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COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051
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MEMORANDUM

October 8, 2003

To: Chairman Tom Davis
Fr: Rep. Henry Waxman
Re: The Leak Investigation

I appreciate the interest you have taken in the release of information about the covert status of Valerie Plame, the wife of Ambassador Joseph Wilson, and I commend you for meeting at length with Ambassador Wilson last week to hear his experiences firsthand. I also agree with your commitment to follow "regular order" in determining whether our Committee should investigate this issue.

As I reflected on our meeting with Ambassador Wilson and your comments at that meeting, it seemed to me that three questions emerged as the most important: (1) Is there a need for a congressional investigation? (2) Is a congressional investigation feasible? and (3) Will a congressional investigation interfere with the criminal investigation being conducted by the Department of Justice?

The purpose of this memo is to provide you my perspective on these questions. My view is that the leak involving Ambassador Wilson's wife raises a host of serious issues that only Congress can address, that a congressional investigation would shed more light on this matter more quickly than any alternative, and that our Committee can conduct this investigation without any inappropriate interference with the Department of Justice.

I. Is There a Need for a Congressional Investigation?

The Justice Department's investigation is narrowly focused. It is investigating whether there was a criminal violation of the Intelligence Identities Protection Act. There are a number of complex elements that need to be established to prove a crime under the Intelligence Identities Protection Act, such as showing that an individual intentionally disclosed information identifying

a covert agent, that the individual knew the information disclosed identified the covert agent, and that the United States is taking affirmative measures to conceal the covert agent's status.¹

Congress, however, does not need to be – and, in fact, should not be – so narrowly focused. There is a lot of wrongdoing that is not illegal under the criminal code. By its very nature, the Justice Department will not examine conduct that is not criminal or, at most, will do so only tangentially. Unless there is a congressional investigation with a broader scope than the narrow Justice Department inquiry, important aspects of the Wilson case will not be asked or answered.

One issue that should be examined by Congress, for example, is the role of the White House political advisor, Karl Rove. *Newsweek* has reported that Karl Rove spoke to Chris Matthews, the host of the MSNBC show *Hardball*, about the Novak column and Ms. Plame. According to *Newsweek*, “[a] source familiar with Rove’s conversation acknowledged that Rove spoke to Matthews a few days after Novak’s column appeared” and further acknowledged that Mr. Rove said it “was reasonable to discuss who sent Wilson to Niger.”² The White House says that none of this is criminal. That may be correct, but that does not make it right. If the President’s political advisor told Mr. Matthews that it was “reasonable” to discuss the revelations in the Novak column, this was in effect an invitation for Mr. Matthews to discuss Ms. Plame’s identity and role on national television. Needless to say, such an action by Mr. Rove would be an incredibly serious matter, regardless of its criminality.

There are many other examples of important questions that need to be addressed that do not necessarily involve criminal conduct. For example:

- Ambassador Wilson was in effect a “whistleblower.” Was there an organized effort in the White House to discredit or intimidate Ambassador Wilson and thereby discourage further whistleblowing?
- The identity of undercover CIA operatives is supposed to be one of the most closely guarded national security secrets, yet in this case, the identity of an undercover operative was disclosed. How did this happen? Where did the process break down, and how does it need to be fixed to ensure this never happens in the future?
- The Novak column disclosing the identity of Ms. Plame was published on July 14, 2003.³ But the White House appeared to dismiss the significance of the disclosure for months. When asked about this on September 27, 2003, White House spokesman Scott McClellan

¹ See 50 U.S.C. §§ 421 et seq.

² *Secrets and Leaks*, *Newsweek* (Oct. 13, 2003) (online at www.msnbc.com/news/976111.asp?0dm=s11Bk).

³ Robert D. Novak, *The Mission to Niger*, *Chicago Sun-Times* (July 14, 2003).

said: "I don't have any information beyond an anonymous source in a media report to suggest there is anything to this."⁴ Similarly, President Bush reportedly had "no plans to ask his staff members whether they played a role."⁵ Was the White House response to the release of Ms. Plame's identity appropriate?

The narrowly focused Justice Department investigation is important, but the public will be ill-served if these broader questions are not closely examined. This responsibility falls to Congress and in particular, I believe, to our Committee.

II. Is a Congressional Investigation Feasible?

One of the great advantages of a congressional investigation is that it could be conducted simply and efficiently. Justice Department investigations tend to take years to complete. Even then, there may be no public accounting of what the Justice Department finds, since the Department does not disclose the results of investigations that do not result in criminal prosecutions. The result is that relying on the Justice Department to investigate this matter ensures a long delay and offers no assurance of the public accounting that is urgently needed.

By contrast, congressional hearings that inform Congress and the public can be put together expeditiously. A handful of potentially key players are already apparent from news reports, such as Mr. Rove and I. Lewis (Scooter) Libby, the Vice President's chief of staff. It would be a simple matter for the Committee to ask them under oath what they know about this matter. In addition, the Committee could expeditiously take testimony from senior officials in the CIA and the National Security Council to assess who had knowledge of Ms. Plame's identity and what steps were taken to keep this knowledge confidential.

Under your predecessor, Dan Burton, this Committee conducted sprawling investigations of the Clinton Administration that involved the issuance of over one thousand subpoenas and the review of literally million pages of documents. During these investigations, dozens of senior Administration officials were deposed, interviewed, or called to testify at hearings, including White House Chief of Staff Erskine Bowles, White House Chief of Staff Mack McLarty, White House Counsel Charles Ruff, and Senior Advisor and Deputy White House Counsel Bruce Lindsey. I am not suggesting replicating this kind of procedure. Instead, I believe a targeted inquiry focused on a few key witnesses could do an enormous amount to illuminate this matter and restore public confidence that this breach of national security is being taken seriously.

III. Will a Congressional Investigation Interfere with a Criminal Investigation?

⁴ *Bush Administration Is Focus of Inquiry*, Washington Post (Sept. 28, 2003).

⁵ *Bush Aides Say They'll Cooperate With Probe Into Intelligence Leak*, Washington Post (Sept. 29, 2003).

At our meeting with Ambassador Wilson, you raised the understandable concern that nothing we do should interfere with the Justice Department investigation. I share this concern and believe we can conduct an investigation without intruding on the Justice Department investigation.

In evaluating this question, an important distinction needs to be drawn. Former Chairman Burton frequently disrupted the Justice Department's investigation of campaign finance issues by issuing subpoenas for or otherwise demanding Justice Department documents or witnesses from the Justice Department. For example, he issued a subpoena for internal memoranda from the head of the campaign finance task force to Attorney General Reno and sought to have her held in contempt when she appropriately refused to comply. He also issued subpoenas for Justice Department work products, such as FBI 301 interview notes. This kind of congressional action is improper and interferes directly with the Justice Department's investigation.

It is an entirely different matter, however, when a congressional committee independently investigates a subject that the Justice Department is also investigating. An independent congressional investigation is perfectly appropriate. Indeed, if there is a congressional need for the investigation, Congress as a co-equal branch of government has a responsibility to conduct the investigation.

There are innumerable examples of independent congressional investigations that cover topics also being examined the Justice Department. In fact, if there were a principle that Congress cannot investigate when the Justice Department is also investigating, there would be little that is controversial left for Congress to investigate. Given the range of matters under investigation at any time by the Justice Department and the fact that the Department often initiates inquiries into matters of significant public import, Congress would not be able to carry out its oversight responsibilities if the existence of criminal investigations automatically precluded congressional review.

One recent example is Congress' investigation into the Enron collapse. In late 2001, the Department of Justice launched an inquiry into allegations of potentially illegal actions by Enron that soon resulted in a broad criminal probe.⁶ Simultaneously, the House Energy and Commerce Committee conducted what Committee Chairman Billy Tauzin and Oversight and Investigations Subcommittee Chairman James Greenwood called a "comprehensive investigation into the financial collapse of Enron."⁷ The House Energy and Commerce Committee's investigation involved several public hearings and covered subjects about which Justice prosecuted.⁸

⁶*Justice Looking at Enron*, Washington Post (Dec. 7, 2001); *Government Opens Criminal Investigation of Enron*, Associated Press (Jan. 9, 2002).

⁷House Committee on Energy and Commerce, Press Release, *Tauzin, Greenwood Release Internal Andersen Memos*, (Apr. 2, 2002).

⁸For example, on January 24, 2002, the Oversight and Investigations Subcommittee held

Our Committee, of course, has a long track record of conducting investigations of the Clinton Administration at the same time that the Justice Department or an independent or special counsel were conducting criminal investigations. The campaign finance investigation, the Travelgate investigation, the Babbitt investigation, and the Waco investigation are all prominent examples. In these investigations, this Committee obtained testimony from numerous individuals who also were interviewed by the Justice Department.⁹ In the case of the campaign finance investigation, at least 14 other House Committees also investigated campaign finance matters in this same time frame.¹⁰

There are times when specific congressional investigative steps may pose a risk of undermining a Justice Department investigation. For example, because congressional immunity shields a witness from criminal prosecution, it is important for committees to consult with the Justice Department before granting immunity to individual witnesses. Such case-by-case consultation on matters with particular sensitivity to the Justice Department can ensure that a congressional investigation will not compromise a criminal investigation.

IV. Conclusion

There is a high level of public cynicism about congressional investigations. The Burton record established that no allegation involving the Clintons, no matter how far-fetched or unsubstantiated, would go uninvestigated if there were partisan points to be scored. The performance of the House since President Bush was elected suggests the polar opposite: Congress will examine no allegation involving the White House, no matter how serious.

a hearing on the destruction of Enron-related documents by Arthur Andersen, and obtained documents from Arthur Andersen on this matter. *See* House Committee on Energy and Commerce Subcommittee on Oversight and Investigations, *Hearing on the Destruction of Enron-Related Documents by Andersen Personnel*, 107th Cong., 2nd Sess. (Jan. 24, 2002). The Department of Justice prosecuted Arthur Andersen on obstruction of justice charges relating to the destruction of Enron documents. *E.g.*, *Andersen Indicted In Enron Shredding*, USA Today (Mar. 15, 2002).

⁹During the campaign finance investigation, for example, the Committee deposed 162 individuals, many of whom testified that they had talked with or been contacted by the Department of Justice. *E.g.*, House Committee on Government Reform and Oversight, *Deposition of Margaret Williams* (Aug. 27, 1997). When the Department of Justice provided lists of witnesses interviewed on particular campaign finance subjects, these lists made clear that the Committee and Justice had talked with the same individuals in many instances. *See e.g.*, Letter from Robert Raben, Assistant Attorney General, to Ken Ballen, Minority Chief Investigative Counsel, Committee on Government Reform (Apr. 7, 2000) (attaching list of individuals interviewed by the FBI as part of the campaign finance investigation).

¹⁰*See* House Committee on Government Reform and Oversight, Minority Views, *Investigation of Political Fundraising Improprieties and Possible Violations of Law, Interim Report*, 105th Cong., 2d Sess., vol. 4, 3966 (Nov. 5, 1998).

As I think you agree, neither of these extremes reflects well on Congress. Serious and substantiated allegations of wrongdoing – such as exist in this case – should be examined by Congress regardless of which party is in power.