



U.S. SENATE COMMITTEE ON

Finance

SENATOR CHUCK GRASSLEY, OF IOWA - CHAIRMAN

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Grassley Questions Attorney General on Ketek, FBI, Boeing Settlement

WASHINGTON – Sen. Chuck Grassley, chairman of the Committee on Finance, and a senior member of the Judiciary Committee, at a Judiciary Committee hearing today asked Attorney General Alberto Gonzales about the government's cooperation in Grassley's investigation of the Ketek antibiotic, the FBI's treatment of a senior Arab-American agent, and whether the Justice Department should do a better job overseeing the tax deductibility of government settlements as in the Boeing case. The text of Grassley's questions and his opening statement follow. The relevant attachments are posted at finance.senate.gov.

Question of U.S. Sen. Chuck Grassley for Attorney General Alberto Gonzales re. Advice from the Department of Justice to the Department of Health & Human Services Tuesday, July 18, 2006

In recent months, the Department of Health and Human Services has worked hand-in-hand with the Department of Justice to obstruct my Committee's investigation of an antibiotic called Ketek. In a letter to the Finance Committee, Assistant Secretary Vince Ventigmilia stated that HHS consulted with the Justice Department regarding executive branch assertions of confidentiality. The Assistant Secretary broadly referred to "long-standing policy" and "governing principles" as a basis for denying access to documents and employees.

Because I know that these claims are not correct, I asked the Congressional Research Service to look into these so-called policies and governing principles. As I anticipated, CRS told me that there is "no legal basis" for these executive assertions of confidentiality. What HHS and Justice are doing flies in the face of numerous historical precedents and legal rulings. In fact the CRS memo which I respectfully request be placed into the record, identifies case after case where Congressional Committees have legitimately obtained access to information about ongoing investigations, including prosecutorial documents, and conducted interviews with law enforcement officials, including line FBI agents and Assistant United States Attorneys.

It seems to me that the Justice Department's consultation with the Department of Health and Human Services is part of a concerted effort to obstruct legitimate congressional oversight into government misconduct, and what is bothering me is a fundamental disregard for constitutional mandates, long-established historical precedents and bed rock legal rulings. Frankly, I am angered by these obstructive policies and principles:

Is it not true that Congressional Committees and their staff members have, in the past, had access to deliberative prosecutorial documents at the DOJ? Is it not true that Congressional Committees and their staff members have, in the past, had access to line attorneys, line FBI agents, Assistant United States Attorneys and investigators in the performance of its oversight responsibilities.

Aside from matters of executive privilege and national security, I want to know the legal justification, not policies and principles, for denying access to deliberative prosecutorial documents and for obstructing interviews with line agents in the performance of my oversight responsibilities to examine allegations of government misconduct. Can I have your written response by the end of this week?

**Question of U.S. Sen. Chuck Grassley for Attorney General Alberto Gonzales
re. the Office of Professional Responsibility on Bassem Youssef
Tuesday, July 18, 2006**

The Department's Office of Professional Responsibility recently found that there was a reasonable basis to believe that the FBI retaliated against its highest ranking Arab American agent for raising concerns about being frozen out of counterterrorism assignments after 9/11. After the agent, Bassem Youssef expressed his concerns to Director Mueller, the FBI halted its plan to transfer him to the FBI's primary counterterrorism section.

While I am glad that DOJ/OPR has recommended that Youssef's transfer be implemented as it should have been four years ago, I am concerned that the person responsible for halting his transfer will not be held accountable. As I understand the Department's whistleblower regulations, OPR's finding will be reviewed by another office, but there will not necessarily be any further investigation to determine who is responsible for the retaliation.

How will retaliation against whistleblowers like this ever stop if your internal process doesn't identify who is responsible and discipline them? Will you help me determine who ordered that his transfer be halted and why? Also, would you commit to reviewing the Department's regulations to make sure that there is a process for identifying and punishing those who retaliate against whistleblowers?

**Question of U.S. Sen. Chuck Grassley for Attorney General Alberto Gonzales
re. the Boeing settlement with the government over hiring and contracting manipulation
Tuesday, July 18, 2006**

I want to speak to you about the Boeing settlement. I am very troubled that your letter makes clear that DoJ was completely blind as to the real amount of the penalty, that is, the after-tax amount. To have a situation where the federal government is negotiating a settlement without understanding what the real settlement amount will be, the after-tax amount, is embarrassing.

Not understanding the after-tax amount and its implications means that the \$615 million settlement with Boeing could be 35 percent less than advertised. For DoJ negotiators to not realize

that they are giving a 35 percent discount to the settlement is of great concern.

I can assure you that the lawyers on the other side of the table in these types of negotiations with the government are very aware of the after-tax amount of these settlements. Of course they are aware of the actual amounts. It means millions of dollars to their client. So we have one side, the government, that has no idea about the after-amount of a settlement, and the other side, the business being fully aware of the amount. That is not the way to negotiate a settlement in the best interests of the public.

It is actually worse that DoJ doesn't even know what the tax treatment is of the Boeing settlement. It tells me that DoJ lawyers gave away 35 percent of the store without even knowing it. And let me make sure you understand one matter, the tax law in this area is quite clear: a fine or penalty is not deductible. If the government clearly states it is a fine or penalty, it is not deductible. It is when the lawyers start getting out their sharp pencils to find the gray areas that the trouble starts. But if DoJ wants to make certain that a settlement is not deductible the law gives clear guidance on how that can be accomplished.

Do you believe this is really how the government should operate? That government lawyers should operate in the dark not knowing whether they are giving away 35 percent of value to the other side? Don't you think your lawyers should understand the after-tax consequences of the settlement so they have a full and accurate picture?

**Prepared Opening Statement of U.S. Sen. Chuck Grassley
re. Senate Committee on the Judiciary Hearing on Oversight of the Department of Justice
Tuesday, July 18, 2006**

Thank you, Mr. Chairman, for holding this hearing on Justice Department oversight. I look forward to hearing the testimony of Attorney General Gonzales. While I share a number of concerns that have been identified by Chairman Specter, I also have several other areas of interest that I would like Attorney General Gonzales to address.

For example, I'm concerned about the tax deductibility of government settlements and the Justice Department's policy regarding these settlements. Recently, I was joined by Senators McCain and Warner in asking the Justice Department about whether The Boeing Company would be able to deduct any of its \$615 million settlement with the government over hiring and contracting manipulation. I was extremely troubled with the inadequacy of the Justice Department's response to our concerns. It's plain to me that the Justice Department doesn't understand that there are serious tax implications to these settlements which undermine the mission of another agency -- the IRS -- and then end up being a burden to the American taxpayer. I plan on questioning Attorney General Gonzales more about the basis for the Department's policy.

I also have serious concerns about the way the Justice Department reacts and how it advises other departments to react to Congressional oversight. Our attempts to gather information from the Executive Branch when we investigate allegations of government misconduct are too often met with delays, excuses and arguments. We frequently hear the same objections time and time again, despite their lack of any basis in law, history or common sense. The Department's "line attorney" or "line agent" policy frequently is cited as a reason to allow only senior level policy makers to speak to

Congress, preventing us from gathering information from front-line government employees who have in-depth knowledge of the facts and problems we are trying to look into. This policy is selectively asserted as a way to deflect certain inquiries, but ignored whenever the Executive Branch decides that allowing such employees to speak to Congress appears to be in its best interests. We have been denied access to files from both the Justice Department's and FBI's Office of Professional Responsibility, purportedly to protect the privacy of government employees who have been investigated by those offices. However, Congress often needs the information in these OPR files to evaluate the credibility of whistleblowers who come to us with information about waste, fraud and abuse, as well as to assess whether they have been retaliated against for such disclosures. That is one of the reasons that there is an exemption in the Privacy Act for Congressional requests.

For instance, the Judiciary Committee was recently denied OPR documents related to allegations of misconduct in the investigation of the death of Jonathan Luna, an Assistant U.S. Attorney in Baltimore who was found dead under mysterious circumstances in the Chairman's home state of Pennsylvania. Three FBI employees were accused of turning the Luna investigation into a personal vendetta against a fellow FBI agent, who complained about an overly personal, aggressive and irrelevant interrogation as well as an unauthorized search of her computer. The FBI employees accused of misconduct were investigated by FBI/OPR, but only after intervention by the Inspector General prevented FBI management from sweeping the incident under the rug. One of the FBI employees accused of misconduct has since been promoted to a senior counterterrorism position. We requested documents regarding this matter from the FBI, but have been provided only a briefing. Even though the head of OPR indicated that she had no objection to providing the Committee a copy of her final report in this matter, neither that report, nor the other documents we requested have been turned over.

This resistance to Congressional oversight has spread to other agencies through the advice that the Justice Department provides to them. In my capacity as Chairman of the Finance Committee, I am frequently conducting inquiries at HHS and FDA that are stalled, delayed, or frustrated by these policies. I have some questions for the Attorney General about those today, and I look forward to hearing his responses.

On a brighter note, I am pleased that when it comes to the Justice Department's oversight of the FBI, there is some good news. Last February, the Judiciary Committee asked the Inspector General to investigate allegations that the FBI's highest-ranking Arab American agent, Bassem Youssef, had been denied a transfer to the International Terrorist Operations Section (ITOS) in retaliation for raising concerns to the Director that his expertise and talents were being underused by the FBI. The Inspector General referred the case to DOJ/OPR, which investigated and found that there was a reasonable basis to believe that Youssef had been the victim of whistleblower retaliation. Moreover, DOJ/OPR recommended that Youssef be transferred to ITOS, as the FBI had originally planned to do four years ago.

I'm glad to see the Department's internal process working to provide some vindication to an FBI whistleblower. This preliminary finding will now be reviewed by another DOJ office for final action. However, I am concerned that the process may still not be as effective as it should be. Specifically, even if Youssef is ultimately found to be a victim of retaliation and transferred to ITOS, the person responsible for keeping him out of that position for four years may escape accountability because of the way the Department's whistleblower regulations work. DOJ/OPR did not identify which FBI official made the retaliatory decision to stop Youssef's transfer, and without further

fact-finding we may never know who did it. No matter how many senior officials claim that whistleblower retaliation won't be tolerated, there is no disincentive as long as retaliators are not identified and punished. I hope this Committee will schedule future hearings on DOJ and FBI whistleblower issues, and specifically the cases of Michael German and Bassem Youssef.

There are other issues that I'm interested in, such as drug patent settlements and interchange fees. I'm pleased that Chairman Specter will be conducting a hearing on interchange fees tomorrow morning, but I'd also like to know whether the Justice Department sees any antitrust concerns with these financial practices. I also wanted to express my disappointment with the Justice Department's position in the recent Schering Plough case before the Supreme Court dealing with drug patent settlements. Sweetheart deals that delay the entry of low cost drugs in the marketplace not only hurt consumers, they also threaten the sustainability of federal health care programs, such as Medicare and Medicaid. The Federal Trade Commission is doing the right thing by going after these kinds of anti-consumer settlements. I hope that the Justice Department will take a hard look at its position and decide to assist the FTC in its effort to crack down on anticompetitive activity and to promote true competition in the prescription drug market.

In the meantime, I look forward to hearing the Attorney General's testimony today and having this opportunity to ask him about some instances where the Justice Department has stood in the way of Congress discharging its duty to conduct vigorous oversight of allegations of misconduct in the Executive Branch, as well as the Justice Department's position regarding the deductibility of government settlements.