U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 6, 2011

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and
Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Grassley:

This responds to the requests set forth in your letter dated September 1, 2011, for transcribed interviews of three prosecutors in the United States Attorney's Office for the District of Arizona (the "USAO") and the requests communicated to us by Committee staff for transcribed interviews of eight additional Department of Justice attorneys concerning ongoing firearms trafficking investigations and related pending prosecutions. Although we are prepared to make several attorneys available for interviews, your request for interviews of some line and lower level supervisory prosecutors raises grave concerns for the Department. In addition, the Committee's need for interviews of several others is unclear because of their limited connection with the firearms trafficking investigations.

The Committee's request for interviews of Department prosecutors is part of a review in which the Committee has already had extraordinary access to Department personnel and documents. As you know, the Department has voluntarily made six ATF employees available for transcribed interviews, and the Committee has conducted interviews of additional ATF personnel, including then-Acting Director Melson. We likewise have made senior Department officials available for public testimony. The Department has cooperated in the scheduling and conduct of those interviews notwithstanding the fact that the Committee sought to inquire about matters related to open investigations and pending prosecutions. The Department has sought to accommodate the Committee's interests regarding the strategy adopted in this law enforcement effort because it recognizes the legitimate questions about whether illegally purchased firearms were knowingly permitted to cross the border to Mexico.

For these same reasons, the Department has made more than 5,000 pages of documents available to the Committee, and it continues to search for and review documents responsive to the Committee's requests, including but not limited to its subpoenas. Indeed, as you are well aware, the Department has dedicated substantial resources to accommodating the Committee's information requests related to the strategy adopted in connection with Operation Fast and Furious. At the same time, however, we have attempted to accommodate the Committee's requests without harming pending investigations and prosecutions, and without impairing other values that are central to the Department's mission.

As we have advised your staff, we are prepared to make Patrick Cunningham, Chief of the Criminal Division in the United States Attorney's Office for the District of Arizona, available for an interview. However, the Department expects to be present to protect its law enforcement interests during the interview. We understand that Mr. Cunningham has retained private counsel and we will defer to him with regard to scheduling, as long as we can attend. We also will make available Gary Grindler, formerly the Acting Deputy Attorney General and now Chief of Staff to the Attorney General, in accordance with our conversations with Committee staff, on December 14, 2011. In addition, we are prepared to make available Jason Weinstein, Deputy Assistant Attorney General in the Department's Criminal Division, but we need to be present to protect the Department's interests, regardless of whether Mr. Weinstein also chooses to be accompanied by any private counsel. We understand that you would like to continue the interview of now former United States Attorney Dennis K. Burke, whom we understand has retained private counsel. The Department has no objection to this further interview so long as we are permitted to attend. We are currently preparing to provide documents to Mr. Burke and his attorney to assist his preparation for this resumed interview.

It is particularly important that the Department attend the interviews of these current and former employees in order to protect its own interests, especially those pertaining to the ongoing criminal investigations and prosecutions. It is standard Executive Branch practice for agency counsel or other agency representatives to attend congressional staff interviews of agency personnel, and a witness's personal counsel does not represent the agency. Indeed, we understand that the Committee has informed another agency that both private counsel and agency counsel may be present at a Committee staff interview. We expect that Messrs. Cunningham, Burke, Grindler and Weinstein may answer questions at their interviews about their knowledge of the strategy adopted in Operation Fast and Furious. For the reasons discussed below, however, and consistent with limitations applicable in prior interviews, they will not discuss the details of pending investigations or prosecutions, including prosecutorial decisions about particular individuals. These limitations are essential to protect the integrity and independence of the criminal justice process as well as the public's confidence that such decisions are made without regard to political considerations. It is the responsibility of the Department's counsel to identify these limitations as needed and any other Department equities that may be implicated during the course of the interviews.

We expect that Messrs. Burke and Cunningham will be in a position to address the topics that Assistant Attorney General Weich identified on page 3 of his prepared statement for the

Committee hearing on June 15 as being at the "core of the Committee's oversight interests" and which the Department has been and is willing to accommodate: "the decisionmaking and responsibility for strategic decisions, if any, regarding the timing of arrests in connection with the alleged sale of firearms to individuals suspected of being straw purchasers, the legal basis to seize such firearms, and any efforts to track the firearms to those higher up the chain of command in firearms and drug trafficking interests." We are concerned about your request for interviews of Kenneth Blanco, also a Deputy Assistant Attorney General in the Criminal Division, because his only connection with Operation Fast and Furious arose from his role in reviewing applications for Title III surveillance, a technique that the Department has acknowledged was used in this investigation. That acknowledgement will not, however, relieve Mr. Blanco of his obligation to protect the confidentiality of information pertaining to particular applications. Moreover, to the extent that you are interested in eliciting from Mr. Blanco any information about the general process for reviewing Title III applications, Mr. Weinstein could provide that information during his interview. Additionally, we have previously agreed to provide a briefing on the Title III procedures in response to a request from Committee staff. Under these circumstances, we would seek to defer the interview of Mr. Blanco and, following Mr. Weinstein's interview, proceed with a briefing if you feel you still need additional information about the general procedures for reviewing Title III applications.

We are also unclear about the Committee's interest in interviewing Bruce Swartz, another Deputy Assistant Attorney General in the Criminal Division, whom the Committee has not indicated had any connection with Operation Fast and Furious. As noted above, we are in the process of searching for documents responsive to the Committee's subpoena, including categories that mention Mr. Swartz. We would like to defer any final decisions about the Committee's request for Mr. Swartz's interview until we have identified any responsive documents, some of which may implicate equities of another agency. We will supplement this response when that process is completed.

The remaining employees you have asked to interview are all career employees who are either line prosecutors or first- or second-level supervisors. James Trusty and Michael Morrissey were first-level supervisors during the time period covered by the Fast and Furious investigation, and Kevin Carwile was a second-level supervisor. The remaining three employees you have asked to interview – Emory Hurley, Serra Tsethlikai, and Joseph Cooley – are line prosecutors. We are not prepared to make any of these attorneys available for interviews. We believe that, in addition to the staff interviews of Department employees that have already occurred and the documents we have and will provide, the transcribed interviews offered above should provide sufficient information to satisfy the Committee's legitimate oversight interests. Committee staff questioning of lower level supervisors and line prosecutors poses significant risks, however unintended, to the Department's discharge of its law enforcement responsibilities and in particular would have a substantial chilling and intimidating effect on Department prosecutors across the country, as we discuss more fully below.

I. Respected Governmental Officials on a Bipartisan Basis Have Opposed Subjecting Line Prosecutors to Congressional Inquiry

Subjecting line prosecutors to congressional scrutiny concerning decisions they have made in particular cases raises very grave concerns for the Department and similarly has troubled an array of respected Congressional leaders and Department officials across the ideological spectrum. In the enclosed September 21, 1993 letter to Attorney General Janet Reno, Senator Orrin Hatch wrote:

> I have been troubled to learn recently that consideration is apparently being given to having career line attorneys of the Department of Justice interrogated by, and appear before, Congressional committees for the purpose of defending or otherwise explaining their conduct of particular cases. My initial impression is that this is a very disturbing idea. It could chill career Department of Justice lawyers in the exercise of their daily duties. . . .
>
> Beyond practical concerns of case management, constitutional concerns are, of course, also raised by the contemplated plan.

Similarly, in the enclosed September 7, 1993 letter to Attorney General Reno on the same topic, Representative Henry J. Hyde criticized the notion that line prosecutors might appear before Congress, calling the idea "misguided" and urging the Attorney General to "thwart this outrageous politicizing of law enforcement" because "[w]e should not open the door to congressional micromanagement of prosecutions." Such a result, Representative Hyde wrote, "would threaten the integrity of the Justice Department and undermine public respect for our entire judicial system."

The views expressed by Senator Hatch and Representative Hyde were shared by the Department during the Administration of George W. Bush. In the enclosed letter dated March 23, 2005, William E. Moschella, Assistant Attorney General for Legislative Affairs, wrote to Senator Susan Collins that:

> [t]he Department has a strong institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional inquiries about Department actions. This is based in part upon our view that supervisory personnel, not line employees, make the decisions that are the subjects of Congressional review, and therefore they should be the ones to explain their decisions. More fundamentally, however, the Department needs to ensure that our line attorneys and agents can exercise the independent judgment essential to the integrity of our law enforcement activities and to public confidence in those activities.

Stuart M. Gerson, an Assistant Attorney General during the Administration of George H.W. Bush, has observed that congressional efforts to subpoena line prosecutors "pose a long-term constitutional threat by impinging upon the core, judicially-unreviewable, Executive Branch function of rendering independent decisions concerning the undertaking or forebearance of criminal prosecutions." Stuart Gerson, "The Legislative Politicization of the U.S. Department of Justice," Legal Backgrounder for the Washington Legal Foundation, at 1 (Nov. 18, 1994) (copy enclosed).

In the enclosed January 5, 1994 response to the letter from Senator Hatch, Attorney General Reno wrote that:

> A prosecutor's discretion to investigate or indict a particular individual is an awesome power, with irreparable impact on the life of that individual and on the integrity of our system of justice. It must be exercised with the greatest of care and in a manner guaranteed to ensure that only objective, non-political considerations bear on its determination. Permitting Congressional examination of line prosecutors carries substantial danger of chilling the objective exercise of that discretion and of generating the appearance of political influence on prosecutorial decisions.

And, for similar reasons, the American Bar Association in 1996 adopted recommendations that "[c]ongressional committees should not seek . . . compelled testimony of . . . line attorneys regarding discretionary decisions being made in pending cases" and that, as a general matter, "congressional committees should not seek the compelled testimony of line attorneys about adjudicated cases." ABA Resolution 104A (AM 96-104A) *available at* http://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting.html#am96104a.

II. Requiring These Prosecutors in the Instant Matter to Provide Information to the Committee Would Imperil Pending and Future Prosecutions Arising Out of the Criminal Investigations Under Review

We take as a given that the Committee seeks to give no aid to those who either have been or will be charged with serious crimes arising out of the Fast and Furious matter. However, requiring an appearance by these prosecutors about the prosecution of already-charged defendants, and the oversight of investigations that may lead to charges against others is certain to lead to significant legal attacks in court by counsel for these individuals. Requiring these prosecutors to explain why certain facts did or did not give rise to legal rights on behalf of the government, or requiring them to explain in exacting detail the government's investigative actions, can give rise to motions by counsel for criminal defendants that may, at the least, complicate the government's ability to bring dangerous individuals to justice. Such results are not in the interests of the criminal justice system or the public generally.

Similarly, requiring these prosecutors to provide information to Congress can trigger additional discovery obligations in favor of criminal defendants that can undermine the government's case. We recognize that such outcomes are not intended consequences of the Committee's request for information, but they may well be unavoidable consequences.

We hope this information is helpful and appreciate your consideration of our views in this matter. Please do not hesitate to contact this office if we may provide additional assistance.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 23, 2005

The Honorable Susan M. Collins
Chairman, Committee on Homeland
Security and Governmental Relations
United States Senate
Washington, D.C. 20510

Dear Madam Chairman:

This responds to your letter to Director Mueller of the Federal Bureau of Investigation, dated March 21, 2005, which challenged the Department of Justice's longstanding policy of not making line agents available for Congressional interviews or testimony. The FBI has correctly stated the Department's line agent policy and that the Department intends to adhere to that policy in this matter. We urge the Committee to refrain from issuing a subpoena to the agent in question and instead to work with the Department and the FBI to develop an accommodation under which the Committee obtains the information it needs, in a manner that is consistent with the law enforcement interests of the Department and the FBI.

The Department has a strong institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions. This is based in part upon our view that supervisory personnel, not line employees, make the decisions that are the subjects of Congressional review, and therefore they should be the ones to explain the decisions. More fundamentally, however, the Department needs to ensure that our line attorneys and agents can exercise the independent judgment essential to the integrity of our law enforcement activities and to public confidence in those activities.

The Department's policy has been articulated most fully in the enclosed letter to Senator Hatch from Attorney General Reno, dated January 5, 1994. Although that letter was written in the context of Congressional questioning of line attorneys, the enclosed letter to Representative Hyde from Assistant Attorney General Sutin, dated November 17, 1998, expressly states that the policy and rationale articulated in the Reno letter apply both to line attorneys and to line agents. Attorney General Reno stated that

> A prosecutor's discretion to investigate or indict a particular individual is an awesome power, with irreparable impact on the life of that individual and on the integrity of our system of justice. It must be exercised with the greatest of care and in a manner

guaranteed to ensure that only objective, non-political considerations bear on its determination. Permitting Congressional examination of line prosecutors carries substantial danger of chilling the objective exercise of that discretion and of generating the appearance of political influence on prosecutorial decisions.

The Department believes that this rationale squarely applies to line agents, who perform a function in the criminal investigative process that is fully comparable to the function that line attorneys perform in the criminal investigative and prosecutorial processes. Adapting Attorney General Reno's words, the Department must "resist . . . efforts to personalize [investigative] decisions at the line level by subjecting the actions of career [agents] to Congressional and public examination. Such personalization can only have a detrimental impact on the proper administration of justice."

Congressional leaders have recognized the legitimacy of the Department's policy. For example, Senator Hatch has observed that Congressional examination of line attorneys "could chill career Department of Justice lawyers in the exercise of their daily duties." See enclosed letter to Attorney General Reno from Senator Hatch, dated September 21, 1993. Representative Hyde has likewise opposed Congressional interviews of line attorneys, expressing concern about a "politicizing of law enforcement." See enclosed letter to Representative Moorhead from Representative Hyde, dated September 7, 1993. As noted above, these concerns about a chilling and politicizing effect on line attorneys apply equally to line agents.

The Department and the FBI intend to adhere to the line agent policy during the course of the pending Committee inquiry. However, we also intend to give our best efforts in seeking an appropriate accommodation of the Committee's information needs. Toward that end, we have already offered to make the line agent available to answer particular fact questions relating to his participation in the Hamade matter, including any questions that arise from his memorandum and affidavit. We reiterate that offer. Department and the FBI representatives, of course, are also available to confer with your staff if the Committee has particular information needs beyond the facts known to the agent regarding the Hamade matter.

I hope that this information is helpful. We are sending an identical letter to Senator Lieberman, the Ranking Member of the Committee, who joined in your letter. Please do not hesitate to contact this Office if you would like additional assistance regarding this matter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosures

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 23, 2005

The Honorable Joseph I. Lieberman
Ranking Member, Committee on Homeland
Security and Governmental Relations
United States Senate
Washington, D.C. 20510

Dear Senator Lieberman:

This responds to your letter to Director Mueller of the Federal Bureau of Investigation, dated March 21, 2005, which challenged the Department of Justice's longstanding policy of not making line agents available for Congressional interviews or testimony. The FBI has correctly stated the Department's line agent policy and that the Department intends to adhere to that policy in this matter. We urge the Committee to refrain from issuing a subpoena to the agent in question and instead to work with the Department and the FBI to develop an accommodation under which the Committee obtains the information it needs, in a manner that is consistent with the law enforcement interests of the Department and the FBI.

The Department has a strong institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions. This is based in part upon our view that supervisory personnel, not line employees, make the decisions that are the subjects of Congressional review, and therefore they should be the ones to explain the decisions. More fundamentally, however, the Department needs to ensure that our line attorneys and agents can exercise the independent judgment essential to the integrity of our law enforcement activities and to public confidence in those activities.

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The Department and the FBI intend to adhere to the line agent policy during the course of the pending Committee inquiry. However, we also intend to give our best efforts in seeking an appropriate accommodation of the Committee's information needs. Toward that end, we have already offered to make the line agent available to answer particular fact questions relating to his participation in the Hamade matter, including any questions that arise from his memorandum and affidavit. We reiterate that offer. Department and the FBI representatives, of course, are also available to confer with your staff if the Committee has particular information needs beyond the facts known to the agent regarding the Hamade matter.

I hope that this information is helpful. We are sending an identical letter to Senator Collins, the Chairman of the Committee, who joined in your letter. Please do not hesitate to contact this Office if you would like additional assistance regarding this matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosures

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 17, 1998

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter, dated November 16, 1998, which requested information about the Department's policies regarding making line attorneys and other non-supervisory employees available for congressional testimony and interviews.

As set forth in the enclosed letter to Senate Judiciary Chairman Hatch, dated January 5, 1994, it is our long standing policy in the context of Congressional oversight inquiries that line attorneys and agents are not made available for testimony or interviews regarding their conduct of particular cases absent the most exceptional circumstances. We generally find other means of accommodating congressional needs for information, such as having the responsible supervisor testify. Because we seek to provide other avenues of information, we also do not generally identify line attorneys and agents who are assigned to work on particular investigations. We appreciate the support for this policy that you have demonstrated over the years.

I hope that this information is helpful. Please do not hesitate to contact me if you would like additional assistance regarding this or any other matter.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

The Honorable Kenneth Starr

Office of the Attorney General
Washington, D. C. 20530

January 5, 1994

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510-4402

Dear Senator Hatch:

Thank you for your letter. I apologize for the delay in responding. Let me assure you that I share your concerns about Congress calling career line attorneys for interviews or testimony regarding their conduct of particular cases. As a consequence, I intend to continue this Department's long-standing policy of opposing such examinations in all but the most exceptional circumstances.

A prosecutor's discretion to investigate or indict a particular individual is an awesome power, with irreparable impact on the life of that individual and on the integrity of our system of justice. It must be exercised with the greatest of care and in a manner guaranteed to ensure that only objective, non-political considerations bear on its determination. Permitting Congressional examination of line prosecutors carries substantial danger of chilling the objective exercise of that discretion and of generating the appearance of political influence on prosecutorial decisions. It can do so in any of three ways.

First, a prosecutor's knowledge that his or her personal recommendations may be subjected to Congressional inquiry, in any but the rarest of cases, may generate pressures to recommend the prosecution of innocent persons in order to avoid Congressional criticism. Inversely, there may be cases where line attorneys anticipate that targets will enlist political support to attack legitimate prosecutions, and so shade their recommendations against prosecution in order to blunt such attack. Finally, the result of permitting such inquiries may simply be that our line attorneys will avoid making true recommendations altogether. Concerned that their candid opinions will become public, and their careers thereby endangered, attorneys may bury their recommendations in the kind of bureaucratic gobbledygook from which the advice of this Department's line prosecutors have been refreshingly free.

Congress does have a constitutional responsibility to conduct oversight of the Executive Branch and to determine

whether the Department of Justice is pursuing its mission appropriately. But it should be in only the most exceptional case that the proper conduct of that responsibility requires the interrogation of career attorneys. In most cases, it should be possible for the Department to provide Congress with alternative sources of information that are sufficient for examining the propriety of the Department's policies, including its exercise of prosecutorial discretion.

Decisions to prosecute or not to prosecute are, in the end, the decisions of the Department of Justice -- not of its line attorneys. It is the leadership of this Department that should be held accountable for them. I welcome efforts to impose such accountability, and to question me and other Presidential appointees about Departmental decisions. What I must resist are efforts to personalize such decisions at the line level by subjecting the actions of career prosecutors to Congressional and public examination. Such personalization can only have a detrimental impact on the proper administration of justice.

I hope these remarks clarify the Department's position on this matter. I believe the policy I have outlined furthers the shared interest of Congress and the Executive in assuring the public that justice is administered objectively and impartially.

Sincerely,

Janet Reno

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 21, 1993

Hon. Janet Reno
Attorney General of the United States
Main Justice Building, Room 5111
Washington, D.C. 29530

Dear General Reno:

I have been troubled to learn recently that consideration is apparently being given to having career line attorneys of the Department of Justice interrogated by, and appear before, Congressional committees for the purpose of defending or otherwise explaining their conduct of particular cases. My initial impression is that this is a very disturbing idea. It could chill career Department of Justice lawyers in the exercise of their daily duties. Unless you are convinced that this idea has merit, I would urge you strongly to oppose the suggestion. Should you choose to oppose this plan, I would be pleased to support you in your opposition.

Beyond practical concerns of case management, constitutional concerns are, of course, also raised by the contemplated plan. Perhaps, if you think it wise, the Office of Legal Counsel could explore the separation of powers implications of the appearance of line attorneys before Congressional committees.

Please advise me of your views on this matter.

Sincerely,

Orrin G. Hatch
United States Senator

OGH:mrd

'93 SEP 29 P5:54

HENRY J. HYDE
6TH DISTRICT, ILLINOIS

COMMITTEES:
JUDICIARY
FOREIGN AFFAIRS

CHAIRMAN
REPUBLICAN POLICY COMMITTEE

2110 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-1306
(202) 225-4561

Congress of the United States
House of Representatives
Washington, DC 20515-1306

September 7, 1993

The Honorable Carlos Moorhead
Vice Chairman
House Energy and Commerce Committee
2346 Rayburn
Washington, D.C. 20515

Dear Carlos:

With increasing concern, I've been following the controversy surrounding Chairman Dingell's effort to have his Committee staff interview career prosecutors at the Department of Justice concerning decisions they made in specific environmental cases.

It is dismaying that Attorney General Reno, in contravention of the settled practice of her Department, has apparently agreed to these proceedings. Her predecessors in office, both Democrats and Republicans, routinely rejected congressional requests for access to career attorneys (as opposed to the Department's senior appointed officials), to shield them from inappropriate political pressure. Abandoning that practice now is a blatant attempt to stigmatize the Environmental Crimes Section of the Justice Department, under the last two Administrations, for its alleged "softness" on polluters.

I hope you will do all you can -- and I'm quite sure our Republican colleagues, on and off the Energy and Commerce Committee will want to help -- to thwart this outrageous politicizing of law enforcement. In fact, opposition to what Chairman Dingell is doing is not partisanship on our part. His most vociferous critic has been Benjamin Civiletti, Jimmy Carter's Attorney General.

We should not open the door to congressional micromanagement of prosecutions. That would threaten the integrity of the Justice Department and undermine public respect for our entire judicial system.

I hope you will aggressively challenge this misguided enterprise on the Committee. Please let me know if I can help.

Sincerely yours,

Henry J. Hyde

HJH/gmf

WASHINGTON LEGAL FOUNDATION

Legal Backgrounder

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Vol. 9 No. 41

November 18, 1994

THE LEGISLATIVE POLITICIZATION OF THE U.S. DEPARTMENT OF JUSTICE

by

Stuart Gerson

Congressional committees have, for most of this century, undertaken investigations collateral to pending or closed U.S. Department of Justice ("Department") cases. During the last two administrations, however, the chairmen of the House committees overseeing the Justice Department have insisted that they have the right to subpoena, *i.e.*, to compel the production of, career staff Department attorneys and their confidential files and work product. These efforts pose a long-term constitutional threat by impinging upon the core, judicially-unreviewable, Executive Branch function of rendering independent decisions concerning the undertaking or forbearance of criminal prosecutions. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *United States v. Nixon*, 418 U.S. 683, 693 (1974).

During the Bush administration, the chairmen of the House Committees on the Judiciary and on Energy and Commerce undertook an inquiry into the Department's handling of an investigation regarding a computer software company called INSLAW alleging an elaborate conspiracy involving the Department to steal proprietary information. Each examination of the matter, including one conducted by a specially-appointed former district judge, concluded that no wrongdoing had occurred, but the House committees insisted on examining all Justice Department files relevant to INSLAW and testimony under oath from the line attorneys who had investigated and litigated the underlying case.

Although publicly determined to maintain its prosecutorial prerogatives, the Justice Department was faced with the countervailing demand of the committee chairmen for the information they wanted in the form they wanted lest there be profound budgetary and programmatic consequences for the Attorney General. These legislative and economic pressures proved largely compelling and, much in the manner achieved in a variety of congressional investigations starting with Teapot Dome, a face-saving solution was reached in which the Justice Department maintained its public stance of independence while privately making available its records, including work product and evaluative information, for examination by committee staff, which also took testimony from career department lawyers under oath.

Perhaps emboldened by this effort, and against the backdrop of media reports of alleged disagreements between the staffs of the Environmental Protection Agency and the Department of Justice concerning the circumstances under which corporate officers would be criminally prosecuted for the environmental crimes of their companies, the oversight committee chairmen sought information concerning the Department's prosecutorial decisions in a score of cases. This time, the Department

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Stuart Gerson is a partner with Epstein, Becker & Green, Washington, D.C. He previously served as Acting Attorney General of the United States and Assistant Attorney General-Civil Division.

stuck to its guns and refused to surrender career prosecutors or their confidential work product, offering instead the testimony of high-level political officers of the Department.

The testimony of these officials should have been sufficiently informative. Congress was ostensibly interested in the policy basis for certain decisions not to prosecute and the officials offered were the ones who defined the policy. They doubtless would have testified (as career prosecutors later did) that they treated environmental crimes like other crimes, irrespective of shifting notions of political correctness, but consistent with their public duty to bring cases against individuals only when they were satisfied that there was probable cause to believe that potential defendants had the requisite knowledge and specific intent to violate the law. Nevertheless, the counteroffer was rejected.

The congressional committees met with greater success when they renewed their demands at the outset of the new Clinton administration. With the same party now in control of both the White House and the Congress, "gridlock" was proclaimed dead, and the new administration signaled its desire to work more harmoniously with the legislature than its predecessor had done. Consequently, the new Attorney General publicly capitulated to the demands of Congress and surrendered both work product and career prosecutors for examination.

It was readily apparent that there was little interest in the policy of the Justice Department; that was obvious enough. What the committees really wanted to explore were the purported disagreements within the Executive Branch and, by pressuring career prosecutors, to show that they had been coopted by their political superior officers. There was substantial public outcry, particularly from all segments of the bar, at this congressional infringement of an essential function of a coordinate branch, but Congress had gained a significant public and formal precedent in a matter of historical conflict between the political branches of government.

The ABA Makes an Important Point. Influenced by former Attorney General Benjamin R. Civiletti's stinging critique of the Justice Department's surrender to congressional efforts to take testimony from members of the Environmental Crimes Section, the Criminal Justice Section of the American Bar Association has forwarded to the ABA's House of Delegates a resolution proposing significant limitations on congressional investigations of Department prosecutorial actions. General Civiletti had suggested with considerable force that by improperly merging legislative and executive functions, congressional subpoena of career prosecutors undermines the power of the Executive Branch to satisfy its constitutionally assigned role as prosecutor. Civiletti, *Justice Unbalanced: Congress and Prosecutorial Discretion,* THE HERITAGE LECTURES No. 472 (Aug. 19, 1993).

If career prosecutors are subject to pressure and threats of punishment because of the decisions they make, they will be less inclined to make such decisions in the future. If congressional committees are able to reverse decisions and prosecutive policies, the legislature will be performing an executive function. The net loss is less one of branch prerogatives than it is of civil liberties and individual rights. The essential and enduring feature of the American Constitution is its separation of powers -- the checks and balances -- intended to keep any one branch (particularly the legislature, otherwise the strongest branch) from accruing tyrannical powers. *See* THE FEDERALIST No. 47 (J. Madison). Just as our Constitution specifically prohibits Congress from enacting bills of attainder, so too must it be held to prevent Congress from indirectly accomplishing politically-punitive prosecutions.

Accordingly, the Criminal Justice Section, tracking the conclusions of former Attorney General Civiletti, has recommended to the governing body of the ABA that it seek adherence to a list of principles governing a legislative committee's seeking information from a prosecutorial agency concerning whether the prosecutors "are enforcing laws under their jurisdiction effectively or whether these laws need revision." The prosecutorial agency is urged to limit its response to "testimony of appropriately-designated high ranking agency officials, pertinent statistics, and descriptive and analytical reports." The legislature is told not to seek and the agency is told to resist requests for compelled testimony of prosecutors, particularly line attorneys, about their discretionary decisions in pending cases and their work product or other deliberative or privileged information in such cases. In closed cases, the ABA Section would limit testimony and disclosure of otherwise privileged information only to those matters presenting undefined "highly unusual circumstances." Where the prosecutor resists a legislative demand for line attorney testimony or privileged information, the ABA

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Section would require that any allegations of misconduct be submitted through inquiry within the agency or appointed independent counsel. Such independent counsel may provide information to the legislature, but the legislature is recommended not to obtain the information directly from the testimony of line attorneys or privileged information.

The Congressional Backlash Deflects the ABA. As a theoretical matter, the ABA recommendation should be unassailable. After all, it follows clear constitutional dictates as to interbranch responsibilities. As a practical matter, however, it has significant vulnerabilities, some of which the Congress has pointed out with alacrity. In a letter dated August 2, 1994, the chairmen of the five committees of the House of Representatives having essential oversight responsibility as to the Justice Department unsurprisingly claim that the ABA proposal would unduly interfere with congressional investigative prerogatives under Article I of the Constitution. Whereas the ABA recommendation is accompanied by citations to important cases holding that prosecutorial decision-making is unreviewable, the congressional response cites the Teapot Dome cases of *McGrain v. Daugherty*, 273 U.S. 135 (1927), and *Sinclair v. United States*, 279 U.S. 263 (1929), as well as *Watkins v. United States*, 354 U.S. 178 (1957) (holding that Congress has the right of oversight which includes prosecutorial decisions even in pending cases).

Former Attorney General Civiletti effectively recalls several signal occasions in which Attorneys General refused to comply with congressional demands for documents relating to prosecutorial decisions, most particularly Attorney General (later Justice) Robert Jackson's denial of a House committee's demand for investigative records regarding labor and subversive activities at naval bases at the outset of World War II, and correctly claims that Jackson's policy "has been followed by every subsequent Administration." Civiletti, *supra*, at 6-7, *quoting* 40 Op. Atty. Gen. 45 (1941) and 6 Op. Off. Legal Counsel 31 (1982). Thus, both the Civiletti speech and the ABA recommendation appear to suggest that the Environmental Crimes capitulation represents the only deviation from the stated policy. Unfortunately, it is not.

Besides the matter in the Bush administration previously noted, the committee chairmen point with alacrity to a recent study detailing a multitude of congressional investigations regarding Justice Department conduct of then-pending cases and involving both the transmission of prosecutorial records and the testimony of both line attorneys and FBI agents. The chairmen's letter had enough force that the President of the ABA enlisted congressional staff participation in the matter and deferred its consideration to the Association's February 1995 meeting.

Right Versus Wrong, or Right Versus Right? General Civiletti's critique makes clear what the ABA recommendation implies: its viability ultimately must depend upon whether the judiciary will enforce it. Civiletti believes that Supreme Court precedent suggests courts will decline to enforce a congressional subpoena for line attorney testimony. That position carries significant weight, but it passes too lightly over several troublesome matters. For example, many Supreme Court decisions hold that save for claims involving class-based discrimination that violates equal protection standards, prosecutorial decision-making is essentially immune from judicial review. But those cases involve *judicial* review. No decided case directly addresses the scope of *legislative* power to investigate prosecutorial decision-making. The congressional response is similarly vulnerable. Although the Supreme Court several times has upheld the power of congressional committees to investigate pending Justice Department cases, it has never held that line attorney testimony can be compelled and has never resolved an inter-branch conflict over document production in such a case. Another question would be raised in a case where a line lawyer receives an individual subpoena and whether through intimidation or willingness would comply with it, notwithstanding the Department's objection.

The Court has indeed held most firmly that the prosecutorial power is a fundamental Executive Branch function arising from the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST., art. II, § 3. *United States v. Nixon*, 418 U.S. at 693; *Heckler v. Chaney*, 470 U.S. at 832; *Wayte v. United States*, 470 U.S. at 607-08; *United States v. Goodwin*, 457 at 380 n.11. As the Court held in *Wayte*:

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence

> value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. . . . Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

The Congressional claim to a related power to investigate derives from Article I and, as noted, this power also has been upheld even when it touches upon the conduct of the Department of Justice in pending cases. *See also Buckley v. Valeo*, 424 U.S. 1 (1976). Moreover, as a matter of practice (and no doubt reflecting the realities of inter-branch pressures), the Department has often opened its decision-making and its line employees to congressional scrutiny. How then is the Supreme Court likely to rule if these countervailing prerogatives are in tension?

Where the two branches have simultaneous powers, the courts generally abjure deciding their extent, holding that such disputes present non-justiciable political questions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). In the case of a resisted subpoena for a line attorney's testimony, it is not unlikely that governing Supreme Court precedent concerning the inviolability of prosecutorial discretion would result in non-enforcement of the subpoena. It is less clear whether a court would involve itself in a dispute concerning the extent of testimony given by political appointees or the production of records. Equally unlikely is that the Court would support the injunction of a congressional hearing into a matter that is the subject of a pending prosecution. However inhibitory to successful prosecutions such investigations might be (*e.g.*, the mandated testimony of Oliver North later was held to require the reversal of his criminal conviction in the so-called *Iran-Contra* case), no court has ever foreclosed one. Watergate exerts a powerful force.

Conclusion. There is nothing inherently less proper about the legislature's seeking the public explication of the reasons and methods underlying prosecutorial decision-making than there is for an individual citizen's or the media's demanding the same information. Nor, as long as the effort is publicly disclosed, is there anything untoward about a congressional or individual request for the prosecutor to follow a particular course of action even in a pending case. The Executive Branch is, after all, a political branch, and it is responsible ultimately to the people.

While the Executive is answerable politically, the thing that it is answerable for is fidelity to the law and independence of judgment. The Executive may disclose its reasons for prosecutorial action or inaction, but it must do so on its own terms, not those of a coordinate political branch. If such disclosures are called for and the public interest requires them to be made, the Executive should undertake them through its appointed policy makers, *i.e.*, through those who are politically responsible, and not by sacrificing the potential independence of non-political staff.

If, consistent with its view of public necessity, the Executive declines to give a specific reason for a prosecutorial decision or gives a reason that legislative or other critics deem inadequate, the Executive may well suffer adverse consequences in the form of truncated appropriations, mandated functions under otherwise-unnecessary laws (which indeed happened during the recent savings and loan institutional crisis), or even at the polls.

The proposed ABA policy is worthy of support but, if approved, it is unlikely ever to be more than a guide. No branch of government will bind itself to such a policy when its leaders believe that it conflicts with their perceptions of their branch's constitutional mandates. In the end, the President and the Attorney General can find no more compelling support for maintaining prosecutorial autonomy in the face of legislative inquiries than that which they write in their own profiles in courage.

ISSN 1056 3059