

United States Senate
WASHINGTON, DC 20510

December 3, 2020

The Honorable Robert Wilkie
Secretary of Veterans Affairs
810 Vermont Ave NW
Washington, DC 20420

Dear Secretary Wilkie,

We are writing to request information regarding your plans for an organized transition to the Biden-Harris Administration and to direct you to cease any further efforts to rush policies or hiring decisions, during your final weeks as Secretary, which merit more scrutiny and should be left to the incoming Administration.

On November 23, after nearly three weeks of delay, the General Services Administration (GSA) finally began the official process for allowing the resources, office space, and official meetings and information sharing to occur between the Department of Veterans Affairs (VA) and the Biden-Harris transition team. The GSA and the Trump Administration's justification for the delay in initiating the transition was unprecedented in the recent history of our country – whether under Republican or Democratic Administrations. The Trump Administration's stonewalling harmed an organized and thoughtful handoff of information so that the incoming Administration can prepare the necessary plans, staffing, budgets and policy to provide services relied upon by America's veterans and their families, including life-saving COVID-19 care.

As you know, VA has a Fiscal Year 2021 requested budget of more than \$243 billion, provides disability compensation to more than 5 million veterans, has more than 9.2 million enrollees in its health care system, and manages more than 420,000 employees, 150 cemeteries, 50 benefits offices, and 1,750 sites of care. Waiting to engage the next Administration, in the middle of the COVID-19 pandemic with cases surging across the country, including within the nation's largest health care system, jeopardized all services VA provides. We know that hard-working non-partisan career officials in your Department worked tirelessly to prepare for this transition but your actions blocked them from sharing critical planning and budget information with the incoming Administration. Finally, the process is now moving forward.

Our concern with your transition activities does not end with information sharing and cooperation with the incoming Administration. Rather, we are deeply troubled by previously announced and ongoing efforts to rush potentially harmful policies through the Department in the last days of the Trump Administration while at the same time attempting to embed politically connected individuals into career positions within VA. This concern and the questions contained in our correspondence follow the same oversight practices of Congressional Republicans and

Democrats used over decades to ensure an outgoing Administration does not harm the American people at the end of its tenure in office.¹

Policy Decisions Harmful to Veterans

The last several weeks and months have seen your Department initiate several policy changes during the chaos of the COVID-19 pandemic and vigorous national elections for President and Congress. For example, in spring of 2020 VA announced it would eliminate the “48-hour” rule that previously allowed veterans’ representatives to have a 48-hour review period before a benefits decision is promulgated.² This unfair policy change prevents accredited representatives, attorneys, and agents from correcting technical errors before benefits decisions are made, potentially leading to additional review time and appeals. In addition, in October of 2020, VA notified Congress about its plan to nearly completely privatize the compensation and pension (C&P) exam process. VA has not proven that the private exam process is more effective, efficient or a better deal for taxpayers or veterans as the program costs billions of dollars to operate. This sweeping change to the exam process, the results of which determine the compensation, health care and other services veterans receive throughout their lifetimes, is too important to be handled in such a rushed manner with so many questions unanswered and weak oversight in place.³ Veterans Service Organizations (VSOs) have expressed significant concerns about both of these policy changes.

More recently, on November 9, 2020, the White House sent the bipartisan leadership of Congress correspondence requesting their recommendations for nominees to the Asset and Infrastructure Review (AIR) Commission by December 9, 2020, as part of Public Law 115-182, the MISSION Act. As an active participant in the legislation’s negotiations, you must know this request is not consistent with the commitments made as part of the deliberations of the law. Rather, all key entities and stakeholders involved in the final drafting of the legislation, including VSOs and bipartisan Members of Congress, understood that the appointments to the AIR Commission would be made by the Administration of whichever President was sworn in on January 20, 2021. In fact, it was this commitment that allowed the legislation to move forward and ultimately pass. The Trump Administration’s attempt to accelerate these nominations, which are not required to be submitted to the Senate until May 31, 2021, is a complete and total violation of the spirit of those hard-fought negotiations. The AIR Commission’s role and duties cannot be overstated. Their determinations regarding the future of veterans’ health care and the facilities in which that care is delivered will set the path for veterans’ care for decades to come in every part of the country – rural, suburban, and urban. The nomination process was never

¹ See, for example, *Chaffetz Letter to 18 Federal Agencies Regarding Hiring During Transition Period*, Committee on Oversight and Government Reform (Jan. 10, 2017) (online at <https://republicans-oversight.house.gov/wp-content/uploads/2017/01/2017-01-10-JEC-to-18-Agencies-Agency-Hiring-due-1-19-18-letters.pdf>); *Johnson letter to OPM Regarding “Burrowing In” of Political Appointees*, Committee on Homeland Security and Governmental Affairs (Nov. 21, 2016) (online at:

<https://www.hsgac.senate.gov/imo/media/doc/2016-11-21%20RHJ%20to%20OPM%20Burrowing%20political%20appointees.pdf>); *Johnson and Tillis Letter to Pres. Obama regarding hiring during transition period*, Senator Thom Tillis (Dec. 2, 2016) (online at <https://www.tillis.senate.gov/public/index.cfm/press-releases?ID=EF043932-8E4A-4474-BF8B-F1284FED6C41>)

² *Tester et al letter to Sec. Wilkie re 48-hr rule*, Senate Committee on Veterans’ Affairs (SVAC) (April 15, 2020) (online at <https://www.veterans.senate.gov/imo/media/doc/FINAL%202020-04-15%20Letter%20to%20Wilkie%20re%2048%20hr%20VBMS.pdf>)

³ *Tester et al letter to Sec. Wilkie re C&P exams*, SVAC (Nov. 20, 2020) (online at <https://www.veterans.senate.gov/imo/media/doc/2020-11-20%20Letter%20to%20Wilkie%20re%20Contract%20CP%20Exams%20FINAL.pdf>)

envisioned to occur prior to the inauguration of January 20, 2021. VSOs involved in the MISSION Act negotiations are alarmed by these actions.

Installing Political Appointees as Career Employees

We are also concerned by what appear to be accelerated efforts by the Executive Branch, including your Department, to hire and “burrow-in” political appointees as career employees and otherwise undermine the federal merit system. Not only is this illegal, but it involves expending taxpayer dollars on the salaries of individuals whose foremost qualifications appear that they were loyal to President Trump. That is not a standard that serves veterans or the American people.

For example, on September 25, 2020, the Department notified Congress of its hiring of an individual to be a senior advisor in the Office of Acquisition, Logistics and Construction (OALC), in VA Central Office in Washington, DC. Disturbingly, the individual's last position was as the 2020 Republican National Convention’s (RNC) Chief Logistics Officer and Director of Intergovernmental Coordination. While that is certainly a complex job, especially during a pandemic and navigating the legal and ethical complexities of conducting a controversial political convention from the grounds of the White House, it is not clear that qualifies this individual for advising on the management of more than \$24 billion in VA contracts and 219,000 annual procurement transactions. Given that the U.S. Office of Special Counsel is investigating certain activities during the 2020 RNC convention for potential Hatch Act violations⁴ and this individual’s central role in organizing the convention, there are profound questions about whether this individual is the best choice for the position.

This is only one element of our concern. We are further troubled that the Department may be planning to convert, or may already be converting, political appointees into career positions. On December 1, 2020, we were provided information that your Acting Chief of Staff notified VA personnel that the Department has moved political appointee Daniel R. Sitterly, Assistant Secretary for Human Resources and Administration / Operations, Security, and Preparedness, to the career position of Deputy Assistant Secretary (DAS), for VA’s Office of Accountability and Whistleblower Protection (OAWP). This conversion and others like it could potentially be in violation of civil service laws and rules as the Office of Personnel Management (OPM) recently reminded agencies in a government-wide memo.⁵ These appointees may be less qualified than others that would otherwise be hired for career positions under a fair process. Appointees who burrow into the civil service will remain on the taxpayers’ payroll for months and potentially years after the Trump Administration departs and the services provided to veterans could be negatively affected as a result. Mr. Sitterly’s position change also poses an additional concern: the very nature of OAWP’s work of investigating senior leader misconduct and allegations of whistleblower retaliation by supervisors inside the VA involves examining decisions by VA human resources officials. With Mr. Sitterly in the number two position, which may make him the acting head of OAWP when the current Administration exists, he is in the position of

⁴ Kerner Letter to Members of the House Committee on Government Reform, Committee on Government Reform (Sept. 9, 2020) (online at:

<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Special%20Counsel%20Response.pdf>)

⁵ Office of Personnel Management, Memorandum for Heads of Departments and Agencies: Appointments and Awards During the 2020 Presidential Election Period, Chief Human Capital Officers Council (Sept. 22, 2020) (online at <https://www.chcoc.gov/content/appointments-and-awards-during-2020-presidential-election-period>)

exercising substantial influence over investigations of his former office and colleagues and beyond.

Open Congressional Oversight Requests and Records Preservation

Congress continues our bipartisan oversight of VA during this transition period. As you know, a large number of requests to VA by Congress for information, documents, and e-mails remain unanswered. For example, nearly two months later a large majority of the questions Congress posed to VA related to the origins, planning and financing of the trips and events you and your senior staff conducted in the last several years in potential violation of the Hatch Act remain unanswered.⁶ You are obligated to provide the information Congress requested regarding your Department's conduct on these and other important topics. In addition, it is more important than ever to remind you, as senior leaders of the House did in their November 10, 2020, correspondence, that you are obligated to ensure that any information previously requested by Congress—and any other information that is required by law to be preserved—is saved and appropriately archived in a manner that is easily retrievable.⁷ We remind you that concealing, altering, removing, or destroying records may constitute a crime, may result in the immediate disqualification from holding a position in the federal government, and may be punishable by up to three years imprisonment under federal law. We share and reiterate the priorities and requests outlined in the House Chairs' letter to you.

To further inform our oversight of the VA during this critical transition period, we ask for the following information:

1. Please provide a list of all political appointees in the Department as of the date of this letter;
2. Please provide a list of all political appointees who have converted from political appointments to career positions from January 20, 2017 to the date of your response to our correspondence or December 10, 2020, whichever is earlier;
3. For questions 1 and 2, please include the following information regarding each employee: employee's full name; employee's first date of employment at the Department; all job titles held by the employee throughout his or her tenure at the Department and the dates of any title changes; all salaries received by the employee throughout his or her tenure at the Department and the dates of any salary changes; for question 2 only, the date on which the employee transitioned to a career position within the Department; for question 2 only, the date on which OPM approved the conversion to a career position;
4. For the period of January 20, 2017 to the date of your response to our correspondence or December 10, 2020, whichever is earlier, please provide a list of positions which were converted from career to political and the reasoning for that conversion. Please also provide any change in position description or salary as part of this conversion;

⁶ *U.S. Senate and U.S. House of Representatives' Committees on Veterans' Affairs Correspondence*, (Oct. 13, 2020) (online at <https://www.veterans.senate.gov/imo/media/doc/2020-10-13-Letter%20to%20Sec.%20Wilkie%20re%20Political%20Travel-Events-Hatch%20Act%20and%20Enclosure.pdf>)

⁷ *Letters from House Chairs to White House and Federal Agencies to Preserve Documents*, (Nov. 10, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-11-10%20Cmte.%20Chairs%20to%20White%20House%20and%20Agencies.pdf>) (see pp. 72-74)

5. From the period from January 1, 2020, to the date of your response to our correspondence or December 10, 2020, whichever is earlier, please provide a list of all individuals, including their titles and salaries, hired using the “expert” or “consultant” authority as outlined in 5 U.S.C. 3109, 5 Code of Federal Regulations part 304, and related laws and regulations. Please include their hire date;
6. Please provide any and all VA Office of General Counsel (OGC); Office of Human Resources and Administration/Operations, Security, and Preparedness/Corporate Senior Executive Management Office; or any other Human Resources (HR) function/entity within the Department’s guidance, memos, directives, analysis, determinations, and/or approval documents related to political appointees transitioning to civil service or civil service positions being converted into political appointments during the period from January 1, 2020 to the date of your response to our correspondence or December 10, 2020, whichever is earlier;
7. Please confirm that you have instructed all entities within the Department to avoid promulgating so-called midnight rules. Please provide evidence of such instruction. We also request that you ensure that before any rule is finalized between now and January 20, 2021, it meets all legal requirements, including a notice and comment process;
8. Please provide copies of OGC or other relevant VA or Trump Administration guidance given to outgoing Trump Administration VA political appointees regarding their post-employment ethics restrictions;
9. Please provide all pre-appointment reviews by OPM for all competitive and non-political excepted service appointment actions that involve the appointment or conversion of a current or former political appointee, Schedule C employee, or Noncareer SES member at the VA from January 1, 2020 through the date of your response to our correspondence or December 10, 2020, whichever is earlier;
10. Please provide OPM merit staffing reviews of proposed VA career SES selections of political, Schedule C, and Noncareer SES appointees before those selections are/were presented to a Qualifications Review Board (QRB) for certification of executive qualifications from January 1, 2020 through the date of your response to our correspondence or December 10, 2020, whichever is earlier;
11. Please provide records from QRB certifications of executive qualifications involving the VA from January 1, 2020 through the date of your response to our correspondence or December 10, 2020, whichever is earlier;
12. Please provide a full accounting of the conversion of Mr. Sitterly from a political to a career position. This should include: the date the conversion was first proposed, by whom, and for what reason; the salary of Mr. Sitterly as Assistant Secretary, the salary of Mr. Sitterly as DAS, OAWP; copy of all VA HR related reviews, legal opinions, certifications, and justifications for or against this conversion from any VA office to include those listed in

question 6; a timeline for the creation of the DAS position within OAWP (when it was first requested, when it was approved, who has served in the role since its creation, and the salary and duties that accompany this position for each person who has held this position); any guidance issued to Mr. Sitterly to properly manage conflicts that may arise if OAWP investigates Mr. Sitterly's former office or colleagues; and documentation of the OPM approvals, reviews, certifications, and other materials related to the conversion of Mr. Sitterly to this career DAS position;

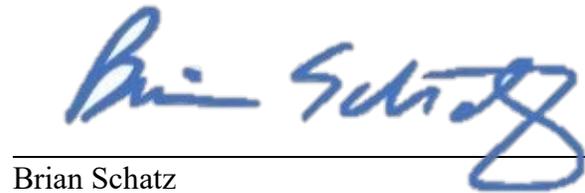
13. Please confirm that you have instructed all entities within the Department to preserve all relevant documents and materials consistent with the letter of the House Chairs of November 10, 2020, referenced above. Please provide evidence of such instruction; and
14. Please provide a weekly update to the above data requested in items 1-6, and 8-11, from the date of our correspondence to the week of January 18, 2021.

Thank you for your attention to these requests and we look forward to your prompt response.

Sincerely,



Jon Tester
United States Senator



Brian Schatz
United States Senator