Chairman Charles E. Grassley
Additional Questions for the Record

Jeanne Davidson
Nominee for U.S. Court of International Trade

<u>Fraud before a Federal Court/Obstruction of Federal Arson Investigation</u>

On December 1, 2014, U.S. Court of Federal Claims Judge Francis Allegra issued an opinion in which he remanded the case of *Dobyns v. U.S*. to the Circuit Court to determine if U.S. Department of Justice attorneys may have committed fraud on the court. Unsealed court documents also raise questions as to whether Judge Allegra has barred you from representing the government in this case. In his opinion, Judge Allegra stated that at least two instances of conduct by defendant's counsel could have constituted fraud on the court.

Interference with re-opening the arson investigation: First, he wrote that ATF Office of Chief Counsel Attorney Valerie Bacon attempted to convince ATF supervisors not to reopen an investigation into the arson of Agent Dobyns' residence because it would damage DOJ's defense in the civil case brought against DOJ by Mr. Dobyns. According to Judge Allegra:

> **On or about March 21, 2013, defendant's attorneys (and their supervisors) received emails from plaintiff's attorney complaining about the contacts made by Ms. Bacon to SAC Atteberry [SAC Atteberry testified that Ms. Bacon told him that if he reopened the investigation it would damage the Civil Division's defense of the lawsuit brought by Mr. Dobyns. Later, defendant's counsel acknowledged these contacts and admitted that Ms. Bacon made the same comments to another ATF agent from the same office.] It appears that defendant's attorneys did not respond to these emails or take any action in response thereto.[1]**
>
> **Defendant's filings regarding this situation demonstrated not only that its counsel—*including supervisors in the Civil Division*, who received email communications on this topic from plaintiff's counsel in March of 2013—were aware of Ms. Bacon's actions prior to the trial in this case, but did nothing to apprise the court of her actions or of the potential that the integrity of these proceedings were at risk.[2] (emphasis added)**

You were one of the DOJ attorneys on this case who received multiple e-mails from plaintiff's counsel on this issue.

Failure to advise the court of a threat against an ATF Internal Affairs investigator: Second, Judge Allegra's December 1, 2014, opinion describes an additional allegation of fraud on the court in which he states Mr. David Harrington, one of the defense counsels on record and someone you directly supervised during this case, failed to advise the court of a

---

[1] *Dobyns v. United States,* U.S. Court of Federal Claims, Opinion dated December 1, 2014 (emphasis added).
[2] *Id*

threat made against an ATF Internal Affairs investigator who testified in the case. Even more worrisome is Judge Allegra's statement that Mr. Harrington threatened the career of this investigator after he requested permission to bring the matter to the Court's attention:

> **…that defendant's attorneys may have committed other violations of the duty of candor, including a potential failure to advise the court that an ATF agent who testified in the case may have been threatened by another witness during the trial. …defendant's counsel ordered the agent in question not to communicate the threat to the court and stated that there would be [career] repercussions if the agent did not follow counsel's instructions. This matter has since been referred to the Office of Professional Responsibility at the Justice Department.** [3]

Judge Allegra also stated "the court finds that significant portions of the testimony of two witnesses [ATF ASAC George Gillett and ATF Agent Charles Higman] unworthy of belief." Based on Judge Allegra's opinion, the government's actions in this case raise serious concerns.

Withholding tape recorded conversations in discovery: In addition to these issues in Judge Allegra's order, the government has also admitted to withholding from pre-trial discovery two tape recorded, exculpatory phone calls between ATF arson investigators and Mr. Dobyns that would have damaged the government's case. Plaintiff's counsel was only made aware of these recordings, which were made when Mr. Dobyns was still being considered as a suspect in the arson of his own home, at a deposition of an ATF arson investigator.

A. On March 21, 2013, you received an e-mail from Mr. Dobyns' attorney which alleged that ATF's Office of Chief Counsel had obstructed justice by attempting to stop the arson investigation from being reopened because it would damage the Civil Division's defense against Mr. Dobyns' civil case. Did you report these allegations to Judge Allegra, the Office of Personal Responsibility or the Inspector General? If not, please explain why not.

Response: I have no recollection of receiving the referenced email in this case, in which I served as the third-level supervisor prior to October 2013. While I was the Director of the National Courts Section, I supervised approximately 150 attorneys (including approximately 15 managers) responsible for an average of 5,000 open cases, including enormous commercial litigation matters and constitutional challenges to statutes enacted by Congress. Mr. Dobyns's attorney sent hundreds of lengthy email messages containing wide-ranging allegations, some of which I knew to be incorrect, to various Civil Division attorneys and officials during early 2013. Additionally, from mid-March until late May 2013, my time in the office was limited because I needed to care for my mother, who was released from the hospital in March 2013 in the final stages of congestive heart failure and liver cancer. I had to arrange for her to be placed in hospice, where she passed away two months later. During this same period, in addition to my own care-giving responsibilities for my mother, I was responsible for hosting and transporting multiple family members who came to town for final visits with my mother.

---

[3] *Id*

B. As Director of the Commercial Litigation Branch of the Civil Division did you have any contact with Valerie Bacon regarding Mr. Dobyns? If so, please describe your contacts in detail.

Response: No.

C. Did you know, prior to the trial, that Valerie Bacon "attempted to convince SAC Atteberry not to re-open the arson investigation" so as not to "damage our civil case"[4]? If so, how and when did you learn of Bacon's conversation with Atteberry?

Response: No.

D. Do you believe Ms. Bacon's actions described by Judge Allegra were appropriate? What steps did you take once you learned of them?

Response: I believe that agencies should not decide to take action, or refrain from taking action, based upon any potential impact upon the government's positions in pending litigation. If ATF's decision whether to open an investigation was influenced by its perceived effect on the government's positions in this or any other pending litigation matter, I would not consider that influence to be appropriate. Upon learning of the alleged actions by Ms. Bacon, I directed the assigned National Courts attorney to investigate immediately and report the facts to the Court.

E. On February 8, 2013, you wrote a letter to Mr. Dobyns' attorney, in response to his various email communications alleging improprieties by Mr. Harrington, stating that you were convinced that his complaints were without merit and that no inappropriate conduct had occurred.

a. What steps did you take to examine the allegations and on what did you base your determination that the complaint was without merit?

Response: Respectfully, I first would like to note that, at the time I sent my letter of February 8, 2013, the main complaint advanced by Mr. Dobyns's attorney concerned a matter unrelated to the allegations that form the basis for these additional questions for the record. The conclusions I reached in the letter (regarding a separate matter that has since been abandoned) were based upon discussions with Mr. Harrington, my familiarity with his excellent performance as a Senior Trial Counsel over many years, and consultations with others. Specifically, I consulted with the Assistant Director with immediate supervisory responsibility over the case, the Deputy Director with second-level supervisory responsibility, and with my immediate supervisor, the Deputy Assistant Attorney General of the Civil Division.

b. Did you question Mr. Harrington as to whether he attempted to discourage an ATF investigator from bringing to the Court's attention that he had been threatened by another witness?

---

[4] *Id*.

Response: No. I first learned of this allegation in September 2014, twenty months after my February 8, 2013 letter, when Judge Allegra issued an order about an *ex parte* telephone call. I left the National Courts Section in October 2013 to become the Director of the Office of Foreign Litigation. Because I no longer had responsibility or authority for National Courts matters in September 2014, I did not question Mr. Harrington about the allegation.

c. Did you ask Mr. Harrington if he had threatened career repercussions against the investigator?

Response: No. As noted above, this allegation arose twenty months after my February 8, 2013 letter and eleven months after I left the National Courts Section to become the Director of the Office of Foreign Litigation.

d. Did you speak to Internal Affairs Investigator Christopher Trainor about these allegations?

Response: No.

e. Who else did you speak to about these allegations?

Response: Because these allegations arose in September 2014, twenty months after my February 8, 2013 letter and almost a year after I left the National Courts Section, I did not speak to anyone about them in preparing my February 8, 2013 letter.

f. What questions did you ask them?

Response: I did not ask anyone questions about these allegations in preparing my February 8, 2013 letter because they were not made until September 2014, twenty months after my letter and almost a year after I left the National Courts Section.

F. Mr. Dobyns' attorney alleges attorneys from your office, in a case you directly worked on, withheld from pre-trial discovery two secretly recorded conversations that were made by an ATF arson investigator at the time when Mr. Dobyns was being considered a suspect in the arson of his own home.

a. Are these allegations correct?

Response: I had no involvement in this discovery matter, and it was not brought to my attention until after it was resolved. Upon hearing from Mr. Dobyns's attorney about the delayed production of two tape recordings, I looked into the matter and determined that the National Courts attorney had not withheld them intentionally. Rather, he had been unaware that they existed until preparing an ATF agent for deposition. Once the National Courts attorney became aware of their existence, he promptly produced them, agreed to extend the discovery deadline, and agreed to recall five witnesses for further

depositions, at the government's expense, to ensure that plaintiff was not prejudiced by the delay in production.

b. If so, when did you become aware that the government failed to produce this evidence?

Response: To the best of my recollection, I became aware of the delayed production in early 2013, after Mr. Dobyns's attorney complained about the matter in email messages.

c. Why were these phone calls not disclosed to plaintiff's counsel during discovery?

Response: My understanding is that the tape recordings were produced to plaintiff's counsel during the discovery period.

d. How did you become aware of these discovery violations and what actions, if any, did you take as a result?

Response: Mr. Dobyns's counsel complained about the delayed production of these tape recordings in email messages addressed to me and others in early 2013. I looked into the matter, and was assured that the National Courts attorney had not intentionally withheld the referenced tape recordings. Also, by that time, the tapes had been produced, deponents had been recalled, and the discovery period had been extended to compensate for the delay in production, to ensure that plaintiff was not prejudiced.

G. When and how did you first become aware of Judge Allegra's December 1, 2014 order?

Response: I believe that I became aware of the December 1, 2014 order sometime after returning from official travel to Israel, in my capacity as Director of the Office of Foreign Litigation, on December 12, 2014.

H. What actions, if any, did you take after becoming aware of the order?

Response: Because I no longer had any supervisory responsibility or authority for the case, I did not take any actions.

I. Are you currently barred from appearing before the U.S. Court of Federal Claims in the matter of *Dobyns v. United States*?

Response: In December 2014, Judge Allegra issued an order, without explanation, barring seven attorneys, including me, from filing any documents in this case. I was surprised to be included in this list – I left the National Courts Section in October 2013, and my name, which was on every document filed by that section while I was the Director, had not appeared on any document in this case for over a year, and would not appear on any future filing regardless of the Court's order.

J. Judge Allegra found that Mr. Gillett and Mr. Higman gave false testimony at trial.

a. What role did you play in preparing their testimony?

Response: None.

b. What steps, if any, did you take to verify their testimony?

Response: None. I was unaware, prior to Judge Allegra's opinion issued ten months after my departure from the National Courts Section, that he considered these witnesses' testimony "unworthy of belief" or that there was any other reason to seek to verify their testimony. By that time, I no longer had any supervisory responsibility or authority for National Courts cases.