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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

November 14, 2011

Via Electronic Transmission

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

I write to express my concerns regarding the perpetual delays for resolving Federal Bureau of Investigation (FBI) whistleblower cases at the Department of Justice (DOJ). As you are well aware, I am a long-standing advocate for whistleblower rights. Whistleblowers point out fraud, waste, and abuse when no one else will, and they do so while risking their professional careers. Whistleblowers have played a critical role in exposing failed government operations such as Operation Fast and Furious, and retaliation against whistleblowers should never be tolerated. Thus, I am concerned about the treatment of whistleblowers at the FBI, specifically in the cases of Jane Turner and Robert Kobus. The process of resolving whistleblower claims appears to be broken.

Jane Turner was a career FBI agent with an outstanding record for conducting investigations involving missing and exploited children. Agent Turner filed a whistleblower complaint with the Department of Justice, Office of the Inspector General (OIG), in 2002 when she discovered that FBI agents removed items from Ground Zero following the terrorist attacks of 9/11. Unfortunately, Agent Turner was forced to file an appeal to the Office of Attorney Recruitment and Management (OARM) due to the OIG's delayed decision in their investigation. Ultimately, the OARM substantiated her allegations in May, 2010, and the FBI was ordered to provide Agent Turner back pay, attorney's fees, and other relief. It is my understanding that the FBI filed an appeal to the Deputy Attorney General concerning the issue of back pay, despite the FBI's failure to raise the issue of back pay during previous OARM proceedings, and the case was remanded, in part, back to OARM for further review of the back pay issue. Consequently, a final resolution to Jane Turner's reprisal case against the FBI is now further delayed by the Deputy Attorney General's curious decision. Given the already excessive delays in this case, the ruling by the Deputy Attorney General postpones a judgment that should have come much sooner. I remind you that Agent Turner initially filed her complaint approximately 9 years ago, and she has yet to receive a final decision. Any reasonable person would agree that 9 years is extreme and unacceptable.

Robert Kobus is a 30 year non-agent employee of the FBI who disclosed time and attendance fraud by FBI agents. The OIG also conducted an investigation into these allegations and substantiated that he was retaliated against for protected whistleblowing. The FBI management not only demoted Mr. Kobus to a non-supervisory position, but they even went so far as to move him from his office to a cubicle on the vacant 24th floor of the FBI's office building. Nevertheless, the OIG's findings were referred to OARM for adjudication and Mr. Kobus' case has now languished in bureaucratic red tape for approximately 4 years.

I'm confident you would agree that a cumulative 13 years is an excessive amount of time to complete two whistleblower investigations. You previously stated during your testimony to the Senate Judiciary Committee that you will "ensure that people are given the opportunity to blow the whistle and they will not be retaliated against, and then to hold accountable anybody who would attempt to do that."¹ You also stated that, "I have seen their [whistleblowers'] utility, their worth, and, frankly, the amount of money that they return to the Federal Government. And they serve a very, very useful purpose."² The Deputy Attorney General, in his responses to congressional "Questions for the Record", asserted he would "work with the Judiciary Committee and the independent Office of Special Counsel, which investigates and prosecutes violation of law, including reprisals against whistleblowers, to provide timely and accurate information to the Congress."³ He further pledged he would "not tolerate unlawful retaliation against any Department of Justice employee, including FBI employees" and he would "work to ensure that there are adequate safeguards so that whistleblowers receive all of the protections to which they are entitled by law."⁴ I would ask that you honor these statements and ensure these cases, and others like them, are investigated and decided in a reasonable timeframe.

Given your previously stated support for whistleblowers, I presume that you would agree that DOJ is sending the wrong message to whistleblowers by taking an inordinate amount of time to issue final declarations for Agent Turner and Mr. Kobus. The excessive time the OARM has taken to issue a final judgment, which is further exacerbated by the Deputy Attorney General's recent decision in Agent Turner's case, has cast your department in a dubious light regarding your stated support for whistleblowers. These excessive delays indicate that the process of adjudicating a FBI whistleblower claim is broken. Consequently, I ask that you review these matters and ensure that the OARM and the Deputy Attorney General conduct their respective reviews in a transparent and expeditious manner. While I appreciate that allegations of fraud, waste, and abuse must be properly investigated, Agent Turner and Mr. Kobus deserve transparency in the process and finality to their cases.

Thank you for your cooperation and attention to this important matter. I request you provide a written response to this letter no later than November 21, 2011.

¹ Committee on the Judiciary, United States Senate, Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States, January 15 & 16, 2009

² *Id.*

³ Responses to Questions for the Record of the June 15, 2010 Confirmation Hearing of James M. Cole, Nominee to be Deputy Attorney General

⁴ *Id.*

Sincerely,



Charles E. Grassley
Ranking Member

Cc: The Honorable Patrick Leahy
Chairman



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 30, 2011

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letter dated November 14, 2011, in which you express concern about delays in resolving FBI whistleblower reprisal cases. The Department shares your concerns and has recently implemented several changes to improve the effective and efficient adjudication of FBI whistleblower cases.

The time required for the Department's final resolution of an FBI whistleblower case is dependent upon a number of factors, including: the complexity of the legal and factual issues presented; the time for and extent of discovery; the time for the parties' respective briefs on the issues; the number and procedural posture of other such cases pending at one time; and whether the parties proceed to a hearing before the Director of the Office of Attorney Recruitment and Management (OARM), where the parties have the opportunity to call and cross-examine witnesses. In some instances, delay results from stay requests and requests for extension of the deadlines for discovery and submissions of briefs made by the parties. For example, in one of the cases you cite, a party asked for a stay to pursue a concurrent Title VII case. To allow the complainant/employee claiming retaliation the fairest opportunity to pursue redress, the Department has been very willing to grant such requests.

This is not to suggest that such requests are the sole or even most significant cause for delay. The legal requirements and various stages of review in adjudication of an FBI whistleblower case also affect case processing time. Before a complainant may file a request for corrective action with OARM, the complainant must first file a complaint of reprisal with either the Department's Office of Professional Responsibility (OPR) or Office of the Inspector General (OIG). The complainant may then file with OARM, but only within certain time requirements, *i.e.*, either within 60 calendar days of receipt of notification from the Conducting Office¹ that it is terminating its investigation, or any time after 120 calendar days from the date the complainant first filed the complaint of reprisal with the Conducting Office if the complainant has not been notified by the Conducting Office that it will seek corrective action. To enforce corrective action, the matter must be brought to OARM (*See* 28 C.F.R. § 27.3-27.4).

¹The term "Conducting Office" refers to whichever of OIG or OPR examines the initial complaint.

After filing with OARM, the complainant must establish jurisdiction over the claim by making a nonfrivolous allegation that the complainant made a protected disclosure that was a contributing factor in the FBI's decision to take, or fail to take (or threaten to take or fail to take), a personnel action. An employee who establishes jurisdiction, must then prove the merits of the allegations by preponderant evidence. If the employee meets that burden, OARM may order corrective action as appropriate and authorized by the regulations, unless the FBI proves by clear and convincing evidence that it would have taken the same personnel action in the absence of the employee's protected disclosure. As these are adversarial proceedings, the parties at each stage require time to present motions and written and/or oral arguments, and to conduct discovery. The parties have the opportunity to seek review of any final determination by the Deputy Attorney General.

As noted above, the Department has recently implemented several changes to significantly shorten the adjudication of FBI whistleblower cases. OARM has adopted a number of procedural guidelines modeled after those utilized by the administrative judges of the U.S. Merit Systems Protection Board to substantially reduce case processing time. A copy of OARM's case processing directive, effective October 14, 2011, is attached and can also be found on OARM's FBI whistleblower website at: <http://www.justice.gov/oarm/wb/whistleblowers.htm>.

The Department has also devoted additional resources to this task. While the current number of cases on OARM's docket is relatively small, the number of cases pending at one time fluctuates and can be heavily impacted by cases in which complex and novel factual and legal issues are presented, and where discovery is extensive and contentious. To expedite the resolution of pending cases, the Department has funded an attorney detail position to augment the staff conducting case reviews. A senior-level official from the U.S. Merit Systems Protection Board with extensive experience has filled the position. The Department will continue to closely monitor these changes to assess their impact on the process, and will make further adjustments as needed.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,



Ronald Weich
Assistant Attorney General

cc: The Honorable Patrick Leahy
Chairman

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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DIANNE FEINSTEIN, CALIFORNIA
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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 31, 2011

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

Via Electronic Transmission

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Attorney General Holder and Director Mueller:

I write to express my concerns regarding recent legal developments involving the anthrax-laced letters the Federal Bureau of Investigation (FBI) alleges were mailed by Army scientist Bruce Ivins in 2001. It is my understanding that the Department of Justice (DOJ), in attempting to defend the government from a wrongful death suit filed by one of the victims of the 2001 anthrax attacks, filed documents in the Federal District Court for the Southern District of Florida that seemingly contradicted previous information provided to congressional leadership and the American people. These court documents initially indicated that the DOJ no longer believed that Dr. Ivins created refined anthrax powder in his laboratory. This information seemed to directly refute previous investigative information uncovered by the FBI which specifically identified his access to specialized laboratory equipment as a justification for the investigation of Dr. Ivins, and evidence that he was the lone suspect and would be found guilty beyond a reasonable doubt.

However, after the filing was made public and the differing positions were highlighted by the media, the DOJ subsequently filed court documents and attempted to retract the information that appeared to dispute the FBI's investigation of Dr. Ivins. The DOJ clarified that Dr. Ivins did in fact possess a machine, referred to in court documents as a lyophilizer, which could be used to dry anthrax spores. Nevertheless, the lyophilizer was not directly located in his laboratory, and scientific colleagues that worked with Dr. Ivins continue to assert in sworn depositions that it was virtually impossible for Ivins to create anthrax spores in his laboratory. While DOJ was ultimately successful in amending its filing in this civil case, the sworn depositions of two government employees continue to contradict the FBI's case that Dr. Ivins could have produced anthrax.

The FBI has consistently asserted that Dr. Ivins created anthrax powder in his laboratory while he was employed at the U.S. Army Medical Research Institute of Infectious Diseases at Fort Detrick, MD. This allegation was based in part on Dr. Ivins' access to specialized equipment. Moreover, the FBI emphasized that Dr. Ivins laboratory time significantly increased prior to the mailing of the letters, thus enhancing the circumstantial evidence of the investigation.

Unfortunately, the DOJ and FBI never obtained a criminal indictment of Dr. Ivins prior to his suicide in 2008.

My concern is accentuated by the apparent contradiction of the DOJ court documents to the original FBI investigation, the subsequent attempt to retract that information and the federal judge's ruling that the DOJ Civil Division "show good cause" to justify a modification to the original court filing. The DOJ original court filing seemingly eliminated the FBI's previous circumstantial evidence associated with Dr. Ivins without providing any additional insight as to the means and methodology he may have used to create the anthrax powder. This is particularly troubling given the February 2011 report by the National Academy of Sciences which questioned the FBI's previous analysis correlating the mailed anthrax to that of the supply maintained by Dr. Ivins in his laboratory.

While I recognize the FBI has concluded their investigation into the matter, the recent confusion created by the DOJ has produced a new set of questions regarding this unsolved crime. Consequently, I request that the DOJ and the FBI provide a briefing to my staff so that I may better understand the situation and determine why it appears, at the least, that the right hand and left hand of the DOJ do not know what the other is doing. The obvious ramifications of this matter require objective and honest answers. Further, I would like this briefing to include an update on the outstanding investigation into whom at the DOJ and/or FBI leaked information to the press regarding the investigation of Dr. Steven Hatfill. As you are well aware, this investigation into the leak to the media has been ongoing for a number of years and yet, no individuals have been publicly named or reprimanded. I find this particularly troubling given that the American taxpayers ultimately picked up the tab and paid Dr. Hatfill nearly \$6 million as a settlement in a civil case.

Thank you for your cooperation and attention to this important matter. I appreciate you scheduling this briefing with my staff as soon as possible.

Sincerely,



Charles E. Grassley
Ranking Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 23, 2011

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letter to the Attorney General and the Director of the Federal Bureau of Investigation, dated August 31, 2011, regarding the investigation of the 2001 anthrax letter attacks. We understand that you have concerns regarding recent developments in the wrongful death suit filed by the family of the first victim of the anthrax letter attacks, *Stevens v. United States*, pending in the Southern District of Florida.

You expressed concern that documents filed in the civil action "seemingly contradicted previous information provided to congressional leadership" and "indicated that the DOJ no longer believed that Dr. Ivins created refined anthrax powder in his laboratory." The motion for summary judgment filed by the Department's Civil Division in this litigation does not contradict the findings in the FBI criminal investigation. To the contrary, the Department has stated in defending the civil action "that the evidence would show that Dr. Ivins was the anthrax assailant." That statement was specifically recited no fewer than 15 times in the dispositive motion filed by the Department.

The issue raised by the United States in its motion did not pertain to whether Dr. Ivins was responsible for the anthrax attacks or whether he could have created the anthrax powder in his laboratory. The issue raised by our motion is whether the Army failed to properly oversee and supervise operations at the United States Army Medical Institute of Infectious Disease (USAMRIID) such that the agency was negligent in failing to anticipate and prevent the theft of liquid anthrax and its conversion into powder for use in the attacks. As stated in our motion and supporting documents, we believe that under applicable Florida tort law, the tragic death of Mr. Stevens from anthrax spores was not a "foreseeable" consequence of USAMRIID's anthrax research operations, given the unprecedented nature of the attacks, the substantial distance between the research and exposure, and the intervening transformation of laboratory material into the form used in the attacks.

As explained in our motion, in that limited respect, the transformation of the liquid anthrax (which was the form of viable anthrax used in research at the Army lab) into powdered form required a number of steps that were outside of USAMRIID's standard anthrax research practices. Also, in the higher biosafety level containment unit where researchers, including Dr. Ivins, had access to live anthrax in liquid form, there was no lyophilizer, specialized equipment that might have been used to dry the anthrax into powder. Accordingly, as the motion states, for proximate cause purposes under Florida law, it was not *foreseeable* to the Army at the time of the events alleged in the *Stevens* complaint that Dr. Ivins, or any other person employed at the facility, was in a position to accomplish such criminal acts. Nothing in that filing, however, is inconsistent with our conclusions that Dr. Ivins actually prepared the powdered anthrax that killed Mr. Stevens and that he did so at USAMRIID. While several of Dr. Ivins' former colleagues may have doubts about his ability to surreptitiously produce the anthrax powder in the specialized equipment available to him at the lab, we are convinced that he did so based upon the totality of the evidence developed in the criminal investigation, which has been previously briefed to the Senate Judiciary Committee. The doubts of his colleagues only underscore our view that Dr. Ivins' actions were not foreseeable under Florida tort law.

The Department's supplemental filing was not a retraction but a clarification that, although there was no lyophilizer available in the same BSL-3 containment unit where researchers had access to the liquid anthrax in the Army lab, there was a lyophilizer available in a BSL-2 containment unit in close proximity to the BSL-3 containment unit where the liquid anthrax was stored. That clarification was submitted both to ensure that the pleading was technically accurate, and also to counter a misconstruction of the government's motion that was reflected in the media at the time, suggesting that the Department had effectively contradicted its findings in the criminal investigation by contending in the civil case that it was "impossible" for Dr. Ivins to have produced the anthrax powder. No such assertion was made in the original or supplemental civil filing, which only identified the location of the lyophilizer as one of several elements that made the transformation of liquid anthrax to powdered form unforeseeable to USAMRIID officials, for tort law purposes. The court's decision to allow the government's supplemental filing, based upon a finding of "good cause," indicates a recognition that the Department sought only to clarify its prior filings, not to present contradictory theories.

It is also noteworthy that, even before the referenced motions were filed, the Department filed a motion in the civil action requesting, in substance, that the court require plaintiffs to acknowledge there had been no evidence presented in the case that would support a conclusion that anyone other than Dr. Ivins perpetrated the anthrax attacks. Any suggestion that the Department's position in the civil action has at any point conflicted with its earlier conclusions in the criminal investigation – that it would have proven Dr. Ivins's guilt beyond a reasonable doubt – is clearly rebutted by this record.

The Honorable Charles E. Grassley
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You also have asked about alleged leaks related to this investigation. After an extensive investigation, career prosecutors concluded that, based upon the Principles of Federal Prosecution, criminal charges were not appropriate in this matter. The Department does not identify individuals who may be the subject of internal deliberations regarding administrative action. Further, as you know, the Department settled a civil suit with Dr. Hatfill based on disclosures about him.

We hope this information is helpful and clarifies our position in this matter. In light of the pending litigation, it would be difficult for us to provide a briefing, but please let us know if you have additional questions. Please do not hesitate to contact this office if we may provide additional assistance regarding any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'R Weich', written in a cursive style.

Ronald Weich
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Chairman

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

October 5, 2011

Via Electronic Communication

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

On September 30, 2011, it was reported that Anwar al-Awlaqi was killed in an operation conducted by the United States in Yemen. According to media accounts, the operation was conducted following the issuance of a secret memorandum issued by the Department of Justice authorizing the targeted killing of a U.S. citizen abroad. The published accounts include details provided by "administration officials" and describe the memorandum as the product of a review of legal issues raised by targeting and killing a U.S. citizen.

As the Ranking Member of the Committee on the Judiciary, I request that you provide a copy of the memorandum described in press accounts to the Committee for review. This document should be made available, along with any other corresponding, related, or derivative memoranda that were prepared as part of drafting the memorandum. The memorandum should be made available in an unredacted manner. Should the memorandum be classified, please alert my staff so appropriate procedures can be followed to transmit the document.

Thank you for your cooperation and attention to this important matter. I would appreciate your response, including the requested memorandum, no later than October 21, 2011.

Sincerely,



Charles E. Grassley
Ranking Member



U.S. Department of Justice

Office of Legislative Affairs

Assistant Attorney General

Washington, D.C. 20530

August 8, 2011

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letters to the Attorney General dated May 16, 2011, and July 29, 2011 regarding a possible criminal investigation or prosecution of Ali Mussa Daqduq. We are sending an identical response to the other Members who joined in your letter to us.

As you know, Ali Mussa Daqduq is currently in United States military custody in Iraq and we refer you to the Department of Defense for information concerning his status. The ultimate disposition of this matter is under consideration by an interagency process that includes the Department of Defense, the Intelligence Community, the State Department, the Department of Homeland Security, and the Department of Justice.

The Department remains committed to using all available tools to fight terrorism, including prosecution in military commissions or Article III courts, as appropriate. The decision to utilize one tool versus another will be made by the members of the interagency review process based on the facts and the law, and guided by the national security interests of the United States.

In addition, you have asked about a July 2009 letter regarding Laith and Qais al Khazali. We understand that this letter was addressed to the White House, not to the Justice Department, but now that you have brought it to our attention we will assist in ensuring that an appropriate response is provided.

We appreciate your interest in this matter. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Chairman