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August 6, 2004

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The Honorable John Ashcroft
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

I am writing to request an explanation for recent actions by the Justice Department relating to former National Security Advisor Sandy Berger. Within the last few days, it appears that senior officials in the Department overruled the judgment of career prosecutors and authorized the disclosure of information about the matter under investigation. I would like to know the basis for this development.

When the Justice Department is conducting a criminal investigation, Justice Department officials and officials from the relevant federal agencies do not normally discuss details of the matter being investigated. This policy is intended to maintain the integrity of the investigation and protect the individuals involved, and it has been applied in many instances. For example, in the investigation into the leak of the identity of covert CIA agent Valerie Plame, officials have said repeatedly that they cannot comment because the matter is currently under investigation.¹ Similarly, in the investigation into whether Ahmed Chalabi leaked classified information to Iran, officials have said that they cannot discuss the matter until the investigation concludes.²

¹ *E.g., Ashcroft Steps Aside in CIA Leak Inquiry*, Los Angeles Times (Dec. 31, 2003) (quoting Deputy Attorney General James B. Comey, Jr., as follows: “I can’t go beyond that, and the reason for that is obvious. I can’t tell you about the details of any criminal investigation because our goal is to make sure that anyone we’re pursuing doesn’t know what we’re doing, and also, anyone who might not be charged with a crime is not unfairly smeared”).

² *E.g., Late Edition with Wolf Blitzer*, CNN (June 13, 2004) (quoting National Security Adviser Condoleezza Rice as follows: “The charges about whether an American citizen might have handed over secrets to Mr. Chalabi or to anybody is under investigation by the FBI, and I won’t comment further on that”).

In Mr. Berger's case, White House press secretary Scott McClellan repeatedly cited this policy in a press briefing held on July 21, 2004. Mr. McClellan reiterated at least ten times during this briefing that he could not answer questions about Mr. Berger's conduct because of the "ongoing criminal investigation."³

Officials from the National Archives and Records Administration (NARA) also asserted this principle when they met with Committee staff on July 27, 2004, regarding Mr. Berger's case. Both the General Counsel of the Archives and the Director of Congressional Affairs made absolutely clear at the outset of this meeting that the Justice Department had instructed them not to discuss details of this case because doing so could compromise the integrity of the ongoing investigation. Although they discussed broader policy and procedural issues, the Archive officials refused to answer specific questions about the actions of Mr. Berger, the Archives, or the White House regarding this case. According to Archive officials, the Justice Department

³ White House, *Press Briefing by Scott McClellan* (July 21, 2004). At this briefing, Mr. McClellan stated:

- (1) "Well, this is an ongoing criminal investigation that has been going on, apparently, for several months. And we believe it's best to direct those questions to the Department of Justice."
- (2) "Well, there's an investigation going on and they're looking into all these matters, and we need to let the investigation proceed."
- (3) "But the issue is that it's an ongoing criminal investigation, and that's a serious matter. So the questions are best directed to the Department of Justice."
- (4) "I've always said that, because it's an ongoing investigation, it's best that we let the investigation proceed, and that those questions be directed to the Department of Justice."
- (5) "And, again, it's just not appropriate for me to go further than that."
- (6) "Again, I'm not going to — it's not appropriate for me to get into talking about an ongoing criminal investigation."
- (7) "And I think, again, it's an ongoing criminal investigation. There are issues that the Justice Department is looking into, and they're the ones where you should direct those questions."
- (8) "[A]gain, because these questions relate to an ongoing criminal investigation, you need to direct all those questions to the Justice Department."
- (9) "Again, this is an ongoing criminal investigation. I'm going to defer all questions to those at the Department of Justice who are overseeing the investigation."
- (10) "Again, you're asking all these questions related to an ongoing criminal investigation. It's not appropriate for me to get into discussing those issues."

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officials who advised the Archives not to discuss the details of the case were the career prosecutors investigating Mr. Berger's conduct.

Yesterday, however, I was informed that the Justice Department has now reversed its position regarding Mr. Berger. It is my understanding that after the Committee's July 27 meeting with Archive staff, Republican Committee staff contacted the Assistant Attorney General in the Office of Legislative Affairs and asked him to intervene to overrule the judgment of the career prosecutors handling the Berger investigation. Within a matter of days, the Justice Department did exactly that. Justice Department officials contacted Archive staff and told them to ignore the previous directive given to them from the career attorneys just one week earlier.

Archive staff have now been told that they are "in no way constrained" from discussing any details relating to Mr. Berger's case. When my staff contacted Justice Department officials to confirm this, they reported that the Justice Department did receive a request from the Republican staff and thereafter revised their instructions to Archive officials.

At the same time that I learned about this change in Justice Department policy, I received a copy of a letter from Chairman Davis to the Archives (attached). This letter instructs the Archives to produce within eight days: "All internal NARA written or electronic communications pertaining to the alleged removal of documents by Mr. Berger," as well as "[a]ll written and electronic communications between NARA and the agency of equity [the National Security Council] pertaining to the alleged security breach." In addition, Republican Committee staff have directed Archive officials to submit to interviews this coming Wednesday.

I have informed Chairman Davis that I believe he is applying an unfair double standard in the case of Mr. Berger. I have also advised him that if he decides to pursue the investigation of Mr. Berger — as he evidently has — he should include as part of this investigation the unusual communications between the Justice Department and the White House about Mr. Berger's conduct.⁴ Mr. Davis, however, has disputed my characterization and taken no steps to investigate why multiple White House officials were briefed about the investigation.

In light of these developments, I would like to know (1) why the Justice Department at the request of Republican staff overruled the judgment of the career prosecutors handling Mr. Berger's case and (2) whether the Justice Department will similarly "clear" agency officials to discuss other matters involving the handling of classified information currently under investigation, including specifically the cases involving Valerie Plame and Ahmed Chalabi.

In addition, I request that you provide to the Committee all written and electronic communications between the Justice Department and White House officials regarding Mr.

⁴ Letter from Rep. Henry A. Waxman to Rep. Tom Davis (July 27, 2004).

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Berger's case and direct any Justice Department officials who communicated orally with the White House about this matter to participate in interviews with the Committee staff.

Sincerely,

A handwritten signature in cursive script that reads "Henry A. Waxman".

Henry A. Waxman
Ranking Minority Member

Enclosure