

JUDICIARY COMMITTEE

SUBCOMMITTEES:

CHAIRMAN

CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
CRIME, TERRORISM AND HOMELAND SECURITY

**TRANSPORTATION AND
INFRASTRUCTURE COMMITTEE**

SUBCOMMITTEES:

HIGHWAYS AND TRANSIT
RAILROADS, PIPELINES AND HAZARDOUS MATERIALS

ASSISTANT WHIP



**Congress of the United States
House of Representatives**

Washington, DC 20515

JERROLD NADLER
8TH DISTRICT, NEW YORK

REPLY TO:

- WASHINGTON OFFICE:
2334 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-5635
- DISTRICT OFFICE:
201 VARICK STREET
SUITE 669
NEW YORK, NY 10014
(212) 367-7350
- DISTRICT OFFICE:
445 NEPTUNE AVENUE
BROOKLYN, NY 11224
(718) 373-3198

Web: <http://www.house.gov/nadler>

January 25, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

I am writing to you about a series of events involving the Department of Justice (DOJ), stemming from a raid on the Agriprocessors, Inc. plant in Postville, Iowa, on May 12, 2008, the subsequent criminal prosecution of Sholom Rubashkin, and the criminal prosecutions and deportations of undocumented immigrants seized in the raid. Various reports concerning the conduct of DOJ personnel leading up to, during, and following the raid raise serious issues of potential misconduct or improper Department policy that I believe demand your careful review, consideration, and, where appropriate, remedial action. As the Ranking Democratic Member of the Subcommittee on the Constitution, I believe it is important that the Department of Justice respects the rights of persons in its custody, and persons accused of crimes.

The first issue involves what have been described as extensive *ex parte* communications between Chief Judge Linda Reade and DOJ. According to reports and court papers, Chief Judge Reade met with representatives of DOJ and Immigration and Customs Enforcement (ICE). Although characterized by DOJ as merely involving "logistical cooperation," these contacts were reportedly extensive and involved a broad range of matters. I have been informed that many of the details of these *ex parte* communications were not available to defense counsel in the trial of Sholom Rubashkin, and were only available to his appellate counsel through redacted documents obtained under the Freedom of Information Act.

I am concerned by the allegation that DOJ may have withheld from Mr. Rubashkin and his attorneys information pertaining to these contacts. Professor Stephen Gillers noted in his September 7, 2010 submission to the United States District Court for the Northern District of Iowa,

I conclude that U.S. lawyers violated rules governing *ex parte* contact with the judge who presided at the trial of Mr. Rubashkin and in failing to inform Mr. Rubashkin's defense counsel at the inception of the criminal proceeding against

The Honorable Eric H. Holder, Jr.
January 25, 2011
Page Two

Mr. Rubashkin or, at the latest, before the deadline for filing a motion to recuse, of the number of, and the substance of communications in, the *ex parte* pretrial contacts with the judge prior to the raid on Agriprocessors

The ethical prohibition against *ex parte* communications, as applied in criminal cases, and the prosecutorial disclosure duty, under both professional conduct rules and *Brady*, build on that constitutional mandate and are required by it. Just as a prosecutor cannot ethically or constitutionally conceal information that will impeach the credibility of a government witness, neither can she conceal information that provides the defense with a basis to argue that his constitutional and statutory rights to the fact and appearance of disinterested justice are compromised.

In the past you have reviewed serious allegations of prosecutorial misconduct, especially when it involved the withholding from defendants information pertinent to their defense, as was the case with the prosecution of Senator Ted Stevens. I believe that these allegations are sufficiently serious to warrant your review.

The second issue involves the conduct of the raid, and the handling of the cases of the undocumented immigrants seized in that raid.

The *ex parte* communications with Judge Reade in question were apparently initiated by DOJ as part of the planning of a raid by DOJ and ICE on the Agriprocessors plant during which 389 undocumented immigrants working at the plant were taken into custody.

As a result of the meetings, arrangements were made to move some of the court's judges and other personnel to the National Cattle Congress in Waterloo, Iowa, to facilitate the processing of undocumented immigrants taken into custody.

Details of the process, as uncovered at a July 24, 2008 hearing by the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, are deeply troubling. As part of this process, individuals detained were reportedly rushed through a criminal proceeding in which, as part of a plea agreement, they had to waive their rights to an administrative removal hearing, regardless of whether they may have had a right to valid immigration relief, such as asylum, a claim under the Violence Against Women Act, or approved family- or employment-based immigrant petitions.

The Honorable Eric H. Holder, Jr.
January 25, 2011
Page Three

Instead of placing these individuals into the normal administrative removal proceedings, 302 of the 389 workers arrested were criminally charged with identity theft, use of a false ID and/or Social Security number, and illegally reentering the United States following deportation. They were told that they faced a minimum of two years in prison, but were offered a uniform plea agreement in which the government would withdraw the heavier charge of aggravated identity theft, the defendants would serve five months in jail, receive three years of supervised release, and be deported without a hearing.

According to testimony presented by Deborah Rhodes, Senior Associate Deputy Attorney General, at the July 24, 2008 hearing, “[d]efendants who were charged with the same offense and offered the same plea agreement typically were arranged in groups of 10.” She further testified that “271 defendants were sentenced to five months in prison and three years of supervised release Two defendants were sentenced to 12 months and a day in prison and three years of supervised release” These cases were disposed of within 10 days. Only 18 criminal defense lawyers were appointed by the federal court to represent hundreds of defendants; every attorney represented 17 defendants on average.

The third issue involves statements made by United States Attorney Stephanie Rose in an interview published in the December 27, 2010 issue of the Gazette. In that interview, Ms. Rose states that “[t]he goal of this case was to prevent future crimes like this, as well as to punish Rubashkin ... This case was important for those that are taking advantage of and employing illegal immigrants but all of that got lost with this other stuff. We are hoping the appeal process will correct some of that.” I do not believe that either the law or Department policy permit an individual to be sentenced for an offence that was neither charged nor decided by the jury.

The final issue involves the position reportedly taken by DOJ at Mr. Rubashkin’s bail hearing. It has been reported that the government opposed bail stating that Mr. Rubashkin was a flight risk solely because, as a Jew, he was eligible for Israeli citizenship under that country’s Law of Return. I hope that it is not the position of the Department of Justice that a defendant’s religion, in the absence of any other evidence, would make him ineligible for bail. Please let me know the Department’s position on the role of religion in bail proceedings, and what steps you are taking to ensure that defendants are treated fairly in our courts regardless of their religion.

The Honorable Eric H. Holder, Jr.
January 25, 2011
Page Four

While the facts of these cases, and the ultimate disposition of important questions of law, are more appropriately considered by the federal courts, there are serious issues of DOJ policy, and prosecutorial conduct arising from these cases that are appropriate for your review. I urge you to examine these questions and let me know how you intend to handle the serious issues raised by these cases.

Thank you for your attention to this matter.

Sincerely,



Jerrold Nadler
Ranking Member
Subcommittee on the Constitution