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Glenn A. Fine
United States Inspector General
950 Pennsylvania Avenue, N.W.
Suite 4706
Washington, D.C. 20530-0001

Re: California Senate President Pro Tempore Don Perata

Dear Inspector General Fine:

We represent former California State Senator Don Perata, who was the President Pro Tempore of the California Senate, and the leading elected Democrat in California until December 2008. Since early 2004, Senator Perata has been the subject of a far reaching investigation conducted by the Federal Bureau of Investigation and the United States Attorney's Office for the Northern District of California, which is where Senator Perata resides. We have now learned that after thoroughly investigating this matter for almost five years, the U.S. Attorney's Office for the Northern District has wholly declined the case against Senator Perata and the other targets of the investigation.

We were informed for the first time in mid-December of 2008 that the Eastern District of California in Sacramento had suddenly taken over this case and was actively pursuing the criminal investigation against Senator Perata and others. Incredibly, in an interview with the *Sacramento Bee* last Wednesday, Acting U.S. Attorney Lawrence G. Brown admitted that the Eastern District only became involved after being contacted by disgruntled FBI agents who were disappointed in the Northern District's decision on the merits to decline the case against Senator Perata and others. Specifically, Mr. Brown claimed that his office was contacted in October by the FBI agents assigned to the case "after they came to understand that the U.S. attorney's office in San Francisco was likely to decline the case." D. Walsh, *Sacramento Office Opens Own Inquiry on Perata*, Sacramento Bee, March 5, 2009.[1] Likewise, Mr. Brown now claims that "it should come as no surprise to Perata that his office has taken over the case, because []

[1] We seriously question the veracity of Mr. Brown's statement that the FBI contacted the Sacramento U.S. Attorney's Office in October 2008 concerning the Perata investigation. At that time, we understood that there were intensive discussions underway between Nick Perata's counsel and line prosecutors in San Francisco (Northern District of California) regarding a possible immunity grant.

Sacramento federal prosecutors have been meeting with the former senator's lawyers 'since last fall.'" R. Gammon, *Senator Perata's Vast Right Wing Conspiracy*, East Bay Express, March 11, 2009. Given that we were not informed of the Eastern District's involvement until mid-December and did not actually meet with the prosecutors in Sacramento until December 23, 2008, Mr. Brown's statement is patently untrue. We seriously wonder why a representative of the Department of Justice resorts to outright misstatements to justify the unprecedented and inappropriate actions of his office.

We urgently request that you conduct an immediate inquiry into the grossly unfair and highly questionable conduct of both the FBI and the U.S. Attorney's Office for the Eastern District of California in resurrecting this high profile and politically charged case against Senator Perata, after the charges had been thoroughly investigated for five years, and declined on the merits by the United States Attorney's Office for the Northern District of California. Indeed, as more information has come to light in the past week regarding the conduct of Eastern District and the FBI, public opinion has began to call into question the integrity of the Justice Department's handling of this case, and increasingly is demanding that the case be closed. *See e.g., Editorial: Extension of Don Perata Case is unfair*, MediaNews Editorial, San Jose Mercury News/Contra Costa Times/Oakland Tribune, March 10, 2009 ("Once the San Francisco office determined there wasn't enough evidence to prosecute, the case should have died. The FBI should not be allowed to shop the case around. U.S. Attorney General Eric Holder should put an end to this nonsense"); Bill Cavala, *Continuing 'Investigation' of Don Perata Puts Our Justice System In A A Bad Light*, California Progress Report, March 10, 2009.

This takeover of the case by the Eastern District, which admittedly was done at the urging of disgruntled FBI agents desperate to justify five years of investigation, flies directly in the face of plainly established Principles of Federal Prosecution. Moreover, at the time this improper forum and venue shopping to the Eastern District occurred, Senator Perata was the leading elected Democrat in California, who was regularly standing up to a Republican governor on enormously difficult budget issues. This inexplicable hijacking of a case that had just been declined on its merits by the Northern District was overseen and approved by the outgoing U.S. Attorney in the Eastern District, who had been politically appointed by the Bush administration. As the entire country knows by now, the Bush administration has been the subject of several inquiries pertaining to the selective prosecutions and the unfair and highly politicized targeting of Democratic politicians. *See, e.g., Allegations of Selective Prosecution in Our Federal Criminal Justice System*, United States House of Representatives Committee on the Judiciary Majority Staff (April 17, 2008).[2]

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[2] While the former U.S. Attorney in Sacramento has vehemently denied any political motivations to the press for his last minute approval of the hijacking of the Perata investigation by his previously uninvolved district, he also has completely failed to explain how his actions and those of his handpicked temporary successor comport with well established principles of federal prosecution. Indeed, as explained below, the extensive and questionable public comments by both the former and current U.S. Attorneys violate at least the spirit, if not the letter, of the regulations and guidelines that severely limit comments by a federal prosecutor concerning a pending investigation.

Title 9 of the United States Attorney's Manual ("USAM") sets forth the "Principles of Federal Prosecution." As described in the Preface to the Principles, "[t]he availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by the attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case." USAM, ¶ 9-27.001 (emphasis added).

The Principles of Federal Prosecution also provide that:

> The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction . . . .

USAM, ¶ 9-27.220. In this case, applying the standard of USAM, ¶ 9-27.220, the United States Attorney's Office for the Northern District decided to decline the case after almost five years of exhaustive investigation. In other words, the Northern District apparently concluded that it could not prove a case beyond a reasonable doubt against Senator Perata and others. After such a decision, neither the targets of this investigation nor the public at large can have any confidence that the Sacramento U.S. Attorney's Office is acting fairly when it suddenly takes over a case that has been declined on the merits after five years of painstaking investigation and rushes to make a judgment within a few short weeks.

Furthermore, the Principles of Federal Prosecution explicitly state that "the time and resources expended in the investigation of the case" is a factor that "deserve[s] no weight." "No amount of investigative effort warrants commencing a Federal prosecution that is not fully justified on other grounds." USAM, ¶ 9-27.230. In other words, the fact that disgruntled FBI agents spent five years investigating a case is of no importance where, as here, the responsible U.S. Attorney's Office determined that the case did not merit prosecution.

As noted above, the Acting U.S. Attorney for the Northern District and his senior professional advisors declined the case against Senator Perata after five long years of intensive investigation, which involved the interviews and testimony of scores of witnesses and the collection and review of tens of thousands of pages of documents. Once a decision to decline was made, the case should have been over. Put another way, implicit in the Northern District's declination on the merits was a determination that there is not sufficient evidence "to obtain and sustain a conviction" against Senator Perata. As such, it is inconceivable that the Eastern District is in a better position to simply brush aside entirely the conclusions of the Northern District, especially given that the prosecutors in Sacramento did not get involved in this case until the end of 2008. Not only does this grossly violate the Principles of Federal Prosecution and general principles of fundamental fairness, but it also appears to be a far cry from the "fair and effective exercise of prosecutorial responsibility" mandated by the same Principles.

When contrasted with the time and care taken by the Northern District, the conduct of the Eastern District prosecutors reflects a careless rush to judgment that should embarrass the entire Department of Justice. The conduct on display here regrettably seems to be that of an unsupervised and runaway office determined to pursue Senator Perata at any cost. It is a sad day for Justice when the FBI can do an end run around the considered judgment of experienced prosecutors in the Northern District by driving ninety miles down the road to get a snap decision by another U.S. Attorney's Office that knows virtually nothing about the case.

In commenting to the press that disgruntled FBI agents forum shopped the case to the Eastern District, Acting U.S. Attorney Brown also violated 28 C.F.R. § 50.2(b)(3), which provides that:

> Where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

See also USAM ¶ 1-7.401(c) (Absent "exceptional circumstances" [defined as crimes of a heinous nature, imminent threat to the community, or requiring a vital request for public assistance], media outreach about ongoing matters prior to indictment is not appropriate). Simply put, Mr. Brown decided to spout off about a pending investigation, even though his comments do not serve any legitimate law enforcement function, nor do they fit within the definition of "exceptional circumstances" justifying such media outreach. His comments, and those of the outgoing politically appointed U.S. Attorney in Sacramento, McGregor Scott, serve no legitimate purpose. As even a rookie AUSA would know, public comments like this about a pending case simply should not be made. This inappropriate conduct by the leadership of the Eastern District U.S. Attorney's Office is highlighted by the fact that to date the Northern District has correctly declined to comment on the investigation.[3]

Likewise, in what appears to be an effort to imply that the case has merit, Acting U.S. Attorney Brown has also told the press that the Office of Public Integrity at Main Justice is working with the Eastern District. R. Gammon, *Senator Perata's Vast Right Wing Conspiracy*, East Bay Express, March 11, 2009. Given the recent conduct of the Public Integrity Section, however, its belated involvement in this case certainly does not validate the merits of the

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[3] This is not the only high profile case in which Acting U.S. Attorney Brown has made comments to the press which appear to run afoul of the regulations and guidelines which strictly limit a prosecutor's ability to comment about a pending case. Specifically, while remarking on a defense motion brought in a pending Sacramento case in which 11 men are charged with plotting the violent overthrow of the Lao government, Mr. Brown spoke to directly the merits of the case, claiming that "[t]he inconvenient fact is that a concerned citizen reached out to the ATF to report that Harrison Jack was looking to acquire 500 AK-47 assault weapons." D. Walsh, *Defense Claims U.S. fabricated case alleging Lao coup plot*, Sacramento Bee, March 10, 2009. These comments appear to be in direct violation both 28 C.F.R. § 50.2(b)(5) (statements in the period approaching trial "ought to be strenuously avoided" and made "only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall only include information which is clearly not prejudicial") and § 50.2 (b)(6) (Justice Department personnel shall refrain from making "any opinion as to the accused's guilt").

investigation against Senator Perata. Rather, the involvement of the Public Integrity Section emphasizes the need for an Inspector General investigation into the Eastern District's handling of this case. As you well know, two attorneys in the top leadership of the Public Integrity Section have very recently been held in contempt of court arising out of the case against former United States Senator Ted Stevens. The shocking misconduct of these senior members of the Public Integrity Section necessarily raises a cloud over that unit and its actions. We do not think that the Public Integrity Section should be endorsing the inappropriate hijacking of the already declined Perata investigation by the Eastern District. The fact that it has done so should not be taken as a vote of confidence, given the recent outrageous conduct by the most senior management of the Public Integrity Section. *See, e.g.,* Del Wilber, *6 Prosecutors No Longer Part of Legal Team in Stevens Case,* Washington Post, February 18, 2009 (Public Integrity Chief William Welch and other prosecutors held in contempt after trial judge labels their conduct as "outrageous"). Given all that has happened here, the Office of the Inspector General should investigate this case before the Department of Justice has another catastrophe on its hands; the involvement of the Public Integrity Section makes the need for an investigation even more urgent.

Finally, Acting U.S. Attorney Brown's comments to the press are also misleading and appear to be little more than a futile attempt to justify the unfair last minute role of the Eastern District in this case. For example, Mr. Brown's claim that "it should come as no surprise to Perata that his office has taken over the case, because [] Sacramento federal prosecutors have been meeting with the former senator's lawyers 'since last fall,'" is simply not true. As noted above, we were not informed that the Eastern District was involved in the case until mid-December 2008, when we were asked to sign another tolling agreement extension in order to allow the Eastern District time to review the case.[4] Moreover, we did not actually meet with the prosecutors in Sacramento until December 23, 2008. In short, despite Mr. Brown's untruthful spin control efforts to the contrary, Senator Perata's lawyers were simply not meeting with the government "last fall."

Along the same lines, given our understanding that in late October prosecutors from the Northern District were still handling the investigation, and were in fact actively engaged in discussions with counsel for Nick Perata (Senator Perata's son who is also a target of the investigation) regarding immunity issues, we also question the veracity of Mr. Brown's assertions that the Eastern District began its review of the case in October of 2008. To the contrary, it was very obvious at our initial meeting with the Sacramento prosecutors on December 23rd that they were in the very earliest stages of their review process, as they were not prepared at that point to discuss any of the specific factual allegations of the case and plainly were ill-informed on the salient facts of the case.

In any event, regardless of whether the Eastern District has been actively engaged in this matter since October 2008 or December 2008, the Eastern District's conduct in pressing forward and rushing to judgment in the face of the Northern District's declination of the case after almost

[4] Of course, we refused to sign the tolling agreement extension since our agreements to toll the statute of limitations had strictly been with the Northern District, and not the Eastern District.

five years of investigation is plainly improper. Likewise, there is simply no legitimate explanation for the FBI's blatant forum and venue shopping of this case.

In sum, not only are Mr. Brown's statements to the press in violation of both 28 C.F.R. § 50.2 and the USAM, but they have the effect of improperly tainting and influencing the potential jury pool against Senator Perata by implying that his underlying conduct justified the outrageous conduct of both the FBI and the Eastern District in seizing a case that already had been declined on the merits by the Northern District.

It is particularly painful for me to describe these actions as I was the United States Attorney for the Eastern District of California under President George H.W. Bush. However, in thirty-two years of legal practice, both as a prosecutor and as a defense attorney, I have never seen a case such as this, where the District that actually investigated the matter for almost five years declined the case on the merits, only to have another district grab it and rush to judgment in a few short weeks. This is simply unfair. Further, the Eastern District's conduct grossly violates the principles of federal prosecution that are designed to protect the public from rogue agents and prosecutors. Simply put, this conduct is not worthy of the Justice Department I once knew, and should not be condoned.

In conclusion, we respectfully request that you immediately begin an investigation into the grossly unfair and highly questionable conduct of both the FBI and the Eastern District of California in taking on this politically charged case against Senator Perata, after the matter had already been thoroughly investigated, vetted, and declined by the Northern District of California.

Thank you for your attention to these matters. We are ready to meet with you and your staff at any time and I look forward to receiving a response from you or your office.

Respectfully,

George L. O'Connell

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cc: Honorable Eric Holder, United States Attorney General
Honorable Patrick Leahy
Honorable John Conyers, Jr.
Honorable Zoe Lofgren
Honorable Linda Sánchez
Honorable Howard L. Berman
Honorable Lawrence Brown, Acting U.S. Attorney, Eastern District of California
Senator Don Perata