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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

September 17, 2014

**Via Electronic Transmission**

The Honorable Gene Dodaro  
Comptroller General  
U.S. Government Accountability Office  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Mr. Dodaro:

As a result of attorney misconduct in the Department of Justice's (DOJ) failed prosecution of the late Senator Ted Stevens, in Fiscal Year 2013 Congress directed the Government Accountability Office (GAO) to conduct a review of, among other things:

the policies and practices of DOJ in paying or reimbursing the attorneys['] fees and costs of departmental employees in actions relating to this case, and allegations of contempt of court or prosecutorial misconduct, including an accounting of funds paid from calendar years 1997 to 2012. The report shall also evaluate the Department's performance in disciplining prosecutors who are found to have engaged in prosecutorial misconduct or contempt of court.<sup>1</sup>

Whether they work at Justice Department headquarters or one of the 94 U.S. Attorneys' Offices (USAOs) around the country, accountability for prosecutors is important because it fulfills a basic expectation from the general public that the government will be held to the same standards as everyone else.

If anything, employees of the United States government, especially prosecutors, should be held to a *higher* standard because of their positions of public trust. Attorneys for the government routinely prosecute other individuals for failure to abide by the law. If prosecutors violate federal statutes, they too should be similarly held accountable.

Investigations of a DOJ employee's misconduct in the employee's role as an attorney are handled by the DOJ Office of Professional Responsibility (OPR), while misconduct that is not specific to an attorney's role is investigated by the DOJ Office of Inspector General (OIG). Recently, the OIG sent me a report of its non-public

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<sup>1</sup> Senate Committee on Appropriations, *Report on the Departments of Commerce and Justice, and Science, and Related Agencies Appropriations*, United States Senate, 112<sup>th</sup> Congress, S. REP. NO. 112-158 (2012).

investigations. Several of the cases in the report raised questions for me about whether federal prosecutors are subjected to a double standard when it comes to accountability.

For example, one Assistant U.S. Attorney (AUSA) whose spouse was engaged in embezzlement made misleading and contradictory statements to the Federal Bureau of Investigation (FBI), the USAO, and the OIG. The statements pertained to how and when she learned of her spouse's criminal activities, the circumstances surrounding an alleged fraudulent transfer of property, and her husband's ownership in the property.<sup>2</sup> According to the United States Code, it is illegal to knowingly and willfully make any materially false or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States.<sup>3</sup> Yet the AUSA's only punishment was apparently a verbal admonishment.<sup>4</sup>

In a second case, an AUSA used his government computer to send official documents from matters occurring before a grand jury to his spouse, who was employed as a paralegal with a private law firm.<sup>5</sup> As stated in the Federal Rules of Criminal Procedure, an attorney for the government must not disclose a matter occurring before the grand jury and a knowing violation of this rule is punishable as contempt of court.<sup>6</sup> The OIG concluded that the AUSA violated these rules. However, since the AUSA retired from government service, the OIG summary said that the Executive Office of U.S. Attorneys (EOUSA) was unable to impose any discipline. The OIG provided its report to both EOUSA as well as OPR to determine whether referral to the relevant state bar association would be appropriate, and EOUSA ultimately informed the OIG that the state bar association was notified.<sup>7</sup>

In a third case, an AUSA was recused from a federal investigation due to an existing personal relationship with the investigation's target. Nevertheless, she revealed information about the investigation and an associated Title III wiretap to her spouse, who subsequently disclosed that knowledge to the target of the Title III wiretap.<sup>8</sup> Further, the AUSA initially lied to investigators before finally admitting that she might have "said something" to her spouse about the investigation.<sup>9</sup> A Title III intercept is both costly and in many cases a last resort, used because no other options are viable. According to 18 USC § 2511, a Title III intercept is used because normal investigative procedures have been attempted and have failed, or reasonably appear to be too dangerous or unlikely to succeed if attempted.<sup>10</sup> According to the Administrative Office of the United States Courts, the average cost of a Title III intercept in 2013 was

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<sup>2</sup> Letter from Inspector General Michael E. Horowitz to Ranking Member Charles E. Grassley and Ranking Member Tom Coburn, Jul. 14, 2014, at 6-7 [hereinafter OIG summaries].

<sup>3</sup> 18 USC § 1001(a)(2).

<sup>4</sup> OIG summaries at 7.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> Federal Rules of Criminal Procedure, Rule 6(e)(2)(B) and Rule 6(e)(7).

<sup>7</sup> OIG summaries at 7.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.*

<sup>10</sup> 18 USC § 2511.

\$43,361.<sup>11</sup> It is unclear how many federal statutes were violated by the AUSA in the course of this case, which potentially tainted an investigation at a significant cost to the taxpayer. Yet once again the AUSA retired from government service, apparently before the EOUSA even proposed any discipline.<sup>12</sup> It is unclear whether OPR or the relevant state bar association was ever notified.

These cases raise a larger issue. Not only did the case of Senator Stevens raise questions about prosecutorial misconduct at DOJ headquarters, each of the 94 USAOs around the country operate with a great deal of independence, and very little oversight. During my investigation into the Bureau of Alcohol, Tobacco, Firearms, and Explosives' Operation Fast and Furious, it was disturbing to learn that many DOJ officials believed that it was not the role of DOJ headquarters to supervise USAOs. On the contrary, all components of the federal government should be subject to meaningful oversight and accountability. That includes USAOs.

Therefore, in an effort to gain a better understanding of how DOJ ensures accountability for prosecutors, I request that in the course of its ongoing work, GAO also evaluate and report on the following:

- 1) What role do OPR, EOUSA, and the relevant USAO play in the discipline of AUSAs for misconduct in an employee's role as an attorney?
- 2) What role do EOUSA and the relevant USAO play in the discipline of AUSAs for misconduct that is unrelated to an employee's role as an attorney?
- 3) How does a finding by the OIG of misconduct that is unrelated to an employee's role as an attorney affect an AUSA's ability to prosecute future cases, both as a matter of policy and as a practical matter?
- 4) If an AUSA is found by the OIG or OPR to have been engaged in misconduct, does EOUSA have policies regarding who authorizes prosecution or the declination of prosecution? What happens in actual practice?
- 5) Does EOUSA have policies on whether other relevant magistrate and law enforcement agencies should be notified of an AUSA's misconduct as determined by the OIG or OPR? If not, why not? If so, do USAOs actually follow this guidance in practice?
- 6) Does EOUSA have policies on whether state bar associations should be notified of an AUSA's misconduct as determined by the OIG or OPR? If not, why not? If so, do USAOs actually follow this guidance in practice?

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<sup>11</sup> Administrative Office of the U.S. Courts, Wiretap Report 2013, available at <http://www.uscourts.gov/Statistics/WiretapReports/wiretap-report-2013.aspx> (accessed September 5, 2014).

<sup>12</sup> OIG summaries at 9.

- 7) What tools does DOJ use to evaluate the collective and individual performance of USAOs?
- 8) What oversight structures, if any, does DOJ have in place to oversee USAOs? To what extent are those oversight structures effective?

If you have any questions about this request, please contact Tristan Leavitt of my staff at 202-224-5225. I look forward to your response.

Sincerely,



Charles E. Grassley  
Ranking Member