



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 21, 2010

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This supplements our earlier response to your letter of October 2, 2008, which requested information about the appointment of Assistant United States Attorney Nora R. Dannehy of the District of Connecticut to determine if criminal charges are warranted based on certain findings in the public report of the Office of the Inspector General (OIG) and the Office of Professional Responsibility (OPR) (collectively *OIG/OPR*) entitled "An Investigation into the Removal of Nine U.S. Attorneys in 2006" (Report). We are sending identical responses to the other Members who joined in your letter to us. As more fully explained below, Ms. Dannehy has determined that no criminal charges are warranted with respect to this matter.

I. Background

The *OIG/OPR* Report noted that "[David] Iglesias's removal led to serious allegations that he was dismissed for improper partisan political reasons – namely to influence voter fraud prosecutions in a closely divided state or to affect the timing of a public corruption case against a prominent Democrat in order to influence the outcome of an election." Report at 197. However, *OIG/OPR* concluded that they were not able to obtain all the evidence related to these allegations. They specifically noted their inability to review relevant White House documents and inability to interview certain individuals who might have relevant information such as Senator Pete V. Domenici, Steve Bell, Harriet Miers, Karl Rove, and Monica Goodling.¹ The Report concluded, therefore, that serious allegations of potential criminal conduct with regard to the removal of David Iglesias, including obstruction of justice and theft of honest services/mail or wire fraud, could not be fully investigated or resolved. Report at 199-200. *OIG* and *OPR* also concluded that both then Attorney General Gonzales and Mr. Sampson made various misleading statements and that further investigation was needed to consider whether any criminal false statements were made. Report at 341, 347.

¹Although Department of Justice employees have an obligation to cooperate with *OIG/OPR* investigations, *OIG/OPR* had no means to compel interviews of individuals not employed by the Department.

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Based on a specific recommendation in the Report, on September 29, 2008, Attorney General Michael Mukasey appointed Ms. Dannehy to serve as a Special Attorney pursuant to 28 U.S.C. § 515 and directed that she:

1. Determine whether the evidence demonstrates that any prosecutable criminal offense was committed with regard to the removal of David Iglesias;
2. Assess the facts that the OIG/OPR investigation uncovered;
3. Conduct further investigation as needed, including obtaining or reviewing additional documents or speaking with witnesses; and
4. Determine whether evidence demonstrates that any criminal false statements were made by witnesses to Congress or OIG/OPR.

Ms. Dannehy, together with other prosecutors and agents of the Federal Bureau of Investigation (the investigative team), sought and obtained all documents noted as relevant by OIG/OPR as well as many additional documents. They questioned over 60 individuals, including those individuals OIG/OPR described as potentially having relevant information. The White House, under former President George W. Bush, fully cooperated with the investigation.

The investigative team determined that, based on the evidence already developed by OIG/OPR and Congress, as well as the additional evidence developed through the criminal investigation, that evidence did not demonstrate that any prosecutable criminal offense was committed with regard to the removal of David Iglesias. The investigative team also determined that the evidence did not warrant expanding the scope of the investigation beyond the removal of Iglesias. Additionally, the investigative team determined that there was insufficient evidence to show that any witness made prosecutable false statements to either Congress or OIG/OPR, or corruptly endeavored to impede a congressional inquiry.

II. Obstruction of Justice And Theft of Honest Services

According to the Report:

[I]f those seeking Iglesias's removal did so to pressure Iglesias to accelerate his charging decision in the Courthouse case or initiate voter fraud investigations to affect the outcome of the upcoming election, their conduct may have been criminal . . . [W]e believe that pressuring a prosecutor to indict a case more quickly to affect the outcome of an upcoming election could be a corrupt attempt to influence the prosecution in violation of the obstruction of justice statute. The same reasoning could apply to pressuring a prosecutor to take partisan political considerations into account in his charging decisions in voter fraud matters.

Report at 199.

The Omnibus Clause of 18 U.S.C. § 1503 punishes anyone who “*corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.*”² Because the Omnibus Clause punishes only endeavors to “influence, obstruct or impede,” it penalizes only forward-looking conduct. Therefore, Ms. Dannehy sought to determine (1) whether the evidence established that any person endeavored to pressure David Iglesias to accelerate his charging decisions in the Courthouse case or initiate voter fraud investigations to affect the election, and (2) whether the evidence established that anyone influenced or endeavored to influence a judicial proceeding by removing Iglesias – that is, whether individuals sought Iglesias’s removal in order to replace him with a United States Attorney who would act in a manner aimed at influencing the due administration of justice.

The evidence did not support charges under the Omnibus Clause of § 1503. There was insufficient evidence that former Senator Pete V. Domenici, other New Mexico Republicans, persons in the White House, or anyone at DOJ attempted to prospectively influence Iglesias’s actions. The weight of the evidence established not an attempt to influence but rather an attempt to remove David Iglesias from office, in other words, to eliminate the possibility of any future action or inaction by him.

Senator Domenici issued a public statement acknowledging that in late 2006 he called Mr. Iglesias and inquired about the time frame of the Courthouse case. Mr. Iglesias made many public statements about being threatened or unjustly pressured by that a call. The evidence about the call developed in the course of Ms. Dannehy’s investigation, however, was insufficient to establish an attempt to pressure Mr. Iglesias to accelerate his charging decisions. And, there was insufficient additional evidence that Senator Domenici explicitly or implicitly threatened Mr. Iglesias that he would be fired if a certain case or cases were not brought before the election.

² Section 1512 is no broader than § 1503 in this context. Only two subsections are potentially relevant:

Section 1512(c)(2) penalizes “[w]hoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so” In the context of this case, § 1512(c)(2) does not materially differ from the Omnibus Clause of § 1503.

Section 1512(d)(4) penalizes only harassment that *dissuades* or *hinders* institution of a prosecution – it does not cover harassment that *encourages* such action: “Whoever intentionally harasses another person and thereby hinders, delays, prevents or dissuades any person from . . . (4) causing a criminal prosecution . . . to be sought or instituted, or assisting in such prosecution . . . or attempts to do so” Because the alleged misconduct in this case was aimed at *promoting* a criminal prosecution, it falls outside the scope of § 1512(d)(4).

There also was insufficient evidence that anyone in the White House or DOJ sought to influence Mr. Iglesias to bring a voter fraud or public corruption case in advance of the November 2006 election, or at anytime. Furthermore, the investigative team concluded that the evidence established that Senator Domenici contacted DOJ and the White House to seek Mr. Iglesias's removal, not to ask the White House or DOJ to pressure Mr. Iglesias, and Mr. Iglesias was not aware of Senator Domenici's complaints to the White House or DOJ. Mr. Iglesias was not asked to resign until December 7, 2006, well after the election and after any actions that he might have taken would have affected the election. Likewise, the evidence did not show that anyone sought Mr. Iglesias's removal in order to replace him with a United States Attorney who would act in a manner aimed at influencing the due administration of justice.

Although Senator Domenici's motive for seeking Iglesias's removal were in part politically motivated, a public official does not violate the law by seeking the removal of a United States Attorney for his failure either to pursue a particular case the official believes is legitimate or to pursue certain types of cases the official believes should be brought, even if the public official's motives are partisan and inconsistent with the values of DOJ.

Ms. Dannehy and her investigative team also concluded that DOJ leadership never determined whether the complaints about Mr. Iglesias were legitimate and that the fact that the investigation of the complaints about Iglesias's performance never occurred bespeaks undue sensitivity to politics on the part of DOJ officials who should answer not to partisan politics but to principles of fairness and justice. While the actions of DOJ leadership were contrary to DOJ principles, they were not intended to and did not influence or in any way impede voter fraud prosecutions or a particular public corruption case.

The OIG/OPR Report also cited theft of honest services fraud/wire fraud as criminal statutes which might have been violated if interstate wire communications were used to pressure Mr. Iglesias to take partisan political considerations into account in his charging decisions.

Title 18 U.S.C. § 1346 provides that for the purposes of the mail and wire fraud statutes, the term "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Ms. Dannehy's investigation, however, concluded that there was no violation of the honest services/wire fraud statute here because the weight of the evidence established that, as early as 2005, well before the 2006 election, there was an effort to remove Mr. Iglesias from Office rather than a scheme to get him to use his Office in return for anything of value, including his continued employment. Additionally, honest services fraud does not embrace allegations that purely political interests may have influenced a public official's performance of his duty.

III. False statements

Under 18 U.S.C. § 1001(a), it is unlawful to make any materially false, fictitious, or fraudulent statement or representation, in any matter within the jurisdiction of the executive, legislative, or judicial branches. Section 1001 requires that the statement or representation actually be false, and the government has the burden of establishing the alleged falsity of the statement. Although a statement may be misleading, unauthorized, or even fraudulent, a conviction under this section generally cannot be sustained unless the statement also is false. *See United States v. Safavian*, 528 F.3d 957 (D.C. Cir. 2008) (literal truth is a complete defense to a charge under Section 1001(a)(1)). However, as the court noted in *Safavian*, “even a literally true statement may be misleading and so, unlike Section 1001(a)(1), literal truth may not be a complete defense to obstruction.” *Safavian*, 528 F.3d at 968 (citing *United States v. Browning*, 630 F.2d 694 (10th Cir. 1980)).³ Thus, the investigative team considered both whether anyone endeavored to obstruct or impede a congressional inquiry in violation of 18 U.S.C. § 1505 as well as whether any person made a criminal false statement in violation of § 1001(a).

The Report concluded that then Attorney General Gonzales made a “series of statements after the removals” that were “inaccurate and misleading.” Report at 341. Similarly, OIG/OPR noted that Kyle Sampson made various misleading statements about the United States Attorney removals to the White House, Congress, and other Department officials. *Id.* at 347. The investigative team focused on the statements referenced in the Report as well as other statements made by not only Mr. Gonzales and Mr. Sampson but also other DOJ officials. Based on a consideration of all the evidence and the legal standards, Ms. Dannehy concluded that there was insufficient evidence to establish that persons knowingly made material false statements to OIG/OPR or Congress or corruptly endeavored to obstruct justice.

IV. Conclusion

In closing, it is important to emphasize that Attorney General Holder is committed to ensuring that partisan political considerations play no role in the law enforcement decisions of the Department. In this instance, Ms. Dannehy, a long time career prosecutor, was asked only to assess the possible criminality of the actions described in the OIG/OPR report, to conduct such additional investigation as necessary to make that assessment, and to determine whether anyone made prosecutable false statements to Congress or OIG/OPR. The Attorney General appreciates the work of Ms. Dannehy and her investigative team and has accepted her recommendation that criminal prosecution is not warranted.

³ 18 U.S.C. § 1505 provides that “whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct or impede the . . . due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of Congress” shall have committed a crime.

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The Attorney General remains deeply dismayed by the OIG/OPR findings related to politicization of the Department's actions, and has taken steps to ensure those mistakes will not be repeated. The Attorney General also appreciates the work of the Inspector General and the Office of Professional Responsibility on this matter.

We hope that this information is helpful. Please do not hesitate to contact this office if we can provide additional assistance regarding this or any other matter.

Sincerely,



Ronald Weich
Assistant Attorney General

cc: The Honorable Lamar S. Smith
Ranking Minority Member