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The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Grassley and Feinstein:

In connection with the nomination of Senator Jeff Sessions to be Attorney General of the United States, I have been asked to address the factual findings of Alabama State Judge James S. Garrett, dated July 16, 1997, in the case of *State of Alabama v. TIECO, Inc.* I have also been asked to explain the effect of *United States Steel, LLC ["USX"] v. TIECO, Inc.*, 261 F.3d 1275 (11th Cir. 2001), on the credibility of Judge Garrett's findings.

Since 1978, I have taught both legal ethics and evidence at New York University School of Law and am qualified to speak about doctrines in both fields. My resume can be found on the law school's website.

In sum, the Garrett opinion is the most scathing criticism of a prosecutorial office I have read in the nearly 40 years I have been teaching legal ethics. It describes an office that is oblivious to the constitutional and ethical rules that govern prosecutors. I also conclude that the subsequent Eleventh Circuit's opinion has no effect on the credibility of Judge Garrett's factual findings about the behavior of the office of the Alabama Attorney General.

In my academic life, especially in conjunction with the publication of my casebook on legal ethics, now in its tenth edition, I have read many court opinions criticizing lawyers or law firms. Conservatively, I would say that I have read more than 2000 such opinions since 1978, probably closer to 2500 opinions. The vast majority of

these opinions criticize individual lawyers. Occasionally, a court will criticize a private law firm. Rarely will a court criticize an entire prosecutorial office. I have never read an opinion critical of any law office that is as harsh as Judge Garrett's opinion censuring the office of the Attorney General of Alabama. I quote his findings in part:

Based on the totality of circumstances in this case including; 1) the Attorney General's repeated refusals and failures to produce exculpatory evidence; 2) the Attorney General's repeated denials of the very existence of exculpatory evidence subsequently discovered by the Defendants; 3) the flagrant disregard of the constitutional rights of those accused; 4) the completely incredible and deceptive testimony of so many witnesses this Court treated as officers of the court (some of whom were either assistants or agents for the Attorney General); and 5) the very patterns of prosecutorial misconduct which exist in this case, this Court can only conclude it is dealing with either intentional and deliberate misconduct or conduct so reckless and improper as to constitute conscious disregard for the lawful duties of the Attorney General and the integrity and dignity of this Court and this Judge.

Senator Sessions was Alabama's Attorney General when all or nearly all of the underlying events took place. The man who headed the office described in the Garrett opinion is unqualified to be United States Attorney General.

What effect did the Eleventh Circuit's opinion have on the credibility of the Garrett opinion? None. The claim that the Circuit Court's ruling means that Judge Garrett's factual findings are unreliable misreads the Circuit Court's ruling and misunderstands the law of evidence and the rule against hearsay.

Hearsay is an out of court statement offered in court for its truth. Historically, all hearsay has been "presumed unreliable" (as the USX court noted) and therefore inadmissible unless there is an exception to the hearsay rule for the particular statement. The presumption of unreliability says nothing at all about the credibility of any particular hearsay statement. Some hearsay statements are highly credible but nonetheless inadmissible against a party who has not had a chance to confront them. It is a matter of fairness *to that party*. By presuming that a hearsay statement is unreliable and, therefore, inadmissible, we protect the interest of a party who will never have had a chance to cross-examine the statement.

The Garrett opinion referred to factual allegations contained in a memorandum submitted by TIECO's counsel. It "incorporates [the memorandum's] statement of facts as a basis for the findings and conclusions as contained in this order" dismissing the prosecution. It is common for a trial judge to request proposed findings of fact from counsel and to adopt them as the judge deems appropriate in light of the record.

In the subsequent federal litigation between TIECO and USX, the district court admitted Judge Garrett's opinion and the memorandum of TIECO's counsel against USX.

Judge Garrett's opinion was hearsay when admitted in the federal case against USX. The memorandum of TIECO'S counsel was also hearsay. So USX faced hearsay within hearsay. There was no hearsay exception that would have allowed the admission of this evidence in the federal case. So the historical presumption of unreliability was not overcome. USX was not a party in *State of Alabama v. TIECO*. So it never had a chance to contest this proof there. If in the federal case USX's lawyers had objected to the admission of Judge Garrett's opinion on hearsay grounds, their objection would have been upheld.

But USX's lawyers did not object on hearsay grounds. As a result, they waived a hearsay objection. They did object on another ground. They asked the trial judge to exclude Judge Garrett's opinion (and the incorporated memorandum of TIECO's counsel) as unfairly prejudicial to USX and misleading to the jury. A trial judge is empowered to exclude even relevant evidence for these reasons, but the trial judge here declined to do so. The Circuit Court held that this was an abuse of discretion. It held that although the Garrett opinion could not be excluded on hearsay grounds – because there was no hearsay objection – the presumed unreliability of all hearsay also made the evidence unfairly prejudicial and misleading in TIECO'S case against USX.

It is important to understand what the Eleventh Circuit did *not* say. It did *not* say that Judge Garrett's findings of fact, incorporating counsel's memorandum, were inaccurate or unreliable *as against the State of Alabama*. It did *not* question the record support for Judge Garrett's factual findings. Unlike USX, the State of Alabama *did* have the opportunity to challenge the evidence before Judge Garrett and had failed to do so. Judge Garrett's findings were and still are reliable against the office about which they were made – the office of the Attorney General of Alabama, which prosecuted the case against TIECO. Nothing in the opinion of the Eleventh Circuit changes that.

Sincerely yours,

A handwritten signature in black ink that reads "Stephen Gillers". The signature is written in a cursive, flowing style.

Stephen Gillers