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September 10, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Attorney General:

We are writing to follow up on our July 17, 2007, letter concerning the issue of selective or politically-motivated prosecutions, in light of Principal Deputy Assistant Attorney General Brian A. Benczkowski's letter to us of September 4, 2007. We were very disappointed that Mr. Benczkowski largely rejected our request for documents that would shed light on the Department's decisionmaking in three cases where concerns have been raised that prosecutorial decisions were influenced by improper political factors: United States v. Don Siegelman, United States v. Georgia Thompson, and United States v. Cyril Wecht. We urge that you immediately take steps to ensure that the Department fully cooperates with our request, so that these troubling concerns about political influence in prosecutorial decisionmaking and the reputation of the Department of Justice can be effectively resolved.

Our request does not arise in a vacuum. The Committee's investigation into the firing of nine U.S. attorneys in 2006 has surfaced substantial evidence that improper political pressure has been brought to bear on the U.S. Attorney corps, and that prosecutors who did not serve the Administration political goals were fired while others who were dubbed "loyal Bushies" were retained.[1] Since our original letter, even more evidence has come to light showing an aggressive effort run by White House political operatives to use the machinery of government for partisan advantage and establishing that top members of your staff attended political briefings led by Karl

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[1] See July 24, 2007, Memorandum from Chairman Conyers to Members of the Committee on the Judiciary re Consideration of Report of the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten to Comply With Subpoenas By the House Judiciary Committee.

Rove.[2] Also in the time since our original letter, public concern and information about the issue of selective or politically-motivated prosecutions has only increased.[3]

Against this backdrop, the Committee has identified a number of cases where substantial questions of political interference have been raised. Of these cases, we have so far limited our request for information to only the three matters referenced in our July 17, 2007, letter. Each of these cases raises substantial, particularized concerns about the role of politics in the exercise of prosecutorial power and whether any of these defendants were targeted for partisan reasons. Needless to say, it is extremely disappointing that the Department has responded by producing only a handful of relevant documents and by focusing its energies on arguing the facts of these cases.

The few materials that the Department has provided are clearly insufficient. You have offered approximately 350 pages of public pleadings, but even this production has been limited to pleadings that represent *the Government's* position in those matters. We understand that the Committee may obtain publicly filed documents from the courts without the Department's assistance, but we question the value of the Department selectively providing those few pleadings supporting its arguments but not providing any responsive pleadings or court decisions that present contrary arguments and facts.

Far more important, Mr. Benczkowski's blanket refusal to provide materials deemed "deliberative" such as prosecution memoranda, even as to closed matters, and his refusal to provide any non-public materials concerning matters that have not been closed, is unacceptable. While the Committee appreciates the sensitivity of these materials, and we are open to reasonable accommodations of those concerns, as described below, we believe it is improper to simply declare such materials off limits, particularly in view of the substantial questions that have been raised about the Department's action in these cases. While Mr. Benczkowski's letter recites the Department's "longstanding" position, relying on a statement by the White House counsel made in 2002, in fact Congress repeatedly has obtained prosecution memoranda and other deliberative materials of the Department regarding both open and closed criminal matters during past

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[2] See Solomon, MacGillis & Cohen, *How Rove Directed Federal Assets for GOP Gains*, Washington Post, August 19, 2007; Eggen & Kane, *Gonzales Now Says Top Aides Got Political Briefings*, Washington Post, Aug. 4, 2007.

[3] See, e.g., Savage & Hamburger, *In Chertoff's Record, Shades of Politics*, Los Angeles Times, Sept. 4, 2007; Editorial, *Selective Prosecution*, New York Times, Aug. 6, 2007.

Congressional investigations.[4] Indeed, this Administration ultimately agreed to make available to Congress prosecution memoranda that were at issue when the White House counsel made the statement quoted in Mr. Benczkowski's letter. Such documents, which dealt with prosecution decisions in murder cases and related issues, and which the Department claimed were related to ongoing litigation, were made available to Congress despite being subject to a formal claim of executive privilege by President Bush, on terms negotiated by then-Assistant Attorney General Michael Chertoff and the then Government Reform Committee staff.[5]

Other examples are plentiful. As early as the Teapot Dome scandal in the 1920s, under Attorney General (and later Chief Justice of the United States Supreme Court) Harlan Stone, a Senate Select investigative committee received broad access to Department files, including investigative reports, recommendations for prosecutorial action, and testimony of investigating agents and attorneys.[6] A great deal of deliberative and investigative material, including "predicate documents relating to the opening of the investigation and prosecution of" an EPA official, were made available to this Committee during Chairman Rodino's investigation into the Department's role in the EPA's decision to withhold documents from Congress, which helped lead to the citation of EPA Administrator Ann Gorsuch Burford for contempt of Congress.[7] And in the aftermath of the Ruby Ridge shootings, Congress received core deliberative materials

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[4] See Statement of Morton Rosenberg, Specialist in American Public Law, Congressional Research Service, Before the House Committee on Government Reform Concerning The History of And Basis For Congressional Access to Deliberative Justice Department Documents, Feb. 6, 2002 (containing a detailed Appendix listing "18 significant Congressional investigations of the Department of Justice which involved either open or closed investigations in which the Department agreed to supply documents pertaining to those investigations, including prosecutorial decisionmaking memoranda and correspondence, and to provide line attorneys and investigative personnel for staff interviews and for testimony before committees").

[5] Everything Secret Degenerates: The FBI's Use of Murderers As Informants, Third Report of the Committee on Government Reform, 108th Congress, 2d Session, Report 108-414, Vol. 1, at 132-33.

[6] Investigation of Hon. Harry M. Daughtery Before the Senate Select Committee on Investigation of the Attorney General, vols. 1-3, 68th Congress, 1st Session, 1924; Rosenberg, supra, at CRS-4 to CRS-7.

[7] Rosenberg, supra, at CRS-7 to CRS-10.

reflecting the Department's prosecutorial and other decisions arising out of those shootings.[8] There is thus ample precedent for production or review of the materials requested by the Committee.

Let us be clear. We have not prejudged the outcome of our investigation. However, without meaningful cooperation from the Department, including access to materials that would reflect the decisionmaking process that led to the indictment of these individuals, it will simply be impossible to make fair judgments or to allay suspicions that improper factors played a role in these and other cases. Accordingly, we must reiterate our request for access to relevant materials that you have so far declined to provide, such as: (i) case impression and prosecution or declination memoranda, including drafts, and notes or emails discussing same, (ii) indictment review files/memoranda, and notes or emails discussing same, (iii) discovery correspondence, (iv) FBI 302s and other witness interview records or memoranda, (v) witness immunity agreements and Giglio materials, (vi) Brady materials, and (vii) any other emails or documents discussing the strengths, weaknesses, merits, wisdom, or political implications of these prosecutions.

As stated above, we recognize the sensitivity of some of the requested materials, and appreciate the Department's interest in preserving the confidentiality of its internal deliberations on prosecution matters. To accommodate those concerns, we are prepared to agree that, instead of the Department producing all the requested materials to the Committee, Committee members and staff would review the most sensitive materials on Department premises, assuming mutually agreeable conditions of reasonable access can be arranged. Such procedures have been used in the past for sensitive executive branch materials, such as some internal Department investigation records relevant to the U.S. Attorney firings and White House materials relevant to the death of Corporal Pat Tillman and the Administration's public statements on that subject. We also are open to your offer of a briefing from U.S. Attorney Biskupic regarding the Georgia Thompson prosecution, but such a briefing would not be productive until the Committee has had a reasonable opportunity to review the documents and memoranda possessed by the Department that are relevant to that case but which have not been produced.

As a primary reason for declining to provide the information that we have requested, Mr. Benczkowski's letter states that "We want to avoid any perception that the conduct of our criminal investigations and prosecutions is subject to political influence." This concern should

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[8] Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary, 104th Congr., 1st Sess. (1995).

lead to precisely the opposite result. Due to the events and revelations of recent months, the "perception that the conduct of our criminal investigations and prosecutions is subject to political influence" already exists, and a refusal to cooperate with the Committee's investigative efforts can only reinforce it. To carry out the pledge that you and others have made to help move the Department forward past these difficult issues and begin the long process of restoring the Department's reputation and credibility, we urge you and all present and future Department officials to cooperate with our efforts, and to provide the materials we have requested on a voluntary basis.

Thank you in advance for your prompt cooperation.

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chair, Subcommittee on Commercial and Administrative Law

Artur Davis
Member, Committee on the Judiciary

Tammy Baldwin
Member, Committee on the Judiciary

cc: Hon. Brian A. Benczkowski
Hon. Lamar S. Smith
Hon. Bobby Scott
Hon. Chris Cannon
Hon. J. Randy Forbes