ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

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December 11, 2003

The Honorable Tom Davis
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On September 29, I wrote to urge that the Committee investigate who leaked the covert identity of the wife of Ambassador Joseph Wilson. I am writing now to renew that request.

On October 2, we met with Ambassador Wilson at length in your office. What Ambassador Wilson told us made a compelling case for a congressional investigation. At that meeting, you indicated that you would proceed under "regular order" in reviewing this matter. My concern is that little is being done and there is no indication we will be pursuing this important matter.

As you know from the memo I sent you on October 8, I believe that we cannot rely on the Justice Department investigation to replace the need for congressional hearings. My reasons can be summarized in three words: scope, speed, and openness. While the Justice Department investigation is important, its focus is limited; it will proceed slowly; and it may not produce public findings.

I am also concerned about the double standard that is being set. As you acknowledged, if President Clinton's White House had leaked the identity of a covert CIA operative, there would have been multiple congressional investigations launched immediately. While I can understand that the Republican majority is less keen to investigate President Bush than President Clinton, surely there must be some abuses by the Bush White House that cannot be ignored.

Given what is already known and what has been alleged about this matter, Congress has a clear constitutional responsibility to find out what happened. The Government Reform Committee, the primary investigative committee in the House of Representatives, should be taking the lead.

Scope

The Department of Justice investigation has a narrow focus: 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 individual knew that the United States was taking affirmative measures to conceal the covert agent's status.[1]

This narrow legal question should be investigated by the Justice Department or — preferably — by an independent special counsel. But it is by no means the only issue that is implicated in this matter. 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 Justice Department inquiry, important aspects of the Wilson case will not be addressed. For example:

- Ambassador Wilson was in effect a "whistleblower." Regardless of whether revealing his wife's identity was illegal, there appears to have been a coordinated White House effort to intimidate Ambassador Wilson and other potential whistleblowers. Any such retaliation would be reprehensible, but it does not appear to be the focus of the Justice Department inquiry. Without an investigation by the Committee, we may never learn whether retaliation occurred or what can be done to prevent a recurrence.

- 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. There should be an investigation of what can be done to fix the system so this never happens again. This is beyond the scope of the Justice Department inquiry.

- The identity of Ambassador Wilson's wife was revealed in the Robert Novak column on July 14, 2003. But the White House did not appear to take the leak seriously — or initiate efforts to preserve records or otherwise to find out who was responsible — until at least September 28, 2003, when the *Washington Post* revealed that CIA Director George Tenet had requested a criminal investigation.[2] Why the White House delayed taking action should be examined, but it is outside of the scope of the Justice Department inquiry.

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[1] *See* 50 U.S.C. § 421 *et seq.*

[2] *Bush Administration Is Focus of Inquiry; CIA Agent's Identity Was Leaked to Media*, Washington Post (Sept. 28, 2003).

There are also significant aspects of the case relating directly to the legislative jurisdiction of the Committee that the Justice Department is unlikely to investigate. As you know, the Committee is responsible for a wide range of matters concerning federal civil service. The facts that have been disclosed to date raise concerns about whether the leak of the identity of Ambassador Wilson's wife violated the Privacy Act or the requirements concerning security clearances for federal employees. These are matters that are our responsibility to examine.

The Privacy Act prohibits government agencies from disclosing to other agencies and the public a wide range of government records, including personnel records.[3] The Act prohibits disclosure of such records except under a limited set of circumstances such as disclosure for a civil or criminal law enforcement activity[4] or for a "routine use," which is defined as for a purpose "compatible with the purpose for which it was collected."[5] It seems unlikely that either of these exceptions apply here.

There is also a serious question whether White House officials violated the terms of their nondisclosure agreements. To obtain access to classified information, federal employees must have the following: (1) a security clearance; (2) a "need to know"; and (3) a classified information nondisclosure agreement, which is a contract between the employee and the federal government in which the employee agrees not to divulge classified information.[6] If federal employees breach their nondisclosure agreements by "knowingly, willfully, or negligently" disclosing classified information to unauthorized persons, they may be subject to administrative penalties including the termination of security clearances and employment.[7]

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[3] 5 U.S.C. § 552a (b). The Act concerns records about an individual that are "maintained by an agency, including, but not limited to . . . employment history and that contains his name . . . or other identifying particular assigned to the individual." 5 U.S.C. § 552a (a)(4). To fall under the Act, the records must be maintained in a system from which information is "retrieved by the name of the individual or by some . . . other identifying particular assigned to the individual." 5 U.S.C. § 552a (a)(5).

[4] 5 U.S.C. § 552a (b)(7).

[5] 5 U.S.C. §§ 552a (a)(7) and (b)(3). Both written and oral disclosures are subject to the Privacy Act. *E.g., Olberding v. Dep't of Defense*, 564 F. Supp. 907 (S.D. Iowa 1982).

[6] Exec. Order No. 13292, further amendment to Exec. Order No. 12958, as amended, 68 Fed. Reg. 15315 (Mar. 28, 2003) (section 4.1(a)). In particular, employees must have a specific need to know the classified information at issue in order to perform official duties. The person who holds the classified information is responsible for confirming that the employee has a security clearance and a specific need to know the classified information.

[7] *Id.* at sections 5.5(b), (c), and (d).

One of the most fundamental principles of safeguarding classified national security information is that this information does not become declassified because it is published through unauthorized sources. Confirming the accuracy of classified information, or calling attention to classified information that has appeared publicly, is considered just as much a violation of the nondisclosure agreement as an unauthorized leak.[8] If there is any doubt about whether information is classified, the nondisclosure agreement requires employees to obtain written authorization prior to disclosing the information.

In this case, press accounts suggest that Administration officials may have violated nondisclosure agreements on a number of occasions. On July 14, 2003, Robert Novak published his column disclosing the covert CIA status of Ambassador Wilson's wife.[9] According to Mr. Novak, he received this information from two "senior Administration officials."[10] In addition to Mr. Novak's column, press accounts indicate that White House officials repeatedly contacted other media outlets to release the initial details about the status of Ambassador Wilson's wife,[11]

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[8] *See id.* at section 1.1(b). In addition, a "questions and answers" briefing booklet distributed by the Information Security Oversight Office specifically addresses this question:

> Question 19: If information that a signer of the SF 312 knows to have been classified appears in a public source, for example, in a newspaper article, may the signer assume that the information has been declassified and disseminate it elsewhere?
>
> Answer: No. Information remains classified until it has been officially declassified. Its disclosure in a public source does not declassify the information. Of course, merely quoting the public source in the abstract is not a second unauthorized disclosure. However, before disseminating the information elsewhere or confirming the accuracy of what appears in the public source, the signer of the SF 312 must confirm through an authorized official that the information has, in fact, been declassified. If it has not, further dissemination of the information or confirmation of its accuracy is also an unauthorized disclosure.

Briefing Booklet: Classified Information Nondisclosure Agreement (Standard Form 312), Information Security Oversight Office, National Archives and Records Administration (undated).

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

[10] Robert D. Novak, *Controversy over the White House Leak Is Misplaced*, Milwaukee Journal Sentinel (Oct. 5, 2003).

[11] A senior administration official told the *Washington Post* that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of

and that White House officials directed members of the media to Mr. Novak's published account.[12] Each of these specific disclosures and conversations could constitute breaches of the nondisclosure agreement.

Speed

One of the great advantages of a congressional investigation is that it could be conducted simply and quickly. Justice Department investigations tend to take years to complete. For example, Credit Lyonnais, a French bank, has been under investigation by the Justice Department since 1999 for an allegedly illegal takeover of Executive Life Insurance Company in 1991. The Justice Department has been investigating Enron for nearly two years without indications to date of imminent closure.

By contrast, congressional hearings that inform Congress and the public can be put together expeditiously. The Committee could narrow the scope of the individuals who potentially could have had access to the leaked information by taking testimony from senior officials in the CIA and the National Security Council. In addition, a handful of potentially key players are already apparent from news reports, such as Karl Rove, the President's senior advisor, 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.

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 Chief of Staff John Podesta, White House Counsel Charles Ruff, White House Counsel Beth Nolan, Senior Advisor and Deputy White House Counsel Bruce Lindsey, Assistant to the President and Deputy Chief of Staff Harold Ickes, and Counselor to the President and Director of

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Wilson's wife." *Bush Administration Is Focus of Inquiry,* Washington Post (Sept. 28, 2003) (emphasis added). Ambassador Wilson had a similar account, reporting that "four reporters from three television networks called him in July and told him that White House officials had contacted them to encourage stories that would include his wife's identity." *Bush Aides Say They'll Cooperate with Probe into Intelligence Leak,* Washington Post (Sept. 29, 2003).

[12] For example, *Newsweek* reported that Karl Rove spoke directly to Chris Matthews, the host of the MSNBC show *Hardball*, about the Novak column and Ambassador Wilson's wife. 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." *Secrets and Leaks,* Newsweek (Oct. 13, 2003) (online at www.msnbc.com/news/ 976111.asp?0dm=s11Bk).

Political Affairs Doug Sosnik. 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.

Openness

Another problem with relying on the Justice Department investigation is that there is often no public accounting of Justice Department investigations. The Department does not disclose the results of investigations that do not result in criminal prosecutions. In addition, where the Department resolves charges through a plea bargain, there is no guarantee that the public will receive details of the investigation results.

Such secrecy is inappropriate in this case. The disclosure of the identity of Ambassador Wilson's wife has raised serious public concerns about White House conduct. These concerns cannot be addressed by further secret proceedings. To the contrary, they are best addressed by public hearings in front of a congressional committee.

Avoiding Interference with the Justice Department Investigation

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 subpoenaed 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. This kind of congressional action is almost always 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. 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 could not investigate when the Justice Department was 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.[13] 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."[14] The House Energy and Commerce Committee's investigation involved several public hearings and covered subjects about which Justice Department eventually brought charges.[15]

Our Committee, of course, has a long track record of conducting investigations of the Clinton Administration at the same time as 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.[16] In the case of the campaign

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

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

[15] For example, on January 24, 2002, the Oversight and Investigations Subcommittee held 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. (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).

[16] During 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

finance investigation, at least 14 other House committees also investigated campaign finance matters in this same time frame.[17]

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.

Conclusion

In the weeks since you indicated interest in investigating the leak relating to Ambassador Wilson's wife, the need for a congressional investigation has only become more apparent. The Justice Department's investigation has not yet resulted in any answers for the public. Further, the Administration continues to refuse to respond to questions regarding the involvement of senior officials in this matter beyond narrowly worded statements that do not resolve the multitude of issues at stake.

This Committee could conduct a meaningful and efficient investigation that would resolve a variety of public concerns about this matter, and it could do so quickly and publicly. I once again urge you to initiate such an investigation.

Sincerely,

Henry A. Waxman
Ranking Minority Member

Investigative Counsel, Committee on Government Reform (Apr. 7, 2000) (attaching list of individuals interviewed by the FBI as part of the campaign finance investigation).

[17] *See* House Committee on Government Reform and Oversight, Minority Views, *Investigation of Political Fundraising Improprieties and Possible Violations of Law, Interim Report*, 105th Cong., v. 4, 3966 (Nov. 5, 1998).