ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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July 24, 1998

The Honorable Dan Burton
Chairman
House Committee on Government Reform and Oversight
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Burton:

I am writing regarding the subpoenas you issued today to the Department of Justice. I am concerned not only about your decision to issue the subpoenas but also about the procedure that was followed to authorize the issuance of the subpoenas.

Yesterday, my staff was notified that you intended to schedule a hearing on Attorney General Janet Reno's decision not to appoint an independent counsel to investigate campaign fundraising matters. The staff was also notified that you intended to issue a subpoena to the Department of Justice for copies of confidential memoranda that were prepared by FBI Director Louis Freeh and Charles LaBella, the head of DOJ's campaign task force. When I indicated to you that I would object to the issuance of the subpoena, a meeting of the Committee's Working Group was scheduled for this morning at 9:30 a.m.

Rep. Lantos, Rep. Cox, and I attended the Working Group meeting with you this morning. The four of us discussed the subpoenas, but reached no consensus. Realizing that you did not have the majority necessary to issue the subpoena, you stated that the Working Group would reconvene later near the House floor so that Rep. Hastert -- who was managing a bill on the floor -- could attend the meeting.

When the Working Group reconvened, four members (Reps. Burton, Waxman, Hastert and Cox) were present. Although our Document Protocol requires that "the Working Group shall endeavor in good faith to reach consensus," you did not allow me an opportunity to present my concerns to Mr. Hastert or to engage in any meaningful discussion with him. Instead, after less than five minutes of cursory discussion, you insisted that a vote be taken. (Ironically, even though you had earlier postponed a vote because Mr. Hastert was not present, you proceeded to

take a vote in Mr. Lantos's absence.) Not surprisingly, I was outvoted three to one.

Last month, when you were seeking the minority's support for immunity for four witnesses, you stated that "[w]e have offered to make our five-Member working group meet to vote on any subpoenas that you oppose, and I have pledged to abide by the working group's decisions." You also assured me that "[t]hese are not cosmetic changes." Unfortunately, your conduct today conflicts with these assurances. A process that denies the minority the opportunity to present its views is simply a sham process.

Not only am I concerned about the procedure that you followed in approving the subpoenas, I also object to the subpoenas themselves. With regard to the memorandum written by Director Freeh, the issuance of a subpoena violates the earlier agreement between the Committee and DOJ. Last December, you subpoenaed the Freeh memo, and DOJ refused to produce it. A compromise was reached whereby DOJ and FBI officials briefed us orally about the contents of the document, but did not produce it. Your issuance of a new subpoena conflicts with your prior agreement to not to subpoena the document in exchange for DOJ's agreement to provide an oral briefing.

With regard to the fact-intensive 100-page document drafted by Mr. LaBella, your subpoena violates the principle -- which has been followed by Administrations of both parties -- that memoranda that make recommendations regarding potential criminal prosecutions are not provided to Congress. See, e.g., Memorandum of Charles J. Cooper (Asst. Atty. Gen'l to President Reagan), Re: Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76 (1986).

There is a sound basis for respecting this principle. First, disclosure of sensitive investigative materials could compromise an on-going criminal investigation.[1] Second, Congress should not be influencing or interfering with DOJ's prosecutorial decisions. This latter factor is particularly relevant in this instance. The Attorney General has not finished reviewing the LaBella memo and evaluating whether the information contained in the memo merits criminal prosecutions or the appointment of an independent counsel. Until she makes these decisions, any congressional intervention risks improperly influencing her decisions on criminal prosecutions.

At a minimum, prior to the issuance of the subpoena, the Working Group should have

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[1] Simply redacting grand jury information pursuant to Federal Rule of Criminal Procedure 6(e) would not be sufficient. The LaBella memorandum may well contain highly sensitive investigative information -- such as witness interviews, document summaries, investigative strategies, and legal theories -- that are not covered by Rule 6(e).

offered DOJ and FBI representatives an opportunity to explain their views on why the Freeh and LaBella memoranda should not be produced to Congress at this time. Unfortunately, this very reasonable suggestion was also rejected at today's meeting.

Sincerely,

Henry A. Waxman
Ranking Minority Member

cc: Members of the Committee on Government Reform and Oversight