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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

November 26, 2012

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

Via Electronic Transmission

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Attorney General Holder:

On September 24, 2012, and October 4, 2012, I joined Chairman Smith of the House Committee on the Judiciary, Chairman Issa of the House Committee on Oversight and Government Reform, and Chairman McHenry of the House Subcommittee on TARP, Financial Services And Bailouts of Public and Private Programs in writing regarding the production of documents and access to witnesses from the Department of Justice (Department). We requested the documents and witnesses as part of our investigation into the quid pro quo deal where the Department agreed to drop two False Claims Act cases against the City of St. Paul, Minnesota in exchange for the City dropping its pending appeal before the Supreme Court in *Magner v. Gallagher*.¹ On October 11, 2012, the Department responded to our letters stating that 1,268 pages of documents were made available to the House Committees, 1,202 of which were only made available for review *in camera* at the Department. Only 66 pages were actually produced to the House Committees.² The October 11 letter also declined to make Department officials available for transcribed interviews.

My staff, along with the staff of the House committees, is currently investigating the details of this quid pro quo. To date, the Department has failed to allow my staff to review the 1,202 documents, even *in camera*, despite my oversight responsibilities on the Senate Committee on the Judiciary (Committee) and the serious questions this arrangement raises. I am disappointed that the Department has failed to provide my staff the same access that it has provided the staff of the House Committees.

Most recently, through a transcribed interview with former Associate Attorney General Thomas Perrelli that occurred on November 19, it has become clear that Assistant Attorney General Tony West was involved in this arrangement in his capacity as head of the Department's Civil Division. Given that Mr. West's nomination for Associate Attorney General is currently

¹ See Letter from Congressman Smith, Congressman Issa, Congressman McHenry, and Senator Grassley to Attorney General Eric H. Holder, Jr., Attorney General, U.S. Dep't of Justice (Sept. 24, 2012) (on file with author) (requesting access to documents and witnesses); Letter from Congressman Smith, Congressman Issa, Congressman McHenry, and Senator Grassley to Attorney General Eric H. Holder, Jr., Attorney General, U.S. Dep't of Justice (Oct. 4, 2012) (on file with author) (same).

² Letter from Judith C. Appelbaum, Acting Assistant Attorney General, U.S. Dep't of Justice to Congressman Smith, Congressman Issa, Congressman McHenry, and Senator Grassley (Oct. 11, 2012).

pending before the Committee, it is important that the Committee understand his involvement in these matters. Therefore, I write today requesting that the 1,202 documents withheld by the Department regarding this matter be produced to the Senate Judiciary Committee as part of the background review process for his nomination.

It is unfortunate that Mr. West's nomination could be delayed by this request, but it is necessary because you have denied my staff access to documents essential to ensure adequate and appropriate Congressional oversight of the Executive Branch as part of the executive nominations process. Specifically, I have been informed that the Department refused my staff access to the documents on Monday, October 15, 2012, because there was not a request from the Chairman of the Committee. However, no such request is required by any law, rule, regulation, or judicial precedent.

The Department's decision to deny the opportunity for my staff to review these documents is misplaced and threatens to delay the review of Mr. West's nomination. This investigation was undertaken in conjunction and cooperation with Chairman Smith, Chairman Issa, and Chairman McHenry. Therefore, the Department's general policy that investigations be conducted by and through the authority of the chairman of a committee with jurisdiction is fully satisfied.

The Department's position seems to be that I, as a ranking member of a Committee, must receive permission from the chairman in order to allow access to the documents in question. Yet, any suggestion to this effect is without a basis in law or policy. Senate committees are organized so as to give minority parties significant resources to conduct our own investigations and further our own priorities. I do not abandon my constitutional responsibilities simply because I am in the minority; rather, I remain bound to provide oversight to those executing the law. A committee chairman may set the agenda for a committee, but a chairman does not control activities of the minority in fulfilling their obligations under the Constitution.

Indeed, the Department's current insistence that I seek the Chairman's permission is tantamount to executive interference in internal Legislative Branch affairs. Both chambers of Congress have a long-established practice of partnerships between Members and Chairmen of other committees with appropriate jurisdiction to permit us to exercise our constitutional power of inquiry. By preventing my staff from viewing these documents, the Department is interfering with these internal rules and norms. As a result, the Department is intruding into how Congress organizes itself and attempting to prevent Members from working cooperatively to advance our legitimate interests.

Moreover, the principle that Congress controls its internal affairs in these matters has been strongly supported by the judiciary, most notably in *Murphy v. Dep't of the Army*³ and *Devine v. United States*.⁴ In *Murphy*, the District of Columbia Circuit held that "[a]ll Members [of Congress] have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive

³ 613 F.2d 1151 (D.C. Cir. 1979).

⁴ 202 F.3d 547 (2d Cir. 2000).

information.”⁵ That court also found that restricting information-gathering powers only to committee chairmen is an “intrusion into the legislative sphere” because “[e]ach [Member] participates in the law-making process; each has a voice and a vote in that process; and each is entitled to request such information from the executive agencies as well enable him to carry out the responsibilities of a legislator.”⁶ The Second Circuit agreed with this principle when it held in *Devine* that the Privacy Act does not prevent committee members other than the chairman from receiving information that might otherwise be protected from disclosure by the statute.⁷

Accordingly, I ask that the Department provide the 1,202 responsive documents outlined in the October 11 letter no later than December 4, 2012. Without these documents, it will be impossible to appropriately evaluate Mr. West’s performance in his current role, as the Committee reviews his nomination for Associate Attorney General.

Sincerely,



Charles E. Grassley
Ranking Member

cc: The Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary, United States Senate

The Hon. Darrell Issa, Chairman, Committee on Oversight and Government, United States House of Representatives

The Hon. Lamar Smith, Chairman, Committee on the Judiciary, United States House of Representatives

The Hon. Patrick McHenry, Chairman, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, Committee on Oversight and Government Reform, United States House of Representatives

The Hon. Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform, United States House of Representatives

The Hon. John Conyers, Jr., Ranking Member, Committee on the Judiciary, United States House of Representatives

The Hon. Mike Quigley, Ranking Member, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, Committee on Oversight and Government Reform, United States House of Representatives

⁵ 613 F.2d at 1157.

⁶ *Id.*

⁷ 202 F.3d at 551.