



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 13, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Messrs. Chairmen:

This responds to your letters, dated March 8, 2007 and March 12, 2007, and subsequent correspondence, as well as the House Committee's subpoena, dated April 10, 2007, concerning the Committees' oversight investigations regarding the resignations of U.S. Attorneys.

Let me begin by emphasizing that the Department remains committed to working with the Committees to reach appropriate arrangements for providing the Committees with the information they need to review the U.S. Attorney resignations, in a manner that is consistent with the important institutional interests of the Department and the Executive Branch that we have identified. We have already made an extraordinary accommodation of the Committees' needs by providing internal deliberative documents concerning the decision to request the resignations of the eight U.S. Attorneys and the preparation of congressional testimony on this matter. We have also made available for review the unredacted versions of documents that were produced to the Committees in redacted form.

We continued that cooperation today by producing an additional 2,394 pages of documents. Included in today's production are unredacted versions of some of the documents that we previously produced in redacted form while making the unredacted copies available for review by Committee Members and staff, as set forth in our March 19th letter. Staff from both Committees have now reviewed the unredacted documents, and we have considered the Committees' specific expression of need to receive copies of unredacted documents containing information about individuals who may have been considered prior to December 7, 2006, for appointment to replace the eight dismissed U.S. Attorneys. In light of your articulated need to explore the possible relationship of the consideration of replacement appointments to the requests for resignation, and as a further accommodation of the Committees' information needs,

we produced this morning unredacted documents containing that information that were created prior to the requests for resignation on December 7, 2006.

We also understand that you have expressed a similar interest in receiving copies of unredacted documents that identify U.S. Attorneys, other than the final eight, who were also listed at certain times for possible replacement but who were not asked to resign. In our view, the balancing of interests regarding this request is very different from your request regarding potential candidates to replace the U.S. Attorneys. The unredacted versions of these documents have been available for review by Committee Members and staff from the beginning of our production, and Committee staff have in fact reviewed them at the Department. Accordingly, the information about these U.S. Attorneys, who were not asked to resign, has been produced on a confidential basis in response to your oversight request.

The further step of producing these documents for public disclosure, however, would raise significant concerns that are not presented by the provision of information regarding potential replacement candidates because the reputations of those individuals would not be materially harmed by public disclosure of the fact that they were considered for appointment. By contrast, as we have repeatedly stressed, the public disclosure that there was consideration about asking for the resignation of a U.S. Attorney would cause substantial harm to his or her reputation, as well as an acute negative impact on the functioning of the Department and our U.S. Attorney offices. As stated in our March 27th letter to the Senate Committee, "it would be fundamentally unfair to these individuals, particularly sitting U.S. Attorneys, to reveal publicly internal Executive Branch deliberations regarding their performance. They had no involvement in this controversy and their reputations should not be unnecessarily maligned. The disclosure of the redacted information also would significantly compromise, for no public gain, the continuing relationships between Main Justice and U.S. Attorneys who continue to serve."

Under these circumstances, we do not believe there would be any public interest in the public disclosure of their identities that outweighs the corresponding public interest in their continued effective service as U.S. Attorneys. We, of course, remain interested in discussing this issue with staff for your Committees if you believe we have failed to consider any important interest that would be served by the public disclosure of this information.

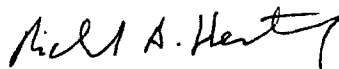
We understand that you have asked questions about the process by which the Department has identified documents responsive to the Committees' requests. Our document productions have been the result of an extensive search and review process that we have conducted on an expedited basis in an effort to accommodate your information needs. We have at all times sought to provide documents identified as responsive to your requests, limited only by our available resources and the urgency of your requests. As we have advised Committee staff, we would be pleased to arrange a meeting at your earliest convenience to discuss our process and respond to your questions.

Finally, the Committees have requested copies of all of the Department's documents that fall within the category of documents "generated for the purpose of responding to the congressional (and media) inquiries." This is a category of documents that were all created after the date, December 7, 2006, of the request for the United States Attorney resignations. Thus, as "after-the-fact" documents, they are not part of the "document trail" leading up to the Department's decision to request the resignations. Moreover, as we have previously stated, we believe that there would be a substantial inhibiting effect on future informal communications within the Executive Branch and between agencies and congressional representatives if records of such informal communications during the conduct of an oversight investigation were to be produced in the normal course of congressional oversight.

Notwithstanding this strong overarching concern, we have produced to you a subset of this category because we recognize that you have articulated a compelling and particularized need for documents that relate to instances in which we believe Department officials may have provided incomplete or inaccurate information about this matter to Congress. We do not believe that the remaining documents in the overall category are relevant to that need, but in light of the Committees' continuing interest, we are prepared to confer with you about the development of a type of log of these documents. Our goal would be to create a document that would provide you with additional information, consistent with your interests in this information and your timing needs. We also believe that the information in such a document would be helpful in clarifying our concerns about the chilling effect of producing the underlying documents. Of course, we would be prepared to respond to questions or expressions of interest regarding particular documents identified on the log document.

My Office will be contacting the staff of both Committees to discuss possible forms this log might take, as well as to schedule a meeting to discuss the Department's process for searching and producing documents to the Committee. As always, please do not hesitate to contact this Office if you would like to confer about any of the matters addressed in this letter.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Lamar Smith
The Honorable Arlen Specter
The Honorable Charles Schumer
The Honorable Jeff Sessions
The Honorable Linda Sanchez
The Honorable Chris Cannon



U.S. Department of Justice

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Office of the Assistant Attorney General

Washington, D.C. 20530

March 26, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Linda T. Sanchez
Chairwoman
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Madam Chairwoman:

This responds to your letter, dated March 22, 2007, seeking production of a variety of Department documents, including those that have been made available for your review. We request that the Committee defer any action to issue subpoenas relating to these materials until we have an opportunity for meaningful discussion about our concerns regarding public disclosure of these documents.

Our fundamental concern about producing the unredacted documents is that it would be deeply unfair to the U.S. Attorneys who were not asked to resign to publicly disclose the Department's internal deliberations over their possible replacement. These dedicated public servants, who continue to serve in their offices, were not in fact asked to resign and had no involvement in the current controversy. They do not deserve to have their reputations maligned unnecessarily by public disclosure as they attempt to continue to tackle the Department's law enforcement mission. In light of the fact that the Department has offered Members and staff the opportunity to review the unredacted documents privately, we ask you to consider the damage that such disclosures would cause to individual U.S. Attorneys and the Department.

Consistent with the extraordinary circumstances of this matter, we have offered access to information that is virtually never disclosed outside of the Department. As set forth in our previous correspondence, we have furnished you with more than 3,100 pages of documents in the past week, from which we have redacted information that implicates individual privacy interests

and significant institutional equities of this Department. We have offered you access to the complete and unredacted versions of those same documents at the Department (or on the Hill for individual Members), with a separate collection set aside for the majority and the minority in each Committee so that your respective staffs can mark and tag documents as they see fit. To date, Committee staff have reviewed only the first 143 pages of unredacted documents on March 19, 2007; no staff or Members have accepted our offer to review the far larger number of unredacted pages and other documents that are now available for your review.

While we understand that you may disagree with the Department's decisions relating to the requested resignations of the eight United States Attorneys, we trust that you have no interest in damaging the Department's ability to serve the Nation as the federal Government's primary law enforcement and litigating agency. Under those circumstances, we believe it is important that we work together to develop an accommodation of your information needs that is consistent with the Department's law enforcement and litigation responsibilities. Some of the particular requests set forth in your letter would materially and adversely affect the Department's operations in ways that serve no useful purpose. Most importantly, disclosure of the names of U.S. Attorneys who were considered for replacement but ultimately not asked to resign would only compromise, for no public gain, the Department's effective relationships with them and do substantial harm to their reputations and their ability to do their jobs effectively. The relevance of such information is attenuated because their resignations were not in fact requested, and disclosing such internal deliberations would also discourage the robust exchanges of views that are important to the Department's management of its leadership resources.

We have not, of course, redacted information about candidates for U.S. Attorney if their consideration was related to the decision to seek a particular resignation. We have redacted names of candidates whose consideration was not related to that decision, and the basis for your further request for such information remains unclear. If the candidate was irrelevant to the U.S. Attorney's resignation, then the relevance of information concerning that individual to your oversight interest is unclear. Moreover, the public identification of such individuals implicates their privacy interests and would chill the internal deliberative process that remains on-going within the Department to select replacements.

Your letter also asks about our withholding of a category of documents "generated for the purpose of responding to the congressional (and media) inquiries." You have suggested that this category is "crucial to [y]our oversight interests." Although we agree that Congress has a "legitimate interest in examining the Department's [assertedly] incomplete and inaccurate responses and testimony to Congress on this subject," it is only a small sub-set of this category that addresses that interest - and we have already produced those documents. As we stated in our March 19th response, we have provided our "deliberative documents concerning the preparation of the congressional testimony by Department officials in order to clarify the integrity of our process for preparing the testimony." These documents included preparatory materials related to congressional briefings. We believe that production, together with the interviews our officials will provide, should satisfy that oversight interest.

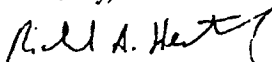
In producing those documents, we made a careful and reasonable exception in these unique circumstances, based on the particularized need relating to the assertedly incomplete testimony, to our longstanding position that it is in the interests of neither the Legislative nor the Executive Branch for agencies to be required to produce their informal communications – whether with Members of Congress or their staff or within the Executive Branch – regarding matters under inquiry by Congress. The withheld documents in this category do not relate to possible inaccuracies or misrepresentations in congressional testimony, but instead reflect the myriad of confidential communications that arise in the course of responding to inquiries about matters being reviewed by Congress.

We believe that there would be a substantial inhibiting effect on future informal communications between agencies and congressional representatives, both majority and minority, if informal communications – to use hypothetical examples, a suggested response for a Member to make to a constituent's inquiry about the matter under review or a candid communication from a Member's staff regarding the Member's view of the matter – were to be produced in the normal course of congressional oversight. This would be especially problematic in this era of emails and Internet posting.

We also hope that you will appreciate our concern with respect to the internal Executive Branch communications in this category. A common sub-category of documents in this category consists of emails and drafts of letters responding to committee requests for documents or information. These draft or informal documents are analogous to documents recording communications between committee staff and Members regarding the drafting of the committee requests themselves. Just as the confidentiality of communications between congressional staff and their principals is essential to the conduct of the public business, so too it is essential for the Executive Branch. Moreover, it would introduce a significantly unfair imbalance to the oversight process if committees were able to obtain internal Executive Branch documents that are generated in order to assist Executive Branch officials in determining how to respond to an inquiry by the very committee seeking the documents or other information.

We earnestly hope that you will accept our offer to review the redacted documents before taking further action. We are available to confer with you about these matters at your convenience.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Lamar Smith
The Honorable Christopher B. Cannon



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Washington, D.C. 20530

March 19, 2007

The Honorable John Conyers
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Linda T. Sanchez
Chairwoman
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Madam Chairwoman:

This supplements our previous responses to your letter, dated March 8, 2007, which requested documents and other information about the request for the resignations of eight United States Attorneys. Under the extraordinary circumstances of this matter, it is important for the Congress and the people it represents to understand both the reasons for our decisions to request these resignations and our efforts to provide testimony to Congress about this matter. It would be improper to remove a United States Attorney for partisan reasons in retaliation for bringing or failing to bring, or in an effort to prevent the U.S. Attorney from bringing, a particular prosecution or enforcement action -- such as for failing to pursue a public corruption case. Because the American public must have confidence that such considerations of partisan gain did not factor into the decision to ask for the resignation of these eight federal prosecutors, we are providing the Subcommittee with confidential, deliberative documents that disclose the process through which the Department reached those decisions and prepared for testimony. The release of such deliberative materials is virtually unprecedented and reflects the Department's commitment to ensuring that all the relevant information underlying these decisions is available to Congress.

Enclosed are over 3,000 pages of documents responsive to your request. Consistent with our prior production, we will make unredacted copies of these documents available for review at the Department by Committee staff. The enclosed documents were located in the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, and the Executive Office for United States Attorneys. As indicated in our letter of March 13, 2007, we are

redacting personal information based upon individual privacy interests. Also redacted is information from multi-subject documents about other subjects, completely unrelated to the removal of any U.S. Attorneys; a few of these redactions concern non-public information about open criminal investigations, which will not be made available for review.

Additionally, we are redacting information that would identify other U.S. Attorneys who were considered for possible removal but ultimately were not asked to resign, and information about candidates to replace those who were removed unless that information played a role in the removal decision. We also have made a few redactions of information about consideration of candidates for judicial appointments. In making the redactions, we are seeking to preserve the privacy and professional viability of those who are continuing to serve as U.S. Attorneys as well as individuals who have been considered but not selected as nominees for that position. While we appreciate the Committee's interest in confirming the character of these redactions, we are unaware of any value in publicly disclosing the unredacted documents that would outweigh the damage to the individuals involved and their ability to function effectively as U.S. Attorneys or professionals in other roles. It would be patently unfair to the individuals and also risk destruction of the trust and collegiality that is critical to the Department's relationship with these and all other U.S. Attorneys. We are, of course, prepared to respond to Committee staff questions about particular redactions in these records.

We have identified three categories of documents that raise such significant confidentiality and privacy interests that we need to limit our response to making the documents available for Committee staff review at the Department or your personal review at your office. One category consists of documents relating to a request by the U.S. Attorney for the Western District of Michigan for an Office of Professional Responsibility (OPR) investigation into a leak of information about an ongoing OPR investigation regarding the conduct of an Assistant U.S. Attorney in that office. The second category consists of documents relating to the U.S. Attorney's Office in the Northern District of California, including internal management issues and a special EARS investigation. These documents include communications confidentially submitted to Department officials by career attorneys, and we believe that preservation of their confidentiality is important to preserving the candor of such communications in the future. As you may recall, we have previously produced the final EARS reports for the offices of the U.S. Attorneys who testified before the Subcommittee. The final category consists of recommendation memoranda submitted in connection with Attorney General decisions on whether to seek the death penalty in individual cases, which are extremely sensitive law enforcement deliberative materials.

As described above, we have made the full disclosure of deliberative documents leading up to the Department's decision to request the U.S. Attorney resignations because we recognize the Committee's interest in obtaining information about the motivation and reasons for that decision. And consistent with that rationale, we have also provided documents relating to our communications with those U.S. Attorneys both before and after December 7, 2006, the date the resignations were requested.

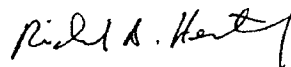
Our response regarding the remaining documents generated after December 7th is based on different considerations. We are providing another category of documents generated after that date, but are doing so to satisfy another legitimate Committee purpose: its interest in examining the Department's provision of incomplete information to Congress. We are providing deliberative documents concerning the preparation of the congressional testimony by Department officials in order to clarify the integrity of our process for preparing the testimony.

Except as previously indicated and consistent with long-standing Executive Branch practice, however, we are not providing other documents generated within the Executive Branch for the purpose of responding to the congressional (and media) inquiries about the resignations. The appropriate functioning of the separation of powers requires that Executive Branch officials preserve the ability to communicate confidentially as they discuss how to respond to inquiries from a coordinate branch of government. Such robust internal communications would be effectively chilled, if not halted, if they were disclosed, which could substantially impede any agency's ability to respond to congressional oversight requests. That result would be detrimental to the operations of both the Branches and serve no useful purpose.

Finally, although we have made available documents that concern our identification of replacement candidates for the U.S. Attorney positions prior to December 7th – because that information may have relevance to the decision to request the resignations, we are not releasing information about the Department's ongoing, confidential consideration of candidates to fill these positions, which began after December 7th. That consideration is integral to the exercise of the President's constitutional authority to appoint Executive Branch officials, and it implicates significant privacy interests for the individuals who may be, or may have been, subject to consideration for these positions.

We believe that the provision of the enclosures completes our response to your document request, although we will certainly supplement this response if we identify additional responsive documents. We hope that this information is helpful and would appreciate the opportunity to confer further with the Committee if you have further questions about this matter.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Lamar Smith
Ranking Minority Member
Committee on the Judiciary

The Honorable Christopher B. Cannon
Ranking Minority Member
Subcommittee on Commercial and
Administrative Law