Congress of the United States

House of Representatives

Washington, DC 20515

August 25, 2017

The Honorable Jefferson B. Sessions, III
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Mr. Attorney General:

We write in response to the April 19, 2017, letter from Samuel R. Ramer, Acting Assistant Attorney General, Office of Legislative Affairs ("OLA"), to Jason Chaffetz, then-Chairman of the House Committee on Oversight and Government Reform, and the August 10, 2017, letter from Mr. Ramer to Lamar S. Smith, Chairman of the House Committee on Science, Space, and Technology ("OLA Letters"). In those letters, Mr. Ramer asserts that the Department of Justice ("DOJ") categorically refuses to investigate and prosecute violations of the federal statute criminalizing contempt of Congress whenever a congressional officer asks DOJ to consider that course of action, unless certain purported "prerequisites for a contempt of Congress referral to [DOJ]" have been satisfied. *See* OLA Letters at 1.

As the Chairmen of the House Committees on Oversight and Government Reform and on Science, Space, and Technology, we (as well as our committees and the House itself) have a significant institutional interest in Congress's ability to perform its constitutionally based oversight function to the fullest extent permissible, and therefore in the rigorous enforcement of the criminal statutes that have been enacted into law precisely in order to protect and facilitate the performance of that important constitutional function. We also have a significant institutional interest in ensuring that DOJ performs its constitutionally based obligation to faithfully execute the laws, including 2 U.S.C. § 192.

The position advanced in the OLA Letters would frustrate the legitimate interests of a coordinate branch of government and hinder DOJ's execution of its constitutional responsibilities, while encouraging the subjects of lawful congressional subpoenas to flout the law with impunity. We urge you to reject those troubling results by (i) overturning the position asserted in the OLA Letters, and (ii) directing your subordinates to give prompt and thorough consideration to all referrals from congressional officials regarding alleged violations of 2 U.S.C. § 192.

The position asserted in the OLA Letters appears to rest on the mistaken assumption that Chairman Chaffetz's and Chairman Smith's criminal referral letters were an attempt to invoke the "certification" process outlined in 2 U.S.C. § 194. Based on that erroneous assumption, the

OLA Letters then incorrectly apply the precedents of the House in an attempt to justify OLA's flawed conclusion that the absence of a "certification" under 2 U.S.C. § 194 means that DOJ cannot consider a Committee's contempt referral. *See* OLA Letters at 2. OLA's position is demonstrably incorrect: It is (i) inconsistent with the plain text of the relevant statutory provisions, and (ii) contrary to DOJ's own historical practice of prosecuting contempt of Congress in the complete absence of any certification from Congress.

Pursuant to the unambiguous terms of 2 U.S.C. § 192, a person who has been "summoned as a witness" by either House or a committee thereof to testify or to produce documents and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine and/or imprisonment for up to one year. *See* 2 U.S.C. § 192. Violation of that statutory provision, without more, constitutes a criminal act subject to prosecution. Certification by a congressional entity is not an element of the offense, nor is it a prerequisite to prosecution.

Separate and apart from the offense defined in 2 U.S.C. § 192, federal law also establishes a mechanism whereby the House or Senate may certify that a recalcitrant witness has committed contempt of Congress and thereby direct the criminal prosecution of that person in the federal courts. 2 U.S.C. § 194. If Congress follows the certification process set forth in the statute, the contempt certification must then be provided to the appropriate United States Attorney, "*whose duty it shall be* to bring the matter before the grand jury for its action." 2 U.S.C. § 194 (emphasis added). Thus, the evident purpose of Section 194 was to provide Congress with a mechanism for mandating the prosecution of contemnors in federal district court, as an alternative to the exercise of Congress's inherent constitutional authority to try and punish contemnors itself.[1]

The OLA Letters assert that DOJ may not even "consider" a referral for contempt of Congress unless the relevant house of Congress has chosen to follow the certification procedure set forth in 2 U.S.C. § 194. But neither the text of the criminal contempt statute, nor the House precedents cited by the OLA Letters, provide the slightest support for the proposition that DOJ is powerless to consider a referral requesting it to investigate and prosecute contempt of Congress unless the procedures set forth in 2 U.S.C. § 194 have been followed. To the contrary, it is perfectly clear that the absence of a certification under 2 U.S.C. § 194 does nothing to eliminate

[1] We recognize that DOJ takes the position that Section 194 unconstitutionally intrudes upon its prosecutorial discretion by imposing a mandatory duty to prosecute upon receipt of a proper certification. Whatever the validity or invalidity of that position, however, DOJ's rejection of the mandatory duty imposed by Section 194 is irrelevant for present purposes. Indeed, the Department's position on Section 194 is in some ways fundamentally incompatible with its position in the OLA Letters in so far as the OLA Letters effectively claim DOJ lacks discretion to prosecute a clear violation of criminal law absent congressional action. The key point here is that Section 194 on its face serves a different purpose from Section 192, and DOJ's refusal to give effect to Section 194 on constitutional grounds provides no justification for OLA's position that DOJ will categorically refuse to investigate violations of Section 192 when requested to do so by Members of Congress.

DOJ's authority and obligation to consider a criminal referral for contempt of Congress, as well as any other information pertinent to such a charge, any more than it would have that effect with respect to any other referral regarding a violation of any other criminal statute.[2]

Notably, OLA does not and cannot contend that Chairman Chaffetz's or Chairman Smith's referrals lack substantive merit. Bryan Pagliano refused to appear before the Committee on Oversight and Government Reform on two separate occasions, despite two duly authorized congressional subpoenas compelling his appearance; plainly he was "summoned as a witness … to give testimony … [and] willfully ma[de] default." 2 U.S.C. § 192. Similarly, Treve Suazo, the Chief Executive Officer of Platte River Networks, also "willfully ma[de] default" by refusing "to produce papers upon [a] matter under inquiry" to the Committee on Science, Space, and Technology, notwithstanding two validly issued subpoenas for documents relevant to the Committee's investigation. *See id.*

Notwithstanding the validity of the grounds for the referrals, OLA maintains that DOJ's policy is to ignore its constitutional obligation to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, cl. 5, whenever it receives notice of criminal contempt of Congress by means of a congressional referral, merely because the contemnor(s) (here, Mr. Pagliano and Mr. Suazo) were not referred to the full House for contempt proceedings pursuant to 2 U.S.C. § 194. But the certification procedure in 2 U.S.C. § 194 provides no justification for OLA's proposed abdication of DOJ's responsibility to investigate and prosecute contempt of Congress. To the contrary, the certification procedure was intended to *compel* DOJ to prosecute contempt of Congress upon certification, not to *immunize* contempt of Congress from prosecution in the absence of a certification. We cannot understand why DOJ would choose to erect a meritless exception to its authority and responsibility to investigate violations of the criminal laws in response to a congressional referral. OLA's Letters reflect a profound lack of respect for the dignity and interests of the Legislative Branch.

OLA's position is not only refuted by the plain language of the relevant statutes and by compelling considerations of public policy and inter-branch comity, it directly contradicts DOJ's own practice regarding criminal prosecutions for contempt of Congress. On multiple occasions, DOJ has indicted and prosecuted individuals for violations of 2 U.S.C. § 192 despite the complete absence of a certification from Congress under 2 U.S.C. § 194. For example, in 2009, at the culmination of its investigation into steroid use in Major League Baseball, then-Chairman Henry A. Waxman of the Committee on Oversight and Government Reform requested that DOJ "investigate whether defendant [Miguel O. Tejada] 'made knowingly false statements to the Committee[.]'" Gov't Mem. In Aid of Sentencing at 6, *United States v. Miguel O. Tejada*, No.

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[2] Nor does House Rule XI.2(m)(3) (which OLA evidently intended to reference in the OLA Letters at 1–2) support OLA's position. While we appreciate OLA's acknowledgement that DOJ is bound by House Rules, Rule XI.2(m)(3) is addressed only to "*enforc[ing] . . . [c]ompliance with a subpoena* issued by a committee or subcommittee"; it has nothing to do with imposing punishment for non-compliance, which is the function of a prosecution for criminal contempt.

09-MJ-077(AK) (D.D.C. Mar. 19, 2009) (ECF No. 9). None of the procedures of 2 U.S.C. § 194 had been followed. There was no committee resolution or report, no vote was taken by the House on a contempt resolution, and there was no certification by the Speaker. Nevertheless, DOJ charged Mr. Tejada with contempt of Congress, and he pled guilty to "one count of making misrepresentations to Congress in violation of [2 U.S.C. §] 192." *See id.* at 1.

Similarly, in April 2010, DOJ charged Scott J. Bloch with a violation of 2 U.S.C. § 192. *See* Information, *United States v. Bloch*, No. 10-MJ-00215 (DAR) (D.D.C. Apr. 22, 2010) (ECF No. 1). Mr. Bloch—formerly the head of the United States Office of Special Counsel ("OSC"), an independent federal agency tasked with safeguarding the merit-based employment system—was the subject of a Committee on Oversight and Government Reform investigation into OSC's hiring of a private computer contractor to perform "seven-level wipe[s]" of several computers in an attempt to prevent their contents from being recovered. *See* Mem. In Aid of Sentencing, 2-3, *United States v. Bloch*, No. 10-MJ-00215 (DAR) (D.D.C. June 13, 2010) (ECF No. 10). Mr. Bloch admitted that his answers during a March 4, 2008, transcribed interview with Committee staff "unlawfully and willfully withheld pertinent information from the Committee." *Id.* at 5. Like Mr. Tejada, Mr. Bloch was prosecuted for contempt of Congress even though the procedures set forth in 2 U.S.C. § 194 had not been followed: There was no committee resolution or report recommending a contempt finding, no vote was taken by the House on a contempt resolution, and the Speaker had made no certification pursuant to 2 U.S.C. § 194.

In sum, the position taken by OLA lacks any legitimate legal basis, and OLA's assertion (OLA Letters at 2) that its letters reflect DOJ's "longstanding position" is, quite simply, untrue. We request that you overturn OLA's erroneous position and direct the United States Attorney for the District of Columbia to institute investigations in response to these criminal referrals.

Sincerely,

Trey Gowdy
Chairman
Committee on Oversight
and Government Reform

Lamar S. Smith
Chairman
Committee on Science, Space,
and Technology

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

The Honorable Eddie Bernice Johnson, Ranking Minority Member
Committee on Science, Space, and Technology