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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
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November 15, 2016

The Honorable Loretta E. Lynch
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Lynch:

I write concerning allegations of a conflict of interest that potentially affected a plea agreement in a criminal case that was negotiated by the United States Attorney's Office (USAO) for the Eastern District of Louisiana. FBI Special Agent (SA) Michael Zummer has reported to this Committee that a relationship between then-First Assistant United States Attorney (AUSA) Fred Harper and defense attorney Ralph Capitelli may have resulted in a lenient plea agreement for former St. Charles district attorney Harry Morel.

Mr. Morel has admitted to soliciting sex from female defendants and female family members of defendants during his time as the St. Charles district attorney. However, Mr. Morel was not charged with any sexual offenses. Rather, Mr. Morel received a three-year sentence in 2016 after pleading guilty to a single count of obstructing justice. AUSA Harper and Mr. Capitelli, who represented Mr. Morel, owned a condominium together until March 2013 when AUSA Harper transferred his ownership to his girlfriend.

The FBI opened a covert investigation into Mr. Morel's conduct in 2009. The USAO initially declined to prosecute Mr. Morel in 2013. AUSA Harper was reportedly directly involved in that decision. SA Zummer filed a complaint with the Office of Inspector General (OIG) in May 2013 against AUSA Harper for failing to recuse himself from matters involving Mr. Capitelli. SA Zummer reported to this Committee that he experienced retaliation as a result of his OIG complaint, including from AUSAs who declined to prosecute SA Zummer's cases. Additionally, in March 2014, the USAO reportedly refused to accept the FBI's referral of SA Zummer to serve as a Special Assistant United States Attorney to prosecute FBI cases.

In 2015, under the leadership of a new United States Attorney, Ken Polite, the USAO reopened the case against Mr. Morel. However, according to SA Zummer, AUSAs were resistant to prosecuting the case, in part, because SA Zummer's OIG complaint would become public and could damage the public's perception of the USAO. When it became apparent that the USAO would not indict Mr. Morel, but would seek a plea agreement, SA Zummer expressed his intent to report concerns to the court about the conflict of interest between AUSA Harper and Mr. Capitelli. SA Zummer drafted a letter to the presiding judge in Mr. Morel's case, Judge Kurt

Engelhardt. It explained the conflict of interest between AUSA Harper and Mr. Capitelli, and alleged a loss of impartiality related to the USAO's handling of the case. Despite submitting the letter to entities within the FBI and OIG for review, SA Zummer was unable to obtain advice on whether he could permissibly send the letter to the court. On August 15, 2016, SA Zummer submitted the letter to Judge Engelhardt. The FBI consequently suspended SA Zummer's security clearance and suspended him indefinitely without pay. That looks like it could be a misuse of the security clearance process to mask retaliation for protected whistleblowing.

Judge Engelhardt characterized SA Zummer's allegations as "particularly interesting" and "troubling, to say the least."¹ He wrote in a court order that "the legitimate concerns of FBI Special Agent Zummer—that the Department of Justice is either unable or unwilling to self-police lapses of ethics, professionalism and truthfulness in its ranks—are shared by the undersigned, particularly over the last few years."²

SA Zummer's communications to this Committee and to the Office of Inspector General (OIG) are protected whistleblower disclosures. FBI employees have rights to furnish information to Congress, the OIG, or the OPR, without interference or retaliation.³ Furthermore, FBI personnel have Constitutional rights to express their concerns to Congress under the First Amendment. Whistleblowers are some of the most patriotic people I know—men and women who labor, often anonymously, to let Congress and the American people know when the Government is not working so we can fix it. As such, it would be prudent for you to remind the USAO and FBI management about the value of protected disclosures to Congress and/or Inspectors General in accordance with whistleblower protection laws.

This Committee seeks a better understanding of the Department's response to these allegations. Accordingly, please provide the following information and documents by no later than November 29, 2016:

1. When did the Department first become aware of the relationship between AUSA Harper and Mr. Capitelli?
2. Does the Department have concerns regarding the relationship between AUSA Harper and Mr. Capitelli?

¹ Order, *United States v. Morel*, Criminal Action No. 16-50 (E.D. La. Sept. 15, 2016).

² *Id.*

³ 5 U.S.C. § 7211 states: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

5 U.S.C. § 2303(a) states: "Any employee of the Federal Bureau of Investigation . . . shall not . . . take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General"

28 C.F.R. § 27.1(a) states that a "protected disclosure" includes a disclosure to the "Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSID) Internal Investigations Section . . . , the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office."

3. Has the Department taken steps to avoid a conflict of interest—and the appearance of a conflict of interest—that could result from AUSA Harper and Mr. Capitelli's relationship? If yes, please explain. If no, why not?
 - a. Has the Department required AUSA Harper to recuse himself from cases in which Mr. Capitelli is involved?
 - b. If yes, when? How does the Department enforce this requirement? If not, why not, and how is that consistent with the United States Attorneys' Manual?
4. In this particular case, did the Department take steps to ensure that the relationship between AUSA Harper and Mr. Capitelli did not affect the outcome?
5. Please explain in detail AUSA Harper's involvement in this case, including the decision to decline to prosecute in 2013 and in the case in 2016.
6. What steps will the Department take to ensure that AUSAs did not decline to prosecute any of SA Zummer's cases as acts of retaliation for reporting to the OIG?
7. Please explain why the USAO declined to accept SA Zummer as a Special AUSA to prosecute FBI cases? What steps will the Department take to ensure that the USAO's declination was not an act of retaliation for reporting to the OIG? Please provide all documents and communications related to this declination.
8. Did the USAO relay SA Zummer's concerns about AUSA Harper and Mr. Capitelli to AUSA Harper or Mr. Capitelli? If yes, what steps will the Department take to ensure that the USAO's disclosure was not an act of retaliation for reporting to the OIG? Please produce any such communications.
9. Please explain what steps the Department will take to ensure that SA Zummer does experience any future retaliation from the USAO.

Thank you in advance for your cooperation with this request. Please number your responses according to their corresponding questions. If you have questions, please contact Samantha Brennan of my Committee Staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Senate Judiciary Committee

cc: The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation

The Honorable Michael E. Horowitz
Inspector General
United States Department of Justice

Robin C. Ashton
Counsel, Office of Professional Responsibility
United States Department of Justice