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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
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October 2, 2007

Hon. Michael B. Mukasey
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036

Dear Judge Mukasey:

I look forward to scheduling and chairing the confirmation hearing on your nomination to serve as the Attorney General of the United States. I also look forward to your response to the Judiciary Committee's questionnaire, and we may have additional requests for background information that would be helpful to the Committee in preparation for the hearing.

As I told you when we met the day after your designation, I look forward to meeting with you and having a substantive discussion before the hearing. I propose that we meet on Tuesday, October 16, at 10 a.m., if that is convenient for you.

I also mentioned when we first met that I would provide you with some of the topics that concern me. Regrettably the White House has chosen not to clear the decks of past concerns and not to produce the information and material it should have and could have about the ongoing scandals that have shaken the Department of Justice and led to the exodus of its former leadership. Those matters now encumber your nomination and, if confirmed, your tenure.

We will need to explore with you how you would ensure the independence of federal law enforcement from political pressure, what steps you would take to restore morale at the Department and the public's trust in the Department, and whether you would uphold constitutional checks on Executive power.

The mass firings of the U.S. Attorneys appointed by this President were unprecedented. I will inquire whether you share my view that the integrity and independence of federal law enforcement should not be compromised by political operatives from the White House. I will ask for your assurance that the Department of Justice and, in particular, our U.S. Attorneys, will not be employed in upcoming elections to seek to affect the outcome. The Department of Justice should be working to protect Americans' right to vote and have their vote count, not seeking to swing close elections into a partisan column by leaking allegations of corruption or bringing last minute legal actions alleging voter fraud.

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A related matter of significant concern to a number of Members of the Committee is the recent rewriting of the Department of Justice's guidebook on "Federal Prosecution of Election Offenses." It not only changed from the "red book" to the "green book," but the traditional practice of not bringing last-minute investigations and actions was turned on its head. The traditional version of the protocol, part of which I read to former Department of Justice official Bradley Schlozman at our June 5 hearing, provided: "In investigating election fraud matters, the Justice Department must refrain from any conduct which has the possibility of affecting the election itself. . . Thus, most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates." As recently revised under the outgoing, discredited leadership group, it provides great latitude for the Department of Justice to influence the outcomes of elections. Will you reassure us that under your leadership that these guidelines will be changed back to the time-honored rules? That is a concrete step you can take at the outset to set a new tone.

Another aspect of this concern is your close association with a candidate for the Republican nomination for President. Given that longstanding relationship, what assurances can you give the Committee, the Senate and the American people, should he be the Republican nominee, that you will not improperly use your position? The White House press operation suggested last weekend that you would recuse yourself from matters involving Mr. Guiliani. Is that true, and would that recusal include the Republican presidential campaign if he is the Republican nominee?

From our earlier meeting I know that you knew and worked with Judge Harold Tyler. I have admired Judge Tyler. He, too, was faced with restoring the Department of Justice when he served as the Deputy Attorney General in 1975, following the Watergate scandal and the resignation of President Nixon. Likewise, I think we both view Attorney General Robert Jackson's 1941 speech to U. S. Attorneys as striking the right chord on the role of the Department of Justice and the independence of federal prosecutors. If they, Elliot Richardson and Edward Levi are your models, I will look forward to working with you to restore the Department.

In that connection, I note that as the House Judiciary Committee was considering contempt citations for former White House officials this summer, a senior Administration official said that a U.S. Attorney "would not be permitted to bring contempt charges or convene a grand jury in an executive privilege case" and that a U.S. Attorney would not be "permitted to argue against the reasoned legal opinion that Department of Justice provided."

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Under applicable statutes and practices, contempt citations against Administration officials by the House and Senate would be certified to the U.S. Attorney for the District of Columbia to bring before a grand jury for its action. If the House or Senate certified a contempt citation against current or former White House officials arising from the U.S. Attorney investigation, would you permit the U.S. Attorney to carry out the law and refer the matter to a grand jury as required by 2 U.S.C. § 194? If the White House sought to prevent the U.S. Attorney from bringing contempt charges to a grand jury as required by law, would you take any action to prevent the U.S. Attorney from doing so?

More generally, what would you do as Attorney General if you learned that a White House official had called a U.S. Attorney asking for information about an on-going criminal investigation? What would you do as Attorney General if you learned that a Member of Congress had called a U.S. Attorney asking for information about an on-going criminal investigation?

What will you do to ensure that legal advice from the Department's Office of Legal Counsel (OLC) is independent and protected from political influence?

While you can set an example and a tone at the Department of Justice, you cannot effectively manage it by yourself. Who will be the members of your team to help turn the Department around?

Other key issues arise from this Administration's abuse of secrecy and expansion of executive power. Policies enacted by this Administration have encouraged Department of Justice officers to withhold information under the Freedom of Information Act (FOIA), the bedrock statute that opens our government to its citizens. Will you commit to review and consider overturning these policies, and supporting legislation Senator Cornyn and I have sponsored to reform FOIA, so that the presumption of openness which is at the heart of FOIA is restored for the American people?

The Attorney General who recently resigned apparently believed that the President has a commander-in-chief override of the laws of this country, which contributed to his violations of the Foreign Intelligence Surveillance Act (FISA), his signing statement reservations, and other overreaching. We must explore those topics. For example, do you believe that the President has authority to override legal requirements and immunize acts of torture contrary to our treaty obligations and laws? Do you believe that before Congress amended the FISA this summer, the Authorization for the Use of Military Force passed in the days following September 11, or Article II of the Constitution gave this President authority to override the requirements of that law with respect to wiretapping Americans?

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In connection with these matters the Judiciary Committee has been seeking the historical legal analysis of the Department of Justice and this Administration. We have made numerous requests and have even had to subpoena the FISA documents. I want to know whether you will work with us and provide those materials so that we can examine the legal justifications that have been utilized by this Administration to excuse its conduct.

Similarly, in light of the failure of the White House Counsel to provide even a privilege log to substantiate his blanket claim of executive privilege for all information relating to the U.S. Attorney firing scandal, we need to consider that matter together. I want to know your view of executive privilege. Do you view it as a communications privilege or something else? Do you think it extends to the actions and emails of political operatives in matters in which the President was not personally involved?

With so much to do and so much damage that needs to be repaired, I had hoped that the White House would have taken advantage of the time since the resignations of Mr. Gonzales and Mr. Rove to work with us to fulfill longstanding requests for information so that we could all agree about what went so wrong at the Department of Justice and work together to restore it. Instead, they have left you to answer the unanswered questions and left longstanding disputes unresolved.

Sincerely,



PATRICK LEAHY
Chairman

*I look forward
to meeting with
you.*