

United States Senate  
WASHINGTON, DC 20510

March 22, 2018

**VIA ELECTRONIC TRANSMISSION**

The Honorable Rod Rosenstein  
Deputy Attorney General  
U.S. Department of Justice

Dear Deputy Attorney General Rosenstein:

We write to request an update on the investigation by the Justice Department (Department) into the conduct of federal prosecutions in connection with the unsuccessful prosecution of Vascular Solutions, Inc. and its CEO Howard Root. In May 2016, we wrote the Department to detail our concerns regarding reports that the federal prosecutors in this case may have violated the Federal Rules of Criminal Procedure, practices outlined in the United States Attorneys' Manual, and the Department's ethical standards.<sup>1</sup> In its June 2016 response, the Department stated that the Office of Professional Responsibility (OPR) was conducting a preliminary inquiry into the matter.<sup>2</sup>

Perhaps the most alarming allegation outlined in the May 2016 letter was that government attorneys levied threats to urge witnesses to alter testimony in support of the government's position at trial.<sup>3</sup> For example, it is alleged that five immunized Vascular Solutions employees were informed that if they did not change their testimony, they could be recommended for exclusion from participation in Medicare and Medicaid, effectively ending their career in medical device sales.<sup>4</sup>

According to recent reports, the Department has similarly sought to exclude Mr. Root from various health care industry conferences to which he was an invited panelist or keynote speaker by threatening to withhold Department participation in the conferences unless Mr. Root's invitations were revoked.<sup>5</sup> These conferences included the American Bar Association's

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<sup>1</sup> Letter from Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, and Sen. Mike Lee, Member, Sen. Comm. on the Judiciary, to Hon. Sally Q. Yates, Deputy Attorney General, U.S. Department of Justice (May 19, 2016) [hereinafter Grassley and Lee Letter].

<sup>2</sup> Letter from Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, and Sen. Mike Lee, Member, Sen. Comm. on the Judiciary (Jun. 23, 2016).

<sup>3</sup> Grassley and Lee Letter.

<sup>4</sup> *Id.*

<sup>5</sup> Justin Dillon, 'OUT, DAMNED SPOT!' THE DOJ WAGES A PETTY RETRIBUTION CAMPAIGN AGAINST HOWARD ROOT, ABOVE THE LAW (2018), <https://abovethelaw.com/2018/01/out-damned-spot-the-doj-wages-a-petty-retribution-campaign-against-howard-root/?rf=1> (last visited Feb. 23, 2018)

27<sup>th</sup> Annual National Institute on Health Care Fraud, scheduled for May 2017, and the American Conference Institute's Advanced Forum on False Claims and Qui Tam Enforcement, scheduled for January 2017. In both cases, it appears that the Department's ultimatums succeeded in blocking Mr. Root from participation.<sup>6</sup>

Taken together, these reports suggest a pattern of threatened and actual retribution against former defendants and witnesses borne out of the Department's disappointment with the outcome of a particular case. This not only casts doubt on the Department's ability to accept the results of judicial proceedings in a professional manner befitting the nation's preeminent law enforcement agency, but it significantly undermines our confidence in its commitment to hold government attorneys accountable for questionable actions that may have occurred in the course of this or other cases.

We are also concerned about a chilling effect that may impair critical Department functions outside the litigation context that support its law enforcement mission. Ironically, the brochure for the National Institute on Health Care Fraud states that, "[t]his National Institute draws panelists, facilitators, and participants from [the public and private sector] and offers unique opportunities to meet and share experiences and concerns in a non-adversarial setting."<sup>7</sup> It is possible that in seeking retribution against former adverse parties within the industry the Department may be undermining the public-private engagement that is essential to making progress on issues like health care fraud and whistleblower protections, which are of significant concern to American taxpayers.

To address the unresolved concerns about the conduct of Department attorneys in this case, please answer the following:

1. What is the status of OPR's preliminary inquiry?
2. If the preliminary inquiry has been completed, on what date was it completed, and what were its conclusions on issues including, but not limited to, those outlined in the questions contained in the May 2016 letter to the Department?
3. Did OPR's preliminary inquiry result in a full OPR inquiry into the matter? If so, what is the status of such inquiry?
4. If a full inquiry has been completed, on what date was it completed, and what were its conclusions on issues including, but not limited to, those outlined in the questions contained in the May 2016 letter to the Department and any additional issues identified during the preliminary inquiry?

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<sup>6</sup> *Id.*

<sup>7</sup> American Bar Association, May 16, 2017, accessed February 23, 2018,

[https://www.americanbar.org/content/dam/aba/events/cle/2017/spring/ce1705hcf\\_webbrochure\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/cle/2017/spring/ce1705hcf_webbrochure_authcheckdam.pdf)

5. Did any OPR inquiry into this matter result in a referral to the Office of Inspector General (OIG)? If so, on what date was the matter referred to OIG? If not, why not?

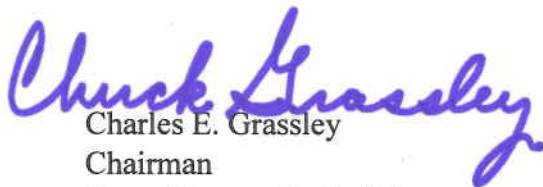
To address our concerns about the alleged pattern and practice of threatened and actual retribution, please answer the following:

6. Did any Department employee pressure the organizers of any conference, including but not limited to those referenced above, to withhold, revoke, or in any way alter an invitation to Mr. Root? What steps has the Department taken, or plan to take, to investigate these reports?

7. Would conditioning Department involvement in a conference on the organizer's exclusion of a private citizen violate Department policies or ethical standards? Are you aware of any precedent in this regard?

Please number your response according to their corresponding questions and respond no later than April 5, 2018. Thank you in advance for your cooperation with this request. If you have questions, please contact Josh Flynn-Brown of Senator Grassley's Judiciary Committee staff at (202) 224-5225 or Marc Marie of Senator Lee's Judiciary Committee staff at (202) 224-8992.

Sincerely,



Charles E. Grassley  
Chairman  
Committee on the Judiciary



Michael S. Lee  
United States Senator