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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 James B. Comey, Jr.  
Director  
Federal Bureau of Investigations  
935 Pennsylvania Avenue, NW  
Washington, D.C. 20535

Dear Director Comey:

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 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 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. When it became apparent that the USAO would not indict Mr. Morel, but would seek a plea agreement, SA Zummer notified FBI management of his intent to report his concerns to the court about the conflict of interest between AUSA Harper and Mr. Capitelli. On May 3, 2016, SA Zummer submitted a draft letter for review by the FBI New Orleans Division's Chief Division Counsel for review. The letter was written 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. The FBI's Office of General Counsel instructed SA Zummer to seek approval for the letter from the OIG or Office of Professional Responsibility. SA Zummer subsequently submitted the letter to the OIG.

SA Zummer also submitted the letter to the FBI's prepublication review program to review for disclosure to the court under the First Amendment. The FBI declined to review SA Zummer's letter for disclosure to Judge Engelhardt. SA Zummer submitted the letter to the court on August 15, 2016. 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.

SA Zummer's communications to this Committee and to the OIG are protected whistleblower disclosures. Denying or interfering with FBI employees' rights to furnish information to Congress, the OIG, or the OPR is against the law.<sup>1</sup> 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 FBI management about the value of protected disclosures to Congress and/or Inspectors General in accordance with whistleblower protection laws.

To assist this Committee in gaining a full understanding of the FBI's involvement in this matter, please provide the following information and documents by no later than November 29, 2016:

1. Why did the FBI decline to provide advice to SA Zummer regarding his letter to Judge Engelhardt? Please provide all documents and communications related to the FBI's reviews of the letter, included the reviews conducted by the FBI New Orleans Division's Chief Division Counsel, the Office of General Counsel, and the FBI's prepublication review program.
2. Why did the FBI not support SA Zummer's disclosure of allegations of a conflict of interest and loss of impartiality to Judge Kurt Engelhardt? Why did the FBI not disclose SA Zummer's concerns to the court?

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<sup>1</sup> 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 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-INSD) 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 FBI ever had concerns about the relationship between AUSA Harper and Mr. Capitelli?
4. Did the FBI ever express concerns to the USAO, the Office of Inspector General, or the Office of Professional Responsibility, related to the relationship between AUSA Harper and Mr. Capitelli?
5. Did the FBI ever conduct or assist in an investigation related to the relationship between AUSA Harper and Mr. Capitelli?
6. Please provide all documentation and communications related to the FBI's suspension of SA Zummer's security clearance and his suspension from duties and pay.
7. What steps will you take to ensure that the suspension of SA Zummer's security clearance was not a misuse of the security clearance process to mask retaliation for protected whistleblowing?

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 Loretta E. Lynch  
Attorney General  
United States Department of Justice

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