay that impedes the GAO's ability to ensure that you are upholding the constitutional power of the purse.⁶

As the OMB official who responded to GAO's inquiry, you are personally responsible for the failure to provide a fulsome and honest response. You are also personally responsible for providing the faulty legal justification for OMB to implement President Trump's illegal hold on Ukraine aid – a justification that GAO stated "has no basis in law."⁷ Therefore, you have a conflict of interest in overseeing OMB's response to inquiries that may call your previous actions into further question.

OMB's Designated Agency Ethics Official is responsible for providing advice and counseling regarding recusals to resolve a conflict of interest.⁸ Given your own apparent conflict, it is untenable for you to continue to serve in this role. 87 percent of Designated Agency Ethics Officials are apolitical career civil servants – not political appointees such as yourself – due to the need to impartiality in this role.⁹

President Trump asserts that under the Constitution, "Article II allows me to do whatever I want."¹⁰ As an attorney, I trust you know that the President is wrong. I hope that you also recognize how continuing to involve yourself in OMB's response to inquiries about withholding Ukraine aid creates – at a minimum – the appearance of a conflict of interest.

Sincerely,



Chris Van Hollen
United States Senator

⁶ Government Accountability Office. 2020. *Office of Management and Budget—Withholding of Ukraine Security Assistance*.

⁷ *Id.*

⁸ 5 C.F.R. § 2638.104.

⁹ Office of Government Ethics, "Results from the 2018 Annual Agency Ethics Program Questionnaire" (2019).

¹⁰ ABC News. 2019. *EXCLUSIVE: Trump cites lessons from Nixon, says he 'was never going to fire Mueller'*.