

United States Senate

WASHINGTON, DC 20510

May 19, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Sally Quillian Yates
Deputy Attorney General
U.S. Department of Justice

Dear Deputy Attorney General Yates:

As you know, we have written to the Justice Department in the past to express our concerns about the Department's handling of allegations of misconduct by federal prosecutors. First, in September 2014, Senator Grassley sent a letter to the Justice Department's Executive Office for United States Attorneys (EOUSA) and the Government Accountability Office (GAO) after the Office of Inspector General (OIG) published a report indicating that the Department did not prosecute multiple cases in which federal prosecutors violated the law.¹ Shortly thereafter, in March 2015, we wrote to you concerning the Department's similarly problematic handling of prosecutorial misconduct in litigation relating to the California "Moonlight Fire" of 2007.² Today, we write regarding the questionable actions of federal prosecutors in connection with the prosecution of Vascular Solutions, Inc. and its CEO Howard Root.³

Following the acquittal of Vascular Solutions and Mr. Root, press reports indicated that federal prosecutors displayed poor judgment throughout the course of the prosecution, and repeatedly engaged in behavior that appears to violate the Federal Rules of Criminal Procedure.⁴ The alleged misconduct included, making false and misleading public allegations about Vascular Solutions.⁵ According to one report, the prosecution team failed to thoroughly investigate the matter before bringing charges.⁶ Even more concerning, court records indicate that federal prosecutors may have divulged confidential grand jury testimony to other witnesses in violation of grand jury secrecy rules.⁷

¹ Letter from Sen. Charles E. Grassley, Ranking Member, Sen. Comm. on the Judiciary, to Monty Wilkinson, Director, Executive Officer for United States Attorneys, U.S. Department of Justice (Sep. 17, 2014); Letter from Sen. Charles E. Grassley, Ranking Member, Sen. Comm. on the Judiciary, to Gene Dorado, Comptroller General, U.S. Accountability Office (Sep. 17, 2014).

² Letter from Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, and Sen. Mike Lee, Member, Sen. Comm. on the Judiciary, to Hon. Sally Q. Yates, Acting Deputy Attorney General, U.S. Department of Justice (Mar. 27, 2015).

³ *United States v. Vascular Solutions, Inc., et al.*, No. 5:14-CR-00926-RCL (W.D. Tex.).

⁴ See Fed. R. Crim. P. (6)(e); "No Justice for Business." Editorial. *Wall Street Journal*, Apr. 15, 2016 [hereinafter, Wall Street Journal Article]; Joe Carlson, "Device CEO acquitted in off-label case," *Star Tribune*, Feb. 28, 2016 [hereinafter StatTribune Article]; Dana A. Elfin, "Vascular Solution, CEO Found Not Guilty in Off-Label Case," *Bloomberg BNA*, Mar. 1, 2016, available at <http://www.bna.com/vascular-solutions-ceo-n57982067945/> [hereinafter Bloomberg Article].

⁵ Wall Street Journal Article; Bloomberg Article.

⁶ StatTribune Article.

⁷ See Defendant's Memorandum in Support of Motion to Dismiss the Indictment Based on Government Misconduct at 19-22, No. 5:14-CR-00926-RCL (W.D. Tex. August 13, 2015), ECF No. 84.

Further, according to the attorneys for Vascular Solutions, whom are former Justice Department officials, the grand jury process was misused to subject witnesses to interviews outside of the grand jury, without the assistance of counsel. Each interview allegedly began with the administration of the oath to the witnesses by government attorneys. As you are aware, prosecutors are not authorized to administer the oath to a grand jury witness.⁸ And finally, and perhaps most alarming, it is alleged by attorneys for Vascular Solutions that government attorneys levied threats to urge witnesses to alter testimony in support of the government's position. For example, it is alleged that:

- At least five fully immunized employees were informed that if they did not change their testimony, they could be subject to prosecution for perjury or recommended for exclusion from participation in Medicare and Medicaid.
- Other employees were told that if they did not change their testimony they would receive target letters or that their employment was in jeopardy.

As we have previously noted, prosecutors must be held to the same standards as the general public and are accountable for their conduct as representatives of the United States. To that end, the Inspector General Access Act of 2015 was introduced, a bipartisan effort that we fully support. This legislation would transfer review of allegations of prosecutor misconduct from the Office of Professional Responsibility to the Office of the Inspector General, which currently investigates misconduct allegations involving all non-attorney Department employees. The repeated failures of some prosecutors to live up to the Department's own standards, combined with the lack of adequate redress for parties harmed in these cases, highlight the need for responsive and unbiased internal mechanisms to respond to allegations of misconduct by Department attorneys.

To address our concerns and to shed more light on the potential wrongdoing of government attorneys, please answer the following:

1. Court records suggest that Department attorneys used grand jury subpoenas in this case to induce witnesses to be examined under oath, outside the presence of the jury, and without their counsel being present.
 - a. Describe the facts and events relating to the prosecutors taking testimony under grand jury conditions outside the presence of the grand jury.
 - b. Has the Department reviewed these events and concluded whether they violated the practices outlined in the United States Attorneys' Manual or any ethical standards enforced by the Department? Describe what action the Department has taken, if any, to review these events. If no action has been taken, please explain why not.
 - c. Is this an accepted practice or policy of the Department? If not, please identify what steps have been taken, or will be taken, to train Department attorneys not to engage in this practice again in the future.
 - d. If this is not an accepted practice or policy of the Department, what disciplinary steps have been taken, or will be taken, against the offending attorneys?

⁸ 28 U.S.C. §§ 459 & 953.

2. Court records indicate that Department attorneys divulged portions of grand jury testimony of certain witnesses to other witnesses.
 - a. Describe the facts and events relating to the prosecutors' apparent failure to follow the Department's Grand Jury Manual.
 - b. Has the Department reviewed these events and concluded whether these prosecutors violated (6)(e) of the Federal Rules of Criminal Procedure or any ethical standards enforced by the Department? Describe what actions the Department has taken, if any, to review these events. If no action have been taken, please explain why not.
 - c. Is this an accepted practice or policy of the Department? If not, please identify what steps have been taken, or will be taken, to train Department attorneys not to engage in such use of grand jury testimony again in the future.
 - d. If this is not an accepted practice or policy of the Department, what disciplinary steps have been taken, or will be taken, against the offending attorneys?
3. Court records indicate that after a witness made statements and gave testimony that contradicted the prosecutors' theory, the prosecutor informed the witness that if they did not change their testimony, the prosecutor would recommend criminal perjury charges against them and recommend their exclusion from federal healthcare programs.
 - a. Describe the facts and events relating to any prosecutor informing any witness to change their testimony or face criminal prosecution or exclusion from federal healthcare programs.
 - b. Has the Department reviewed these events and concluded whether the prosecutors violated the practices outlined in the United States Attorneys' Manual or any ethical standards enforced by the Department? Describe what actions the Department has taken, if any, to review these events. If no action has been taken, please explain why not.
 - c. Is this an accepted practice or policy of the Department? If not, please identify what steps have been taken, or will be taken, to train Department attorneys not to engage in this practice again in the future.
 - d. If this is not an accepted practice or policy of the Department, what disciplinary steps have been taken, or will be taken, against the offending attorneys?
4. Court records indicate that when a witness made statements and gave testimony that contradicted the prosecutors' theory, the prosecutors read verbatim excerpts from grand jury transcripts of two other Vascular Solutions employees and informed the witness that if they did not change their testimony, the prosecutor would recommend criminal perjury charges against them and ask Vascular Solutions to terminate their employment.
 - a. Describe the facts and events relating to any prosecutor informing any witness to change their testimony or face criminal prosecution or less or employment.
 - b. Has the Department reviewed these events and concluded whether the prosecutors violated the practices outlined in the United States Attorneys' Manual or any ethical standards enforced by the Department? Describe what actions the Department has taken, if any, to review these events. If no action has been taken, please explain why not.

- c. Is this an accepted practice or policy of the Department? If not, please identify what steps have been taken, or will be taken, to train Department attorneys not to engage in this practice again in the future.
 - d. If this is not an accepted practice or policy of the Department, what disciplinary steps have been taken, or will be taken, against the offending attorneys?
5. With respect to these allegations, has OPR initiated an investigation of any of the Justice Department employees involved in this case? If not, why not?

Please number your responses according to their corresponding questions and respond no later than June 2, 2016. Thank you in advance for your cooperation with this request. If you have questions, please contact Josh Flynn-Brown of Senator Grassley's Judiciary Committee staff at (202) 224-5225 and William Levi of Senator Lee's Judiciary Committee staff at (202) 224-2791.

Sincerely,



Mike Lee
Member

Charles E. Grassley
Chairman