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Re: *United States v. Sholom Rubashkin*

Dear Attorney General Holder and Ms. Ashton:

We know you both to be committed to ensuring that all criminal matters brought by your prosecutors in the federal courts are handled in a fair and uniform manner. Critical to that mission is ensuring that the constitutional and other protections afforded to the accused are not infringed upon in the zeal to convict. In a number of actions, from the decision last year to seek the post-conviction dismissal of all charges against the late Senator Ted Stevens after it became clear that his trial was tainted by prosecutorial misconduct, to establishing a separate unit within the Department of Justice earlier this year to address wrongdoing by DOJ lawyers, the Department has demonstrated a willingness to take decisive action to uphold the fundamental principle that the pursuit of justice be ethical and even-handed.

The signatories of this letter - a combination of law professors and former DOJ prosecutors - are writing to ask that you turn that same unsparing focus on the troubling evidence of prosecutorial misconduct that has emerged in connection with the federal prosecution of Sholom Rubashkin. While a number of issues warrant further scrutiny, we refer principally to the numerous *ex parte* communications between Chief District Court Judge Linda R. Reade, who presided over Mr. Rubashkinôs trial, and the federal prosecutors and law enforcement agents who pursued the case against him.

Documents recently disclosed in connection with Mr. Rubashkinôs appeal of his conviction and extraordinary 27-year sentence make it clear that Judge Reade met repeatedly, *ex parte*, with law enforcement agents and Assistant United States Attorneys from the U.S. Attorneyôs Office for the Northern District of Iowa (USAO) during the six months preceding a May 2008 immigration raid that ultimately led to Mr. Rubashkinôs prosecution.

These *ex parte* communications, during which Judge Reade pledged her ñfull support for the initiativeò and at which the prosecutionôs ñcharging strategiesò and ñfinal gameplanò were discussed, were never transcribed or recorded. Indeed, neither Judge Reade nor the prosecutors even informed Mr. Rubashkin or his attorneys that these meetings had taken place, or provided them with any pretrial discovery to shed light on their content. Defense counsel learned of the extensive and troubling nature of these *ex parte* communications months after Mr. Rubashkinôs trial, when prosecutors were forced to turn over, pursuant to defense counselôs Freedom of information Act request, partially-redacted documents summarizing at least some of these *ex parte* contacts. These documents consist mainly of emails and memoranda written by agents from the U.S. Immigration and Customs Enforcement (ICE).

Beyond the summaries in the ICE documents, no reliable record exists to document these *ex parte* communications. Judge Reade and the USAO have rebuffed defense requests for further discovery and the opportunity to hold an evidentiary hearing. Thus, we are not privy to potentially critical information about these meetings, including their number, nature, and a detailed account of what was discussed. Nor are we currently in a position to conclude that the prosecutors acted unethically. But what we do know, based on the evidence that is publicly available and the opinions of highly respected experts in judicial and prosecutorial ethics who have reviewed that evidence, is deeply troubling. These factors, and the severity of the sentence imposed upon Mr. Rubashkin, warrant, at a minimum, an expeditious and independent investigation by the Department of Justice.

Overview of the ex parte contacts between Judge Reade and federal prosecutors

Beginning in October 2007, the USAO and ICE agents began planning a massive immigration raid on Agriprocessors, Inc., a kosher meatpacking plant in Postville, Iowa. At the time, Agriprocessors was owned by Mr. Rubashkinôs father; Mr. Rubashkin was employed at the plant as a vice president.

On October 16, 2007, lawyers from the USAO contacted Judge Reade and informed her of ñthe number of criminal prosecutions that they intend[ed] to pursue relative to this investigation.ò According to a memorandum summarizing this meeting, ñJudge Reade indicated full support for the initiativeò after prosecutors ñbriefed [her] regarding the ongoing investigation.ò *Id.*

Neither Judge Reade nor any USAO representative has ever disclosed the precise number of *ex parte* contacts that followed this initial meeting ï not in any of the briefing filed in connection with Mr. Rubashkinôs motion for a new trial, not in Judge Readeôs decision denying that motion, and not in the governmentôs appellate brief, which was filed on March 11, 2011.

What we do know from the ICE documents is that there were at least six meetings involving Judge Reade and federal prosecutors that took place between October 16, 2007 and the May 12, 2008 raid. And there is the distinct possibility that there may have been more ï many more. An April 11, 2008 email, disclosed in response to Mr. Rubashkinôs FOIA request, refers to ñweeklyò meetings with the ñChief Judgeò that also included an ñAUSA.ò

At a January 28, 2009 *ex parte* meeting attended by prosecutors and Judge Reade, Judge Reade ñmade it clear that she was willing to support the initiative in any way possible, including staffing and scheduling.ò The words ñin any way possibleò indicate that Judge Readeôs support was not limited to ñstaffing and scheduling,ò as the local prosecutors have since suggested.

On March 17, 2009, another *ex parte* meeting was held, attended by Judge Reade, members of her staff, federal prosecutors, and representatives from the U.S. Marshalôs Service and U.S. Probation Department. An ICE memorandum states that in this meeting, ñ[t]he parties discussed an overview of the charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issuesò related to the investigation and operation. *Id*. This extensive list of topics belies Judge Readeôs later assertion that her involvement was purely ñlogistical in nature.ò *United States v. Sholom Rubashkin*, 2010 WL 436255, at *3 (N.D. Iowa 2010). To the contrary: the memorandum lists ñlogisticsò as one of *five* topics of discussion. Nor do several of the other topics, including ñcharging strategiesò and the ambiguous catch-all ñother issues relating to the . . . operation,ò fit with Judge Readeôs characterization of her participation was ñlimited to ensuring that a sufficient number of judges, court-appointed attorneys and interpreters would be available and that the court would be able to function efficiently at an off-site location.ò *Rubashkin*, 2010 WL 436255, at *3.

At an *ex parte* meeting three days later, Judge Reade asked the USAO and ICE agents for a ñfinal gameplanò for the raid. A March 31, 2008 email refers to a planned meeting between Judge Reade and AUSA Richard Murphy, scheduled to take place on April 4, 2008. According to the email, AUSA Murphy planned to give a ñpresentationò to the judge and requested ñan operation plan from ICE . . . so that he can incorporate it into his presentation.ò

In another email, AUSA Murphy wrote, ñWe have a meeting with the chief judge at 8 a.m. on Friday. She was ill last week when we met with the other stakeholders.ò AUSA Murphyôs phrasing strongly implies that he also viewed Judge Reade as a ñstakeholderò -- that is, someone with a vested interest in the outcome of the case rather than someone with the detached and neutral stance required of judicial officers.

The Raid on Agriprocessors

The governmentôs raid on the Agriprocessors plant took place on May 12, 2008. It resulted in the arrest of 389 workers on immigration violations, ñthe largest criminal enforcement operation ever carried out by immigration authorities in the workplace.ò Julia Preston, *Illegal Immigrants Sent to Prison in Federal Push*, N.Y. Times, May 24, 2008. The prosecutions, like the arrests, were handled *en masse*. At Judge Readeôs direction, temporary courtrooms were set up at a fairgrounds called the National Cattle Congress. *Rubashkin*, 2010 WL 4362455, at *3. In

ñunusually swift proceedings,ò which took place in ñmobile trailers and a dance hall modified with black curtains,ò 297 of the arrestees ñpleaded guilty and were sentenced in four days.ò Julia Preston, *Illegal Immigrants Sent to Prison in Federal Push*, N.Y. Times, May 24, 2008. The immigrants were brought into and out of these makeshift courtrooms shackled, entering guilty pleas and receiving prison sentences in groups of ten. *Id*. The arrest, prosecution, conviction, and sentencing of these 297 individuals took less than two weeks from start to finish. *Id*.

The manner in which the prosecutions were carried out prompted substantial public criticism. The guilty pleas were obtained after the immigrants were threatened with more serious identity theft charges, which would have resulted in mandatory two-year prison sentences. The vast majority of the arrestees pleaded guilty to a lesser charge in exchange for five months incarceration. Subsequently, the United States Supreme Court issued a decision reflecting that the prosecutionôs plea bargaining threat was improper. *See Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009) (holding that federal identity-theft law may not be used to prosecute alien worker who uses false Social Security numbers to get a job without proof that defendant knew that identification information actually belonged to another person).

While some of the criticism over the handling of these cases came from predictable sources ï the American Immigration Lawyers Association argued that the defendants ñhad been denied meetings with immigration lawyers and that their claims under immigration law had been swept asideò ï some did not. U.S. District Judge Mark Bennett, who sentenced 57 of the immigrants, called the prosecutions ña travesty.ò He stated, ñI was embarrassed to be a United States District judge that day,ò and explained that he approved these draconian plea agreements for fear that the defendants would actually remain in custody longer if he did not. Tony Leys, *Postville Documentary Criticizes Sentencings*, Feb. 5, 2011, *available at* http://tinyurl.com/judgebennett.

Judge Reade, however, remained a stalwart supporter of the USAO. In a May 24, 2008 interview with *The New York Times*, Judge Reade took the extraordinary step of coming to the governmentôs defense, telling a reporter that the prosecutors ñhave tried to be fair in their chargingò decisions and that immigration attorneys critical of the process did ñnot understand the federal criminal process as it relates to immigration charges.ò Julia Preston, *Illegal Immigrants Sent to Prison in Federal Push*, N.Y. Times, May 24, 2008.

The Arrest, Prosecution and Sentencing of Sholom Rubashkin

Approximately six months after the raid on Agriprocessors, the government arrested Mr. Rubashkin and charged him with harboring and aiding and abetting illegal aliens for profit. He was subsequently charged in seven superseding indictments with additional offenses, including bank fraud, document fraud, and money laundering.[1] His case was assigned to Judge Reade, who severed the immigration counts from the financial fraud counts and ordered that the latter be

[1] The bank fraud allegations (based on inflated receivables and inventory figures) related to financial transactions between Agriprocessors and a local bank and cattle vendors. Some of the charges concerned the 1921 Packers and Stockyards Act ï a federal law that had never before in its then-88-year existence been invoked in a criminal case.

tried first on the ground that Mr. Rubashkin would otherwise be prejudiced by introduction of the immigration-related evidence at his financial fraud trial.

The severance, however, did not mean that the immigration charges ï derived directly from evidence obtained from the May 12 raid ï went unmentioned in the financial crimes trial. To the contrary, that evidence played a significant role. Evidence of the immigration violations was introduced ostensibly to support the governmentôs theory that Mr. Rubashkin had committed fraud by violating a clause in his agreement with the bank that required him to certify that he was compliant with all laws that had the potential to impact Agriprocessorsô financial stability. For nearly three days, the jury heard testimony from seven witnesses, who testified that Mr. Rubashkin knew that many of his workers were illegal, had set up a side payroll to avoid attracting attention from more vigilant employees at the company, and gave some of his workers thousands of dollars to purchase false documents that would allow them to work in the United States.

Rubashkinôs trial on the financial allegations began in October 2009 and lasted one month. In November 2009, he was convicted of 86 of the 91 counts. In a hearing held the following spring, Judge Reade imposed a prison term of 27 years ï effectively a life sentence given that Mr. Rubashkin was 51 years old at the time. Judge Reade imposed this sentence despite receiving a letter signed by 23 former high-ranking members of the Department of Justice ï including *six* former Attorneys General of the United States ï who criticized the slightly less draconian 25-year prison term sought by the USAO as a ñpotentially severe injustice.ò

Judge Readeôs imposition of a 27-year sentence on Mr. Rubashkin ï a first-time offender with no history of violence, a long record of charitable endeavors, and a father of ten, including an autistic son heavily dependent on his father for support ï generated extensive public criticism. In addition to the numerous op-eds and blog postings decrying the sentence as draconian, 47 members of Congress from 16 states ï 27 Democrats and 20 Republicans ï have written to the Department of Justice to express their concerns about the fairness of the proceedings. Nor are these critiques limited to the length of the sentence. Many, including most of the letters written by members of Congress, have asked that the Department of Justice investigate the allegations of prosecutorial and judicial misconduct surrounding the numerous *ex parte* meetings detailed above.

The Department of Justice's Response to Date

The USAO opposed Mr. Rubashkinôs motion for a new trial, his request for additional discovery, and his request for an evidentiary hearing. In its appellate brief, the USAO continues in the same vein, insisting all of its actions and those of Judge Reade were entirely proper, and dismissing as ñmeritlessò Mr. Rubashkinôs claim that he is entitled to a new trial before an unbiased judge because Judge Readeôs involvement in the case was ñlimited to matters of court logisticsò (despite the fact that the ICE documents indicate otherwise). Govôt Brief at 33, 43.

While the ICE documents do not provide a complete picture of what transpired at these meetings, what we do know raises serious questions regarding the extent of Judge Readeôs involvement in

the planning of the raid and the prosecutions that stemmed from it, including that of Mr. Rubashkin. The unwillingness of either Judge Reade or the USAO to provide a full and complete account of these meetings ï indeed, the cursory and dismissive manner in which both parties have responded to requests for greater information and transparency ï have only served to underscore those concerns.

Adding to our concern is the belated and grudging manner in which the ICE documents were produced. The USAO made the evidence available months after Mr. Rubashkinôs trial and conviction, and only after defense counselôs FOIA request forced its hand. Rather than concede this serious error, the government blames defense counsel for not proactively seeking the documents (even though the government kept defense counsel ignorant of their existence) and argues that Mr. Rubashkinôs request for a new trial based on Judge Readeôs failure to recuse herself is untimely (even though it was the governmentôs own failure to disclose that made it impossible for defense counsel to know the full basis for a recusal motion prior to trial).

In furtherance of this latter argument, the government takes the remarkable position that none of the ICE documents are ñnewly discoveredò because defense counsel ñknew or should have known the factual basis for [a recusal] motion prior to trial.ò Govôt Brief at 32. This argument flies in the face of the record, which establishes that, pretrial, defense counsel had access only to a meager number of publicly-available documents, consisting of: (1) an article in which Judge Reade described her involvement as being ñadvised informallyò of a ñmajor law enforcement initiativeò without being ñgiven any detailsò; (2) a House Judiciary Committee hearing in which a government lawyer misleadingly described the prosecutorsô *ex parte* contacts with Judge Reade as nothing more than a routine ñheads upò about an impending law enforcement operation; and (3) Judge Readeôs written order denying a recusal motion filed in a related case, in which Judge Reade stated that she ñlimited her actions in the [Agriprocessors] cases to her role as Chief Judge of the Northern District of Iowa, that is, performed duties in her official capacity.ò Govôt Brief at 21-23. The USAOôs claim that these limited and misleading descriptions of Judge Readeôs involvement in the planning of the Agriprocessors raid served to provide the same ñfactual basisò for a recusal motion as the ICE documents described above is simply not credible.

In short, the USAOôs response to the serious and credible allegations of judicial and prosecutorial misconduct raised by Mr. Rubashkinôs lawyers has been deeply disappointing, falling far short of any acceptable standard. Concerns about the USAOôs conduct in this case are shared by many, including the American Civil Liberties Union of Iowa, the Washington Legal Foundation, and the National Association of Criminal Defense Lawyers, all of which have filed amicus briefs in support of Mr. Rubashkin.[2] Indeed, two nationally renowned experts on legal

[2] Initially, the USAO took the ñrare stepò of refusing to consent to the filing of any amicus briefs in connection with Mr. Rubashkinôs appeal. *See* Anthony J. Franze & R. Stanton Jones, *With Friends Like These: The Troubling Implications of the Government's Recent Effort to Block Amicus Curiae Briefs in a Controversial White Collar Criminal Appeal*, Bloomberg Law Reports, Vol. 5, No. 8 (2011). The USAO then went even further, filing a ñresistanceò in which it ñurged the Eighth Circuit to adopt a restrictive standard for granting leave to file amicus briefs ï one that has been criticized by courts and commentators and is contrary to the governmentôs own longstanding amicus curiae practice.ò *Id.* & n.2. After a cascade of

ethics have concluded that the prosecutorsô extensive *ex parte* contacts with Judge Reade constituted both prosecutorial and judicial misconduct. Their opinions are summarized below.

Ethical Concerns Arising Out of the Rubashkin Prosecution

Professor Stephen Gillers of the New York University School of Law, one of the leading experts on legal ethics in the country, was asked to review the conduct of the USAO in the Rubashkin case. Professor Gillers concluded that the USAO committed misconduct by violating the Iowa Rules of Professional Conduct[3] in the following respects: (1) participating in *ex parte* meetings with Judge Reade in which ñstrategies,ò ñthe ongoing investigationò and ñother issues relating to the é investigation and operationò were discussed; (2) failing to transcribe and keep a detailed record of the *ex parte* meetings with Judge Reade; and (3) failing to inform Mr. Rubashkin and his counsel, pre-trial, of the date, duration and substance of the *ex parte* meetings and thereby preventing him from having the facts necessary to argue ñthat [Mr. Rubashkinôs] constitutional and statutory rights to the fact and appearance of a disinterested judge [were] compromised.ò Declaration of Stephen Gillers, ¶¶ 2, 23(a)-(h), 24.

Professor Gillers also correctly made short shrift of the USAOôs argument that there was no *ex parte* communication because there was no actual ñproceedingò when the meetings took place. As Professor Gillers explained (¶ 17):

> This tortured interpretation of an ethics rule is wrong for several reasons. It would read the rule to allow lawyers in civil and criminal matters to meet ex parte with judges without limitation on frequency or content so long as they refrain from filing the document (e.g., complaint, indictment) that formally begins an action, timing that is generally within their control. That in turn would enable lawyers opportunistically to skirt the rule and thereby undermine the very policies . . . that justify it in the first place.

Mark Harrison, the former Chair of the ABA Commission to Revise the Model Code of Judicial Conduct, was retained by defense counsel to express an opinion concerning whether Judge Readeôs conduct contravened the Code of Conduct for federal judges and/or 28 U.S.C. §455(a), the recusal statute applicable to federal judges. Mr. Harrison concluded, based on his review of the evidence, that Judge Reade ñviolated several provisions of the Code of Conduct and 28 U.S.C. §455(a).ò Declaration of Mark Harrison, ¶ 9. Specifically, Mr. Harrison found that Judge Readeôs violations consisted of: (1) participating in *ex parte* meetings with the USAO; (2) failing to maintain a complete record of those *ex parte* meetings; (3) failing to disclose the *ex parte* meetings to defense counsel ñat the earliest practicable timeò so that

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criticism from the legal community, *see, e.g.,* Franze & Jones, *supra*, the government withdrew its resistance.

[3] As Professor Gillers noted, the USAO is subject to the Iowa ethical rules. 28 U.S.C § 530B(a). These rules are similar to those in place throughout the country, and are modeled after the Model Rules on Professional Responsibility.

counsel could file a motion to recuse; and (4) failing to recuse herself ñfrom presiding over the trial of the principal individual who was responsible for managing the business that was the subject of the ex parte meetings.ò *Id*. at ¶ 10(a)-(d). Notably, Professor Gillers also concluded that the prosecutors engaged in misconduct by aiding and encouraging Judge Reade to violate her own ethical proscriptions. Gillers Decl., ¶ 21.

Conclusion

The credibility and integrity of federal prosecutors and investigators are vital to the proper functioning of the federal judicial system. As proven from the Ted Stevens case, serious and credible evidence that exculpatory information has been withheld not only affects an individual defendantôs ability to defend himself, but also diminishes societyôs confidence in the federal criminal process. Detailed, unrecorded communications and private meetings between a federal judge and federal law-enforcement agents and prosecutors who bring a case to trial before that same federal judge are deeply troubling. Moreover, if *ex parte* contacts between the judge and the prosecution are concealed from the defendant and his attorneys so that they are unable to move for recusal of the judge or seek other redress, the result is demonstrably and unquestionably unjust.

We strongly urge you to direct and carry out a full and prompt investigation of the allegations of impropriety and unfairness in the Sholom Rubashkin case in order to remove the cloud that is growing publicly and in judicial circles about the matters we describe in this letter.

We thank you very much in advance for your careful consideration of this matter.

Respectfully submitted,[4]

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