



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

June 24, 2008

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to the Committee's subpoena, dated June 12, 2008, which we received on June 16, 2008, regarding documents from the files of the Department's investigation into the leak of classified information.

We are disappointed that the Committee issued the subpoena. As acknowledged in your letter of June 3, 2008, the Executive Branch has made substantial efforts to accommodate the Committee's oversight interests, including by producing or making available for the Committee's review dozens of Federal Bureau of Investigation reports summarizing interviews with senior White House, the State Department, and the Central Intelligence Agency officials. As indicated in our letter of June 11, 2008, we are consulting with the White House about the remaining 302s for White House staff and other White House documents sought by the Committee. We expect to complete our consultations soon, and we anticipate offering to make the remaining interview reports sought by the Committee (other than those of the President and the Vice President) available for the Committee's review on the same basis as the reports previously reviewed by Committee staff. We also expect that other White House documents sought by the subpoena (beyond the interview reports) will likely be offered for Committee review with limited redactions.

As we have explained in letters and informal communications with the Committee, we have been, and remain, open to considering all reasonable accommodations that might satisfy the Committee's requests for information. In particular, we are prepared to discuss with Committee staff the possibility of making available for review, upon a showing of particularized need, specific redacted portions of the White House staff interview reports previously reviewed by the Committee. In seeking to accommodate the Committee's requests, however, we must take into account core Executive Branch confidentiality interests and fundamental separation of powers principles, and we must avoid taking steps that could compromise the effectiveness of future criminal investigations involving White House personnel. Consequently, as we have informed the Committee, we are not prepared to provide or make available any reports of interviews with

the President or the Vice President from the leak investigation. To do so would allow Congress to obtain through access to Justice Department investigative files information that it otherwise could not gather through its own inquiry because of separation of powers.

Your various letters on this matter have explained that the Committee's legislative purpose for its inquiry concerns the review of White House procedures for handling classified information. We have attempted to accommodate this interest by permitting the Committee to review the reports of interviews of senior White House staff, which contain some information relevant to this subject. However, these reports also contain considerable information detailing the internal White House deliberations and communications of senior White House staff concerning how they should respond on behalf of the President to public assertions challenging the accuracy of a statement made in the President's State of the Union Address. The Executive Branch has important institutional interests in the confidentiality of such White House deliberations and communications, and we therefore accommodated the Committee's interests by making interview reports of senior White House staff available for review but not copying, with limited redactions of presidential and vice presidential communications and personal information not germane to the leak investigation.

We are not prepared to make the same accommodation for reports of interviews with the President and Vice President because the confidentiality interests relating to those documents are of a greater constitutional magnitude. The President and the Vice President are the two nationally elected constitutional officers under our Government. The President heads the Executive Branch and, as the Congress has by law recognized, the Vice President often advises and assists the President in the President's performance of his executive duties. It is settled as a matter of constitutional law, reflected in court decisions, and congressional and Executive Branch practice, that the communications of the President and the Vice President with their staffs relating to official Executive Branch activities lie at the absolute core of executive privilege. The interview reports sought by the Committee deal directly with internal White House deliberations and communications relating to foreign policy and national security decisions faced by the President and his immediate advisers. Congressional access to those reports would intrude into one of the most sensitive and confidential areas of presidential decision-making.

Moreover, from the institutional perspective, the Committee's request for copies of FBI reports of interviews with the President and the Vice President raises a very serious additional separation of powers concern relating to the integrity and effectiveness of future law enforcement investigations by the Department. There is an admirable tradition, extending back through Administrations of both political parties, of full cooperation by the White House with criminal investigations. In keeping with this tradition, the President and the Vice President (as well as the White House staff) cooperated voluntarily with the Special Counsel's leak investigation and agreed to be interviewed informally outside the presence of the grand jury. Were future Presidents and Vice Presidents (or their staffs) to perceive that providing such voluntary interviews would create records that would likely be made available to Congress, there is a clear and unacceptable risk that they might limit the scope of any voluntary interview or insist that they

will only testify pursuant to a grand jury subpoena and subject to the protection of the grand jury secrecy provision, Rule 6(e) of the Federal Rules of Criminal Procedure. Thus, if the Department were to make available records of voluntary interviews with the President and the Vice President (or release copies of the interview reports of senior White House staff), this precedent could create an unfortunate disincentive for voluntary cooperation with future Department criminal investigations involving official White House actions. Such a result would significantly impair the Department's ability to conduct future law enforcement investigations where such investigations would benefit from full White House cooperation.

We are aware that in 1999 the Department made available to this Committee the FBI reports of interviews with President Clinton and Vice President Gore that were taken during the Department's campaign finance investigation. We consider that situation to be fundamentally different from the present situation. We understand that the intrusion on Executive Branch confidentiality interests was significantly less because the Clinton Administration interview reports presumably did not involve the substance of internal White House deliberations and communications concerning official White House business, but rather concerned campaign-fundraising political activities.

In closing, we want to reiterate that we remain ready to work to accommodate the Committee's legitimate legislative interests. Although we will not make available records of any interviews of the President and Vice President in the leak investigation or produce copies for public release of the reports of interviews with senior White House staff, we remain prepared to discuss alternative accommodations that will address the Committee's needs in a manner consistent with the Executive Branch's confidentiality and separation of powers concerns. Please do not hesitate to contact this Office if you would like additional assistance regarding this matter.

Sincerely,



Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Tom Davis
Ranking Minority Member