MINORITY VIEWS OF HON. HENRY A. WAXMAN, HON. TOM LANTOS, HON. ROBERT E. WISE, JR., HON. MAJOR R. OWENS, HON. EDOLPHUS TOWNS, HON. PAUL E. KANJORSKI, HON. BERNARD SANDERS, HON. CAROLYN B. MALONEY, HON. ELEANOR HOLMES NORTON, HON. CHAKA FATTAH, HON. ELIJAH E. CUMMINGS, HON. DENNIS J. KUCINICH, HON. ROD R. BLAGOJEVICH, HON. DANNY K. DAVIS, HON. THOMAS H. ALLEN, AND HON. HAROLD E. FORD, JR.

INTRODUCTION

On August 6, 1998, the Committee on Government Reform and Oversight voted on party lines (24 to 19) to cite Attorney General Janet Reno for contempt of Congress. This action constituted an abuse of the contempt power, which is the most coercive and rarely invoked power of Congress. It follows nearly 2 years of mishaps and systematic abuses of power by the majority. As Norman Ornstein, congressional expert with the conservative American Enterprise Institute, has observed, "I think the Burton investigation is going to be remembered as a case study in how not to do a congressional investigation." [1]

There was no reasonable basis for proceeding with the contempt citation. The Attorney General was cited for contempt because she did not give the Committee memoranda written by Louis B. Freeh, the Director of the FBI, and Charles G. La Bella, the former head of the Department of Justice's investigative task force on campaign finance. These memoranda contain prosecution recommendations and other sensitive and detailed information regarding the Department's largest ongoing criminal investigation. The Attorney General's refusal to turn over this information was consistent with 100 years of precedent in which both Republican and Democratic administrations have refused to provide Congress with prosecution memoranda in ongoing criminal investigations. The Committee's contempt vote occurred just 2 days after Director Freeh, Mr. La Bella, and the lead FBI agent in the investigation, James V. Desarno, Jr., testified that releasing the memoranda would provide a "road map" of the investigation to criminal defendants and be "devastating" to future prosecutions.

Further, the contempt proceeding itself has questionable legal merit because the subpoena calling for the Freeh and La Bella memoranda was not validly issued. The Chairman violated Committee rules in issuing the subpoena because the Working Group that is supposed to evaluate such subpoenas did not make a "good faith" effort to reach a consensus. It is doubtful that a court would uphold this subpoena.

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[1] *House Probe of Campaign Fund-Raising Uncovers Little,* Los Angeles Times (May 2, 1998).

The Attorney General made every effort to reach an accommodation with the Committee, including offering to brief the Chairman and Ranking Minority Member on the contents of the memoranda and testify before the full Committee at a public hearing. She requested only that before taking these steps, she be given three weeks to complete her review of the LaBella memorandum and make her decisions free of political influence. The Chairman rejected every attempt at accommodation.

The Committee proceeded with the contempt citation in an apparent effort to intimidate the Attorney General. The Committee appears to want to force her to choose between seeking the appointment of an independent counsel to investigate the President or going to prison for contempt of Congress. In fact, in a meeting with the Attorney General in his office on July 31, Chairman Burton explicitly linked his efforts to hold the Attorney General in contempt to her decision on an independent counsel. As the Washington Post wrote in an editorial after the Committee vote, "Mr. Burton's approach to the matter has been nothing less than thuggish. . . . [Ms. Reno] is right in her refusal to be bullied."[2]

Unfortunately, the Committee's irresponsible vote to hold the Attorney General in contempt adds to a long history of misconduct by the Committee in the campaign fund-raising investigation. The vote follows nearly 2 years of mistakes, partisanship, and raw abuses of power by the majority. These actions have thoroughly discredited the investigation and reduced it to irrelevancy.

This report details the minority's views on the August 6 contempt finding. It is organized as follows:

I. The Attorney General is justified in not turning over the Freeh and La Bella memoranda to Congress

A. Release of the memoranda would "devastate" the Justice Department's ongoing investigation

B. Release of the memoranda would improperly inject politics into prosecutorial decisions

C. Release of the memoranda would have a "chilling effect" on the Attorney General's ability to receive confidential advice

D. A century of precedent supports the Attorney General's position not to produce the memoranda

II. The contempt proceeding is an apparent attempt to intimidate the Attorney General

A. There is a tradition of accommodation between the executive and legislative branches of government

B. The Attorney General has made "extraordinary" efforts to accommodate the Committee

C. Chairman Burton should have followed Senator Hatch's example and accepted the Attorney General's proposals

D. The Committee is apparently seeking to intimidate the Attorney General

III. The contempt citation will bring the Committee into further disrepute

[2] *Mr. Burton and Ms. Reno,* Washington Post, A24 (Aug. 7, 1998).

A. The majority has a lengthy record of mishaps and abuses of power
B. The contempt citation has produced a new round of public criticism
IV. The contempt citation is legally flawed and would not be upheld by a court
V. The majority's arguments are not persuasive
A. The precedents cited by the majority are inapplicable
B. The majority's pledge of confidentiality cannot be relied upon
C. Redaction of grand jury material is not sufficient
D. An assertion of a claim of executive privilege is not necessary
E. Former Attorneys General do not support the contempt citation

I. The Attorney General is Justified in Not Turning Over the Freeh and La Bella Memoranda to Congress

A. Release of the memoranda would "devastate" the Justice Department's ongoing investigation

The partisan nature of the Committee's action is illustrated by its approach to the advice offered by Director Freeh, Mr. La Bella, and Mr. Desarno. When the issue is whether an independent counsel should be appointed, Republican Members laud these three men's credentials and rely on their professional advice. For instance, Chairman Burton has called them "outstanding figures in law enforcement" and "the three most senior people in the investigation, who have the greatest knowledge of the facts."[3]

But when the issue is whether their memoranda should be released to the Committee, the professional opinions of Director Freeh, Mr. La Bella, and Mr. Desarno are conveniently overlooked. Each of these officials strongly cautioned the Committee against seeking the memoranda because of the adverse consequences that release of the memoranda could have on the Justice Department's investigation. Yet the majority simply disregarded this advice.

The Committee's decision to ignore the recommendations of the senior law enforcement officials involved in the Justice Department's campaign finance investigation poses great peril for that investigation. Although the majority claims to want a thorough investigation by an independent counsel, its insistence on obtaining the memoranda could undermine any investigation that an independent counsel might bring. The Miami Herald succinctly described the situation in an editorial written on the day of the Committee vote:

> If you want to rid your house of rats, one extremely effective way is to burn down the house. That's essentially what U.S. Rep. Dan Burton seems willing to do by threatening Attorney General Janet Reno with contempt of Congress. . . . Mr. Burton's request is . . . bereft of any sign

[3] Press releases from Chairman Burton (July 23, 1998; July 27, 1998).

> that he has weighed what these memos, if leaked, could do to the Justice Department's own investigation.[4]

In arguing against the release of these memoranda, Attorney General Reno stated: "The disclosure of these memoranda could provide a 'road map' of the Department's investigation. . . . The investigation could be seriously prejudiced."[5] Moreover, according to the Attorney General: "Criminals, targets and defense lawyers alike can all agree on one thing—they would love to have a prosecutor's plans."[6]

The Attorney General's warnings were echoed by Director Freeh, Mr. La Bella, and Mr. Desarno when they testified before the Committee on August 4, 1998. In his written opening statement, Director Freeh explained: "The need for confidentiality is especially important during an ongoing criminal investigation. . . . As the chief investigator, I am most reluctant to publicly provide a 'road map' to potential subjects and witnesses."[7]

Mr. La Bella went even further and expressed his opposition to release of his memorandum several times during the Committee's hearing:

> *The last thing in the world that I want to see as the prosecutor heading this task force is that this memo ever get disclosed. . . . I don't think it should ever see the light of day because this, in my judgment, would be devastating to the investigations* that the men and women of the task force are working on right now, and that I've put my blood, sweat, and tears into, and I don't want to see that jeopardized. I would even be stronger than the Director. I can't see a set of circumstances under which this report should see the light of day.
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> It is my opinion, my considered opinion, that this could hurt the investigators and the investigation in a hundred different ways. You don't make a white collar case by going to the target, tapping him or her on the shoulder, and say "confess, please." You make them by inches, sometimes centimeters. You get a document. You go after a witness. You crack that witness. You go up the ladder. You crack that witness. You go up. You crack the next witness. That's how you make these cases. And those witnesses, wherever they are on the ladder, are important. . . . I think it is important that no one who is within the range, whether they are covered, non-covered, within the range of our criminal investigation, be given access to this information.[8]

Similarly, when Mr. Desarno was asked about the impact of producing the La Bella memorandum to Congress, he agreed with Mr.

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[4] *Tell Him No, Ms. Reno! Don't Yield to Burton,* Miami Herald (Aug. 6, 1998).
[5] Letter from Attorney General Reno and Louis B. Freeh to Chairman Burton (July 28, 1998).
[6] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998).
[7] Opening statement of Louis B. Freeh before the House Committee on Government Reform and Oversight (Aug. 4, 1998).
[8] Testimony of Charles G. La Bella before the House Committee on Government Reform and Oversight (Aug. 4, 1998) (emphasis added).

La Bella's assessment: "Yes, I think it would be devastating if that report were to be made public." [9]

Clearly, the prudent course for Congress to follow is to defer to the assessments of "the three most senior people in the investigation, who have the greatest knowledge of the facts." [10] The campaign finance investigation is the largest ongoing criminal investigation in the Department of Justice, with more than 120 agents and attorneys working on the investigation. Congress should not blindly follow a course that could irreparably damage this investigation.

B. RELEASE OF THE MEMORANDA WOULD IMPROPERLY INJECT POLITICS INTO PROSECUTORIAL DECISIONS

Not only would release of the memoranda be damaging to the Justice Department's ongoing investigation, it also would improperly inject partisan political pressures into the work of the Justice Department. Historically, both Republican and Democratic Attorneys General have strived to ensure that prosecutorial decisions are based solely on the facts and the law, not partisan political pressures from Congress.

On August 4, 1998, Attorney General Reno wrote to Chairman Burton about the importance of preserving the independence of the Department of Justice. Her letter stated: "Even when conducting vigorous oversight, Congress has respected the principle that law enforcement must be free from even the appearance of partisan political tampering. And the Justice Department has adhered to this position for the better part of a century, under presidents from Teddy Roosevelt to Ronald Reagan—and under FBI Directors from J. Edgar Hoover to Louis Freeh." [11]

The Attorney General's position is the same as the position taken by the Justice Department during the Reagan administration. In 1986, Assistant Attorney General Charles J. Cooper explained that "the Department of Justice has an obligation flowing from the Due Process Clause to ensure that the fairness of the decision making with respect to the prosecutorial function is not compromised by excessive congressional pressure." [12]

The Attorney General's position is also supported by many of her other predecessors. Former Attorney General Nicholas deB. Katzenbach, for example, wrote Representative Waxman that "it is hard to imagine a less appropriate subject for a subpoena or one more calculated to politicize the Department. . . . For Congress to attack her independent judgment by use of subpoena and contempt is simply the wrong way to resolve a disagreement of this kind and would do great damage to the integrity of the Department." [13] As the Washington Post reported in an editorial on August 9, and as is further discussed *infra* in part V.E., most other former Attorneys General share the same view.

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[9] Testimony of James V. Desarno, Jr., before the House Committee on Government Reform and Oversight (Aug. 4, 1998).

[10] *See supra* note 3.

[11] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998) (attached).

[12] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. 68 (Apr. 28, 1986).

[13] Letter from Nicholas deB. Katzenbach to Representative Waxman (Aug. 5, 1998).

The Committee's decision to hold the Attorney General in contempt ignores these principles. The Committee is seeking sensitive prosecution memoranda from the Attorney General before the Attorney General has even completed her review of one of the memorandum. If the Attorney General succumbed to the Committee's pressure and allowed Congress to interject itself in this way in her decisionmaking process, public confidence in the integrity and independence of Federal prosecutors would be destroyed.

C. RELEASE OF THE MEMORANDA WOULD HAVE A "CHILLING EFFECT" ON THE ATTORNEY GENERAL'S ABILITY TO RECEIVE CONFIDENTIAL ADVICE

The Committee's attempt to obtain these memoranda also disregards the impact such congressional oversight would have on sensitive deliberations within the Justice Department. During his testimony before the Committee on August 4, 1998, Director Freeh repeatedly emphasized this point. For example, he stated: "If we were to set . . . an unnecessary precedent where prosecution memos—and these are in effect prosecution memos—are disclosed and publicly discussed, the chilling effect that that would have on prosecutors, assistant U.S. attorneys and investigators in my professional judgment would be very severe." [14]

At another point during the hearing, Director Freeh described a discussion he had recently had with a prosecutor as follows:

> One of the attorneys who is working in the task force just the other day expressed a concern about whether or not he should put into writing a recommendation that he was about to make, and his concern stemmed directly from the fact that he was unsure whether that recommendation would later be discovered and subpoenaed, and something that would require him to appear here today and discuss or explain.[15]

Director Freeh's anecdote is a vivid illustration of the negative impact that political pressure can have on sensitive decisions within the Justice Department. If the confidentiality of prosecution memoranda is lost through congressional interference, Justice Department prosecutors may frequently be unwilling to provide their candid views and recommendations in written memoranda. The result will be to deny the Attorney General exactly the kind of advice she most needs. As the Los Angeles Times wrote in an editorial on the day of the Committee vote: "The precedent Rep. Burton seeks could make the executive branch a ground for all sorts of witch hunts by those who second-guess motives and judgments of decision makers." [16]

Director Freeh's view mirrors the position taken by President Reagan's Justice Department. A 1986 legal opinion by the Department stated that "[e]mployees of the Department would likely be reluctant to express candidly their views and recommendations on controversial and sensitive matters if those views could be exposed

[14] Testimony of Louis B. Freeh before the House Committee on Government Reform and Oversight (Aug. 4, 1998).
[15] *Id.*
[16] *Buck Stops With Reno,* Los Angeles Times (Aug. 6, 1998).

to public scrutiny by Congress on request."[17] Former Attorney General Griffin B. Bell, who served under President Carter, expressed the same view in a letter to Mr. Waxman, stating: "I believe it is of paramount importance to preserve the confidentiality of internal communications between the Attorney General and advisors or investigators in order to ensure that such advisors feel free to render candid advice that is not swayed by public opinion or fear of future disclosure to Congress."[18] Similarly, William H. Webster, who served as FBI Director and CIA Director under Democratic and Republican administrations, wrote in a New York Times opinion: "Intrusive Congressional demands to see such reports and recommendations could keep decision makers from seeking the best available advice."[19]

Prior to the Committee's vote, there had been a bipartisan understanding that congressional oversight into politically sensitive criminal investigations must not be so intrusive that it significantly impairs the functioning of the Justice Department. Regrettably, the Committee has chosen to disregard this understanding.

D. A CENTURY OF PRECEDENT SUPPORTS THE ATTORNEY GENERAL'S POSITION NOT TO PRODUCE THE MEMORANDA

In deciding not to turn over the Freeh and La Bella memoranda, Attorney General Reno is relying on a long history of Justice Department precedents. Without exception, these precedents support her refusal not to turn over prosecution memoranda to Congress. The strength of these precedents was summarized by Charles J. Cooper, Assistant Attorney General during the Reagan administration, in a 1986 legal opinion:

> This policy [of not turning over investigative materials] was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. *No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files.*[20]

As the following discussion demonstrates, Justice Departments under administrations of both parties have refused to turn over to Congress the very type of materials that the Committee is now seeking.

1. Theodore Roosevelt Administration

In January 1909, the Senate requested that the administration provide information as to why no legal proceedings were being instituted against U.S. Steel. President Roosevelt instructed his Attorney General "not to respond to that part of the [Senate] resolution which calls for a statement of his reasons for nonaction . . . because I do not conceive it to be within the authority of the Senate

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[17] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. 68 (April 28, 1986).
[18] Letter from Griffin Bell to Representative Waxman (Aug. 6, 1998).
[19] William H. Webster, *Congress Exceeds its Reach,* New York Times (Aug. 11, 1998).
[20] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. (Apr. 28, 1996) (emphasis added).

to give directions of this character to the head of an executive department, or to demand from him reasons for his action." [21]

2. Franklin Roosevelt Administration

In 1941, a House committee requested all Justice Department investigative materials relating to labor strikes involving naval contractors. Attorney General Robert H. Jackson refused to provide the information, stating: "[A]ll investigative reports are confidential documents of the executive department of the Government [and] congressional or public access to them would not be in the public interest." [22]

3. Eisenhower Administration

In 1956, a House committee requested that the Justice Department provide all files relating to a consent decree between the government and AT&T. The Justice Department declined, stating: "Department policy does not permit disclosure of staff memoranda or recommendations." [23]

4. Nixon Administration

In 1969, during a House committee investigation into the My Lai massacre, the Army was asked to provide all materials from its ongoing investigation into the incident. On behalf of the Army, Thomas Kauper, Deputy Assistant Attorney General, refused to provide the materials, stating: "If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." [24]

5. Ford Administration

In 1976, Congresswoman Bella Abzug, who chaired a subcommittee of the Government Operations Committee, requested FBI investigative files concerning domestic intelligence matters. Deputy Attorney General Harold R. Tyler, Jr., refused to provide the information, stating: "[I]f the Department changes its policy and discloses investigative information, we could do serious damage to the Department's ability to prosecute prospective defendants and to the FBI's ability to detect and investigate violations of criminal law." [25]

6. Reagan Administration

In 1986, the Justice Department's Office of Legal Counsel was asked to provide its opinion on whether the Attorney General could disclose to Congress the contents of reports filed with a court pursuant to the Independent Counsel Act. Assistant Attorney General Charles J. Cooper concluded that such materials could not be provided, because "the executive . . . has the exclusive authority to enforce the laws adopted by Congress, and neither the judicial nor legislative branches may directly interfere with the prosecutorial

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[21] 43 Congressional Record 528 (1909).
[22] Opinion of Attorney General Robert H. Jackson (1941).
[23] Letter from Dept. of Justice to House Judiciary Committee (July 13, 1956).
[24] Thomas E. Kauper, *Submission of Open CID Investigation Files* (Dec. 19, 1969).
[25] Letter from Harold R. Tyler, Jr., to Representative Bella Abzug (Feb. 26, 1976).

discretion of the Executive Branch by directing the executive to prosecute particular individuals." [26]

7. Bush Administration

In 1989, the Justice Department's Office of Legal Counsel was asked to provide its opinion on whether agency inspectors general were required to provide information to Congress about open criminal investigations. Assistant Attorney General Douglas W. Kmiec concluded that there was no obligation to provide such confidential law enforcement information, stating: "[T]he executive branch has generally declined to make any accommodation for congressional committees with respect to open cases: that is, it has consistently refused to provide confidential information." [27]

8. The Majority's Arguments

The majority has stated that these precedents are inapplicable and that the Justice Department has turned over investigative materials to Congress in the past. The majority's arguments on this point are inaccurate, as is discussed in part V. What the historical record in fact shows is that the Committee's contempt citation departs from 100 years of bipartisan consensus about the need to preserve the confidentiality of prosecution memoranda in ongoing criminal investigations.

II. The Contempt Proceeding is an Apparent Attempt to Intimidate the Attorney General

Article II of the Constitution vests the power to execute and enforce the laws of the United States in the executive branch.[28] The courts have long recognized that criminal prosecution is exclusively the province of the executive branch.[29] By statute, moreover, the responsibility and authority to recommend appointment of an independent counsel rests exclusively with the Attorney General.[30] Nevertheless, under the pretext of the Committee's generalized responsibility to oversee the activities of the executive branch, Chairman Burton appears to be using the extraordinary power of criminal contempt to intimidate the Attorney General into making a discretionary decision of his liking.

A. THERE IS A TRADITION OF ACCOMMODATION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT

The Committee's decision to seek contempt against Attorney General Reno is contrary to the spirit of accommodation that has long characterized disputes between the executive and legislative branches. As the D.C. Circuit Court of Appeals has observed, "[t]he framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in a manner most

[26] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. 68 (Apr. 28, 1996).
[27] Douglas W. Kmiec, *Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations,* 13 Op. O.L.C. 93 (Mar. 24, 1989).
[28] U.S. Const. Art. II, §§ 1, 3.
[29] *E.g. Heckler* v. *Chaney,* 470 U.S. 821, 832 (1985).
[30] *See* 28 U.S.C. § 592 (1998).

likely to result in efficient and effective functioning of our governmental system."[31] For this reason, "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[32]

Similarly, Attorney General William French Smith, who served under President Reagan, observed that "[t]he accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch."[33]

Unfortunately, the Committee's refusal to consider any alternatives offered by the Attorney General, and its failure to offer any constructive alternatives of its own, have needlessly and irresponsibly precipitated a constitutional confrontation between coordinate branches of government.

B. THE ATTORNEY GENERAL HAS MADE "EXTRAORDINARY" EFFORTS TO ACCOMMODATE THE COMMITTEE

In keeping with her obligation to try to accommodate the legitimate needs of the Committee, Attorney General Reno offered several measures to provide information about the Freeh and La Bella memoranda to the Committee without compromising her decisionmaking under the Independent Counsel Act or the integrity of the ongoing task force investigations. Chairman Burton, however, rejected every offer by the Attorney General.

In a letter dated July 28, 1998, Attorney General Reno and Director Freeh expressed their concern over the production of the Freeh and La Bella memoranda. Explaining the long standing policy of refusing to turn over such documents during the pendency of criminal investigations, the damage that disclosure of such materials could cause to the ongoing work of the campaign finance task force, and the chilling effect the production would have on the provision of candid advice within the Department of Justice, Attorney General Reno and Director Freeh nonetheless made an offer of accommodation. They wrote:

> We remain committed to seeking to accommodate the committee's oversight responsibilities and information needs to the fullest extent that we can, consistent with our law enforcement responsibilities. We are prepared to make the same accommodation that the Committee agreed to last year with respect to the Freeh memorandum and, after the Attorney General has completed her evaluation of Mr. La Bella's recommendation, provide a confidential briefing on appropriate portions of the La Bella memorandum.[34]

On July 31, Attorney General Reno and Director Freeh requested a meeting with Chairman Burton and Mr. Waxman to make another attempt at accommodation. In a letter to the Attorney Gen-

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[31] *United States* v. *AT&T,* 567 F.2d 121, 127 (D.C. Cir. 1977).
[32] *Id.*
[33] 5 Op. O.L.C. 27, 31 (1981).
[34] Letter from Attorney General Reno and FBI Director Freeh (July 28, 1998) (attached).

eral recounting the events of the July 31 meeting, Mr. Waxman observed:

> During the meeting, you proposed an alterative to Mr. Burton. You said that you were still considering the La Bella memorandum, that you wanted other lawyers in the Department to review the memorandum, and that you wanted to make the best decision possible. You stated that your review of the issues would take you about three weeks to complete. You offered to meet with Mr. Burton and me after you had made your decision to explain your decision. You indicated that you would be prepared to discuss the contents of the La Bella memorandum with Mr. Burton at that time, but that it would be inappropriate to do so before a decision was made.[35]

Unfortunately, Chairman Burton did not accept these offers. On August 3, Chairman Burton responded in writing to the Attorney General's July 28 letter, indicating that he had considered and rejected all of her attempts at accommodation.[36] Resting his decision on the Committee's power to obtain the memoranda, rather than the prudence of exercising that power, Chairman Burton wrote: "This Committee cannot accept a recitation of policy arguments and a recapitulation of points made in correspondence many months ago in the place of compliance with its subpoena."[37] Chairman Burton offered no compromise or indication that an accommodation would be possible.

The next day, the Attorney General asked Chairman Burton for permission to testify at the Committee's August 4 hearing, so that she could explain her position in person to the full Committee. Chairman Burton rejected even this request, however. Having been denied the opportunity to address the Committee, the Attorney General wrote again to the Chairman to reiterate her interest in reaching an accommodation with the Chairman. She wrote:

> Last week, Director Freeh and I again offered an accommodation that we believe protects both your oversight role and prosecutorial responsibilities. We explained that this memo is extensive, that I need to review it carefully and thoroughly, and then when I finish my review, I may or may not decide to trigger the Independent Counsel Act. The Justice Department is willing to provide the leadership of the Committee with a confidential briefing on appropriate portions of the La Bella Memorandum after I have had an opportunity to evaluate it fully, in approximately three weeks.[38]

Director Freeh was asked about the Attorney General's efforts to reach an accommodation during the August 4 Committee hearing. In an exchange with Representative Barr, he called the Attorney General's efforts "extraordinary":

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[35] Letter from Representative Waxman to Attorney General Reno (July 31, 1998) (attached).
[36] Letter from Chairman Burton to Attorney General Reno (Aug. 3, 1998).
[37] *Id.*
[38] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998) (attached).

> Mr. BARR. Is there not some way that some of the essence of what we're trying to get at here could be conveyed to us——
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> Mr. FREEH. There's a very good way. And with all due respect we did this last year in agreement with the chairman and Mr. Waxman and the Attorney General. . . . And having discussed it with her, she's offering a very extraordinary presentation, from my point of view, which is a briefing to the committee [chairman and ranking member] on the document once she's had the opportunity to make a decision.
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> And I think that's just a very good opportunity for everybody to compromise on an issue that avoids a constitutional confrontation.[39]

Despite these extraordinary efforts on behalf of the Attorney General, Chairman Burton continued to resist any attempt to reach an accommodation. He observed:

> There's been no offer whatsoever, other than you'll get together with me and the Minority, Ranking Minority Member to discuss this. And that's not going to be sufficient. We have a lot of Members who want to be informed about this, because it's been leaked to the papers.[40]

On August 6, the Attorney General contacted Chairman Burton by telephone and once again made an attempt at accommodation. In response to the Chairman's statement that all members of the Committee should be briefed about the contents of the memoranda, Attorney General Reno said that after she had reviewed the La Bella memorandum, she would be willing to appear before the full Committee and, to the extent that it would not prejudice the ongoing criminal investigation, explain Mr. La Bella's legal rationale.

At the August 6 Committee meeting, however, Chairman Burton rejected even this offer at accommodation:

> The Attorney General has not budged an inch from the position she took last week. She wants to do a partial briefing for only two members of the committee, myself and Mr. Waxman, a month from now. She wants to deny any information whatsoever to the other 42 members of the committee. Given the serious nature of what we're looking into, that's unacceptable.[41]

In his very next sentence, however, Chairman Burton acknowledged that the Attorney General had more than "budged" from her previous position and, in fact, had met Chairman Burton's demand that she provide information to all Committee members. Nonetheless, Chairman Burton continued to reject her offer:

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[39] Testimony of Louis B. Freeh before the House Committee on Government Reform and Oversight (Aug. 4, 1998).

[40] Remarks of Chairman Burton, House Committee on Government Reform and Oversight (Aug. 4, 1998).

[41] Remarks of Chairman Burton, House Committee on Government Reform and Oversight (Aug. 6, 1998).

> This morning, she made another offer which was also unacceptable, which I presented to our committee members, and that was that we would wait until we came back in September and in open forum she would express some of the reasons why Mr. La Bella and Mr. Freeh said there should be an independent counsel. But in an open forum, there's no doubt in any of our minds that the guts of the reasons would not be able to be made available to us.[42]

C. CHAIRMAN BURTON SHOULD HAVE FOLLOWED SENATOR HATCH'S EXAMPLE AND ACCEPTED THE ATTORNEY GENERAL'S PROPOSALS

The proposals that the Attorney General made were reasonable ones that would not have impeded the work of the Committee. In essence, what Attorney General Reno requested was a 2-week delay from the date the Committee voted to cite her for contempt of Congress to allow her to finish her consideration of the La Bella memorandum free from congressional interference. After that, she said she would be willing to brief Chairman Burton and Mr. Waxman in private or to testify to the full Committee in open session. Given that the House departed for its month-long August recess the day after the Committee voted to cite the Attorney General for contempt, it is difficult to understand how Chairman Burton or the Committee could possibly have been prejudiced by the brief delay requested by the Attorney General.

The unreasonableness of the Committee's position is underscored when it is compared to the position being taken by the House and Senate Judiciary Committees—neither of which are demanding the memoranda prior to the a final decision by the Attorney General. In contrast to Chairman Burton, Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee, agreed to give the Attorney General the time she requested to review thoroughly Mr. La Bella's memorandum. In fact, Senator Hatch said on national television that he was "happy to give her that time."[43] He told NBC's Tim Russert that he plans to sit down with Chairman Hyde and the Attorney General after she has had time to study La Bella's report, probably at the end of August. At that point they will discuss the memorandum and her position on the appointment of an independent counsel. According to Senator Hatch, only after that discussion would he consider issuing a subpoena for the memorandum.[44]

This is a very different approach from the one taken by this Committee. Chairman Burton issued the subpoena to the Attorney General on July 24, 1998, only 1 week after Mr. La Bella gave his memorandum to the Attorney General. He then proceeded to reject each of the many attempts at accommodation initiated by the Attorney General. At no point did Chairman Burton or the Committee make any serious effort to accommodate the many legitimate concerns raised by Attorney General Reno, Director Freeh, Mr. La Bella, and Mr. Desarno about the impact of releasing the memoranda.

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[42] *Id.*
[43] NBC's Meet the Press (Aug. 2, 1998).
[44] *Id.*

D. THE COMMITTEE IS APPARENTLY SEEKING TO INTIMIDATE THE ATTORNEY GENERAL

There is an explanation for why Chairman Burton and the Committee rejected each of the Attorney General's attempts at accommodation. The Chairman and the Committee do not want to reach a reasonable understanding with the Attorney General. Instead, they appear to be pursuing contempt charges as a means of improperly pressuring the Attorney General to seek the appointment of an independent counsel. Their goal seems to be to force the Attorney General to choose between seeking the appointment of an independent counsel or facing the $1,000 fine and year of imprisonment that are the criminal penalties for being held contempt of Congress.

Chairman Burton made these intentions explicit during the July 31 meeting requested by the Attorney General and the FBI Director. During this meeting, the Chairman told the Attorney General that he would drop his efforts to seek contempt if she would seek the appointment of an independent counsel. As Mr. Waxman wrote to the Attorney General after the meeting:

> The Chairman's remarks were a blatant attempt to influence your decision. You were told that you could avoid being held in contempt of Congress if you acceded to Mr. Burton's demands that you seek appointment of an Independent Counsel. Conditioning a contempt citation on your willingness to appoint an Independent Counsel is clearly coercive.
>
> * * * * *
>
> Mr. Burton's tactics are not subtle. He knows that you cannot turn over the La Bella memorandum. . . . Thus, Mr. Burton is seeking to place you in an untenable position. In effect, he has given you only two choices: (1) become the first Attorney General in history to be held in contempt of Congress because you cannot turn over the La Bella memorandum or (2) appoint the Independent Counsel that he demands.[45]

The Chairman's spokesman, Will Dwyer, confirmed the Chairman's intent. As reported in the Washington Post on August 1, Mr. Dwyer conceded that "[t]he only one real objective here is getting an independent counsel, as these documents advise her to do. . . . If she follows that advice, there will be no need for the documents."[46]

Attorney General Reno has properly resisted these efforts at intimidation. As she explained on August 4: "Chairman Burton told me Friday that if I triggered the appointment of an independent counsel, I would not have to produce the memos. If I give in to that suggestion, then I risk Congress turning all decisions to prosecute into a political football."[47]

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[45] Letter from Representative Waxman to Attorney General Janet Reno (July 31, 1998).
[46] *Democrats Say Burton Made Threat Against Reno,* the Washington Post, A1 (Aug. 1, 1998).
[47] Press conference of Attorney General Reno, unofficial transcript (LEXIS, "Scripts") (Aug. 4, 1998).

III. THE CONTEMPT CITATION WILL BRING THE COMMITTEE INTO FURTHER DISREPUTE

The Committee's decision to hold Attorney General Reno in contempt of Congress is only the latest in a continuing series of events that has subjected the Committee to criticism and even ridicule from across the country. Since the investigation began in January 1997, dozens of editorials from across the Nation have condemned the Committee's investigation as partisan, wasteful, and inept. Many have called for the resignation of Chairman Burton.

Unfortunately, the Committee's vote to hold the Attorney General in contempt will only add to the disdain with which the Committee's campaign finance investigation is already regarded.

A. THE MAJORITY HAS A LENGTHY RECORD OF MISHAPS AND ABUSES OF POWER

From the outset of the investigation in January 1997, the Committee's investigation has been characterized by mishaps and abuses of power. The Committee has issued subpoenas to the wrong witnesses,[48] staked out the home of an innocent individual,[49] released the President's private fax number,[50] falsely accused the White House of altering videotapes of fundraising events,[51] and caused an international incident on a trip to Taiwan.[52]

Even Republican Members and staff have called the investigation "a big disaster,"[53] "incompetent,"[54] "unprofessional,"[55] and "an embarrassment, like Keystone Cops."[56] According to one former senior Republican investigator, Charles Little, "[n]inety percent of the staff doesn't have a clue as to how to conduct an investigation."[57]

Virtually every power that has been given to the Committee has been abused. From the McCarthy era through 1994, no Democratic Chairman ever issued a subpoena unilaterally without either the consent of the Ranking Minority Member or a Committee vote. Since the beginning of the Committee's campaign finance investigation, however, Chairman Burton has issued 684 unilateral subpoenas—675 (over 99%) of these subpoenas have been targeted at Democrats.

The Committee's deposition authority has been similarly abused. As documented in detail in letters from Mr. Waxman to Chairman Burton, the Committee has abused the deposition power by harassing witnesses during depositions and using depositions as

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[48] *See Investigators Issue Subpoena to Wrong DNC Donor,* the Los Angeles Times (Apr. 15, 1997).
[49] *See Burton's Men Nailed Wrong Ma,* the Washington Post (Sept. 12, 1997).
[50] *See House Panel Posts Clinton's Fax Line On Internet,* Associated Press (Nov. 20, 1998).
[51] *See* Representative Dan Burton, CBS's Face the Nation (Oct. 19, 1997); letter from Representative Waxman to Chairman Burton (Oct. 30, 1997).
[52] *See Burton's Campaign-Finance Probe Is Drawing Criticism for Mounting Costs and Slow Progress,* the Wall Street Journal (Mar. 27, 1998).
[53] *GOP Memo Targets 3 N.E. Congressman to Co-Opt Democrats,* the Boston Globe (May 6, 1998).
[54] *Cox Leads Defeat of Burton, Waxman Agreement,* Roll Call (Sept. 29, 1997).
[55] *Burton Tape Fiasco Pitted Panel's Pros Vs. Pols,* the Hill (May 13, 1998).
[56] CNN's Inside Politics (Sept. 16, 1997).
[57] *Burton Tape Fiasco Pitted Panel's Pros Vs. Pols,* the Hill (May 13, 1998).

fishing expeditions.[58] In total, 160 witnesses have been called for over 700 hours of depositions, but only 14 of these witnesses have ever been asked to testify in a public hearing. In one case, a witness who serves in the Clinton administration but has been accused of no wrongdoing has been forced to appear for 5 separate days of depositions spanning more than 21 hours.[59]

The Committee has also abused its power to confer immunity. Due to errors committed by the majority staff, one of the first witnesses given immunity by the Committee unexpectedly testified to potentially serious tax and immigration violations, thereby receiving an unintended "immunity bath." The testimony the Committee received from this witness in exchange for the grant of immunity turned out to be demonstrably false.[60]

Even the Committee's power to release documents has been abused. Under the Committee's Document Protocol, the Chairman was given the unilateral authority to release confidential records received by the Committee during the investigation. Chairman Burton then used this power to release doctored transcripts of the Webster Hubbell prison tapes. This action misled the public because exculpatory statements were systematically edited out of the transcripts.[61] It also violated Mr. Hubbell's rights to privacy, because the tapes released by Chairman Burton contained intimate conversations between Mr. Hubbell and his wife and family.

The majority's first chief counsel, John Rowley, resigned in protest over the Committee's abuses. In his letter of resignation, Mr. Rowley stated that he had "been unable to implement the standards of professional conduct I have been accustomed to at the U.S. Attorney's office."[62] Ten months later, Speaker Newt Gingrich forced Chairman Burton to fire his chief investigator, David Bossie. At a closed-door meeting of the Republican Conference, Speaker Gingrich said to Chairman Burton, "I'm embarrassed for you, I'm embarrassed for myself, and I'm embarrassed for the conference at the circus that went on at your committee."[63]

At one point in the investigation, Chairman Burton even called President Clinton "a scumbag." He went on to say, "That's why I'm after him."[64]

These mistakes and abuses have led to widespread criticism of the Committee's campaign finance investigation and its Chairman, Dan Burton. The headlines in editorials across the Nation speak for themselves:

"Ethically Comprised Inquisitor"[65]
"Reining In Dan Burton"[66]

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[58] *See, e.g.,* letter from Representative Waxman to Chairman Burton (Sept. 10, 1997).
[59] *See* letter from Representative Waxman to Chairman Burton (Apr. 1, 1998); letter from Representative Waxman to Chairman Burton (Apr. 3, 1998).
[60] *See* Committee on Government Reform and Oversight Minority Staff Report, at 1, 5–6 (Oct. 9, 1997). *See also* letter from Representative Waxman to Chairman Burton (Oct. 22, 1997).
[61] *See Republican Congressman Comes Under Attack for Releasing Hubbell Transcripts,* the New York Times (May 4, 1998); *Democrats Hit Burton Over Tapes Of Hubbell,* the Washington Post (May 4, 1998); *Portions of Hubbell Prison Tapes Released,* the Los Angeles Times (May 5, 1998).
[62] Letter from John P. Rowley III to Chairman Burton (July 1, 1997).
[63] *Burton Apologizes to GOP,* Washington Post (May 5, 1998).
[64] *Dan Burton's Dogged Pursuit of the President,* the Indianapolis Star (Apr. 16, 1998).
[65] Hartford Courant (Mar. 11, 1997).
[66] New York Times (Mar. 20, 1997).

"Mr. Burton Should Step Aside"[67]
"Millstone of Partisanship; House Campaign Finance Inquiry Appears Short on Credibility"[68]
"A House Investigation Travesty"[69]
"A Chairman Without Credibility"[70]
"A Disintegrating House Inquiry"[71]
"Reno Roast Embarrasses Nobody But Congress; Grilling Of Attorney General Is A Sorry Partisan Spectacle"[72]
"Soap Opera"[73]
"A Chairman Out of Control"[74]
"What Is Dan Burton Thinking?"[75]
"Burton's Vendetta"[76]
"Dan, Go to Your Room"[77]
"Dan Burton Is a Loose Cannon"[78]
"Congressman Plays Dirty with Tapes"[79]
"Rep. Burton Goes Too Far"[80]
"Abuse of Privacy; Burton Should Be Censured"[81]
"Give Dan Burton the Gate"[82]
"Headcase"[83]
"Burton Bumbles in Bad Faith"[84]
"Wild Card: Chairman's Rampage Demeans Entire House"[85]
"Remove Burton From Money Probe"[86]
"Out of Control"[87]
"The Dan Burton Problem"[88]
"Burton Unfit to Lead Clinton Probe"[89]
"Mistakes Were Made: Burton Inquiry Can't Reach a Credible Conclusion"[90]

Prior to the Committee's efforts to cite the Attorney General for contempt, at least 40 newspapers around the country had criticized the Committee's investigation in over 60 editorials. Some, like the New York Times and the Washington Post, had written five or six editorials each lambasting the investigation.[91]

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[67] Washington Post (Mar. 20, 1997).
[68] Los Angeles Times (Apr. 11, 1997).
[69] New York Times (Apr. 12, 1997).
[70] San Francisco Chronicle (Apr. 14, 1997).
[71] New York Times (July 12, 1997).
[72] Los Angeles Times (Dec. 10, 1997).
[73] Roll Call (Apr. 17, 1998).
[74] The Hill (Apr. 29, 1998).
[75] Minneapolis Star Tribune (May 5, 1998).
[76] Boston Globe (May 5, 1998).
[77] Boston Herald (May 5, 1998).
[78] Hartford Courant (May 5, 1998).
[79] Allentown Morning Call (May 5, 1998).
[80] The Times Union (Albany, NY) (May 5, 1998).
[81] Harrisburg Patriot-News (May 5, 1998).
[82] Chicago Tribune (May 6, 1998).
[83] New York Daily News (May 6, 1998).
[84] San Antonio Express-News (May 6, 1998).
[85] Fayetteville Observer-Times (May 6, 1998).
[86] Seattle Post-Intelligencer (May 7, 1998).
[87] Roll Call (May 7, 1998).
[88] New York Times (May 8, 1998).
[89] Milwaukee Journal-Sentinel (May 8, 1998).
[90] Sacramento Bee (May 11, 1998).
[91] New York Times editorials included: *Reining In Dan Burton* (Mar. 20, 1997); *A House Investigation Travesty* (Apr. 12, 1997); *The Bipartisan Subpoena Squeeze* (May 13, 1997); *A Disintegrating House Inquiry* (July 12, 1997); and *The Dan Burton Problem* (May 8, 1998). Washington

Continued

B. THE CONTEMPT CITATION HAS PRODUCED A NEW ROUND OF PUBLIC CRITICISM

It is unfortunate that the Committee would compound its record of mishaps and abuses by seeking to hold the Attorney General in contempt of Congress for simply doing her job. Yet this is exactly what has happened. The result has been a new round of public criticism of the investigation.

Since August 8, 1998, Chairman Burton and the Committee have been criticized for their attempt to cite the Attorney General in contempt in newspapers from New York to Los Angeles and from Chicago to Miami. Examples of these editorials include the following:

- *Mr. Burton and Ms. Reno,* Washington Post (August 7, 1998): "The House Government Reform and Oversight Committee's vote yesterday to cite the attorney general for contempt of Congress is a dangerous political interference in a law enforcement decision that threatens to undermine the Justice Department's campaign finance investigation—an interference, ironically, by the same people who purport to want a vigorous investigation. . . . Mr. Burton's approach to the matter has been nothing less than thuggish."
- *Buck Stops With Reno,* Los Angeles Times (August 6, 1998): "Congress has no business threatening Reno with contempt charges. . . . This is a fishing expedition by Chairman Dan Burton. . . . The precedent Rep. Burton seeks could make the executive branch a ground for all sorts of witch hunts by those who second-guess motives and judgments of decisionmakers."
- *Tell Him No, Ms. Reno! Don't Yield to Burton,* Miami Herald (August 6, 1998): "If you want to rid your house of rats, one extremely effective way is to burn down the house. That's essentially what U.S. Rep. Dan Burton seems willing to do by threatening Attorney General Janet Reno with contempt of Congress. . . . Mr. Burton's request is dangerous. It's more than laced with his palpable political motives. Worse, it's also bereft of any sign that he has weighed what these memos, if leaked, could do to the Justice Department's own investigation."
- *The Foolish Threat Against Reno,* Chicago Tribune (August 6, 1998): "Given their professed desire to see that the law is enforced, you would think Burton and his GOP colleagues would be leery of any step that might hinder prosecutors. The threat of contempt citation makes sense only if their real purpose is to embarrass the administration."
- *Giving Ms. Reno Time To Study,* New York Times (August 6, 1998): "[W]e think it is better to give [Attorney General Reno] the time than to hold her in contempt of Congress, as proposed by Representative Dan Burton. . . . Two wiser students of the Democratic campaign abuses, Senator Orrin Hatch and Representative Henry Hyde, favor giving Ms. Reno the requested time so she can think her way through this. . . . [A]

Post editorials included: *Mr. Burton Should Step Aside* (Mar. 20, 1997); *Faking It On Campaign Finance* (May 30, 1997); *Will the House Do It Again?* (June 26, 1997); *A Touch of Civility* (July 1, 1997); *The Hubbell Tapes* (May 3, 1998); and *Mr. Burton's Transcripts* (May 6, 1998).

confrontation over the reports would be unsound on legal grounds and counterproductive."

• *Do It Justice, Appoint An Independent Counsel in the Campaign Finance Mess But Hold on to the Memos,* New York Newsday (August 6, 1998): "This is sheer pigheadedness on Burton's part."

In short, by needlessly citing Attorney General Reno for contempt and provoking a constitutional crisis, Chairman Burton and the Republican majority on the Committee have once again brought the actions of the Committee into widespread public disrepute.

IV. The Contempt Citation is Legally Flawed and Would not be Upheld by a Court

In issuing the subpoena for the memoranda written by Director Freeh and Mr. La Bella, Chairman Burton failed to follow the basic procedures required by the Committee's Document Protocol. As a result, the contempt citation is legally flawed. Even if the full House votes to approve the contempt citation, it is doubtful that any reviewing court would uphold the contempt citation.

Under the Committee's Document Protocol, if the Ranking Minority Member of the Committee objects to the issuance of a subpoena, the Chairman must present the subpoenas to a five-member "Working Group" comprised of the Chairman, the Ranking Minority Member, the Vice Chairman, a minority member chosen by the Ranking Minority Member, and another majority member chosen by the Chairman. The Protocol requires that "[t]he Working Group shall endeavor in good faith to reach consensus." The Working Group is supposed to vote on subpoenas only if it fails to reach a consensus after a good faith effort.[92]

On July 23, 1998, Chairman Burton notified the minority that he intended to issue the subpoena. Mr. Waxman indicated to him that he would object to the issuance of this subpoena, and the Chairman scheduled a meeting of the Working Group. On July 24, the Chairman convened a meeting of the Working Group attended by Representatives Lantos, Cox, and Waxman, but the four Members deadlocked on the merits of the subpoena. The Chairman, not having the majority vote, stated the group would reconvene later near the House floor so that Representative Hastert could attend the meeting.

Four Members—the Chairman and Messrs. Waxman, Cox, and Hastert—were present when the Working Group reconvened. The Chairman did not allow Mr. Waxman to present his views to Mr. Hastert or engage in any meaningful discussion with him. Instead, he rushed to a vote of the Working Group after less than 5 minutes of cursory discussion. This process directly contradicted the Protocol's mandate that the Working Group make a "good faith" effort to "reach consensus."

As Mr. Waxman wrote to Chairman Burton in protesting this action:

> Last month, when you were seeking the minority's support for immunity for four witnesses, you stated that "[w]e

[92] House Committee on Government Reform and Oversight, *Protocol for Documents,* part A(2)(a) (June 23, 1998).

> 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.[93]

Supreme Court precedent holds that legislative committees must follow their own rules, and the Court has reversed a contempt conviction where a congressional committee failed to observe its rules.[94] The U.S. Court of Appeals for the District of Columbia also has reversed contempt convictions of witnesses, where these witnesses were compelled to appear before a Senate subcommittee by subpoenas issued in violation of a Senate resolution.[95] In one case, a subpoena was issued to a witness by the subcommittee's Chairman after conferring with his chief counsel and at most only one other subcommittee member. Because the entire subcommittee had not decided or even considered whether the witness should be compelled to testify, the subpoena was invalid and the witness's contempt conviction did not stand.[96]

In light of the precedent reversing contempt convictions where committees have violated their own rules, this Committee's failure to observe the Protocol in issuing the subpoena to Attorney General Reno undermines the legal merits of the contempt proceeding against her. It is doubtful that the House will ever act on the Committee's contempt citation. But even if it does, no court is likely to uphold a contempt citation based on a subpoena that was issued without the good faith effort to reach a consensus that is required under the Committee rules.

V. The Majority's Arguments are not Persuasive

In the draft report and during the Committee debate on August 6, several arguments were made by the majority in support of the contempt citation. These arguments, however, are not persuasive and do not withstand careful scrutiny.

A. THE PRECEDENTS CITED BY THE MAJORITY ARE INAPPLICABLE

The majority has cited several precedents in its draft contempt report in support of its demand for the Freeh and La Bella memoranda. None of these precedents, however, resembles the fact situation currently before the Committee. In particular, none of the precedents involves a congressional attempt to obtain a prosecution memorandum during an open criminal investigation.

1. Palmer Raids Investigation

The majority cites the fact that, in the course of congressional investigations into the deportation of suspected Communists in 1920–1921, the Justice Department produced a "memorandum of com-

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[93] Letter from Representative Waxman to Chairman Burton (July 24, 1998).
[94] *See Yellin* v. *United States,* 374 U.S. 109, 114 (1963).
[95] *See Liveright* v. *United States,* 347 F.2d 473 (D.C. Cir. 1965); *Shelton* v. *United States,* 327 F.2d 601 (D.C. Cir. 1963).
[96] *Liveright* v. *United States,* 347 F.2d 473, 474–75.

ments and analysis" by a Justice Department lawyer of a trial court opinion that was under appeal.

The Palmer Raids case is distinguishable from the current circumstances for at least two important reasons, however. First, in the Palmer Raids investigation, the trial had ended. Second, the document produced was not a prosecution memorandum, but rather simply a legal analysis of a trial court opinion.

2. Teapot Dome Scandal

The majority claims that the Senate Committee that investigated the Teapot Dome scandal in 1920's received documents related to ongoing criminal investigations.

In fact, the circumstances surrounding Teapot Dome are fundamentally different than those surrounding the Freeh and La Bella memoranda. At the time the Justice Department produced documents to Congress, it had finished investigating the matter and had finished considering legal action. Moreover, the primary document produced was not a prosecution memorandum, but the report of an accountant working on the investigation.

3. White Collar Crime in the Oil Industry

The majority cites as precedent a 1979 congressional investigation into the Justice Department's alleged failure to prosecute fraudulent pricing in the oil industry. During this investigation, the Justice Department discussed, mostly in closed hearings, the reasons for not going forward with certain cases.

This case is also significantly different from the current circumstances. In the oil industry investigation, it appears that the Justice Department did not turn over documents relating to open criminal cases. In fact, the Chairman of the House Subcommittee on Energy and Power stated: "We know indictments are outstanding. We do not wish to interfere with the rights of any parties to a fair trial. . . . Evidence and comments on specific cases must be left to the prosecutors in the cases they bring to trial."

4. Gorsuch/EPA Investigation

The majority also cites as precedent a 1983 investigation in which House Judiciary Chairman Rodino requested and received documents relating to the Environmental Protection Agency's enforcement of hazardous waste cleanup laws.

This case is distinguishable, however, because the documents that were produced by the Justice Department were documents generated by EPA, not the Justice Department. Moreover, the documents related to civil, not criminal, enforcement of the Superfund statute.

5. Iran-Contra

The majority cites the Iran-Contra investigation as a recent example in which sensitive law enforcement documents were given to Congress by the Justice Department.

In the Iran-Contra investigation, however, the documents produced to Congress were not generated as part of a criminal investigation by the Justice Department. Rather, they related to an internal administration review, led by Attorney General Meese, that

was designed to determine why different agencies in the Reagan administration were making conflicting public statements regarding Iran-Contra. This civil investigation was completed before the Department's criminal investigation, which was conducted by the Department's criminal division, had even begun. Moreover, the civil investigation was completed before the documents were produced to Congress.

6. Rocky Flats Case; Other Environmental Crimes Cases

These investigations are distinguishable because, as the majority acknowledges in its draft report, these investigations involved cases that were closed at the time the documents were produced to Congress. For example, in the Rocky Flats matter, the criminal case was closed and a plea had been obtained when the Justice Department provided Congress with access to certain documents.

7. Watergate

The majority draft report discusses Watergate as "another notable example of the scope and need for Congressional oversight of the Justice Department." However, the majority does not allege that the Justice Department turned over documents relating to an ongoing criminal investigation during Watergate.

B. THE MAJORITY'S PLEDGE OF CONFIDENTIALITY CANNOT BE RELIED UPON

During the August 6 Committee meeting, the majority argued that production of the Freeh and La Bella memoranda would not jeopardize the Department's criminal investigation because the Committee could be trusted to keep the memoranda confidential, as if received in "executive session" of the Committee.

This contention was properly rejected by the Justice Department. The majority's argument overlooks the fact that executive session material can be released upon a majority vote of the Committee at any time. The Committee has an unfortunate record on voting to release documents despite objections by the Justice Department. For example, the Committee voted on August 4 to release certain checks relating to Charlie Trie despite having received a letter from the Acting Assistant Attorney General Mark Richard which stated:

> I am writing to request that the checks not be released at this time. . . . Certain facts surrounding the travelers checks are under active investigation and are crucial to our determination whether additional crimes are charged. Release of the checks now would inevitably compromise our ability to develop new evidence by alerting witnesses and conspirators about the nature and direction of the investigations.[97]

Moreover, there is ample reason to doubt that the majority would succeed in preventing the contents of the memoranda from being leaked. Since the beginning of the campaign finance investigation, the Committee has been the source of many documents leaked for

[97] Letter from Mark M. Richard to Chairman Burton (July 30, 1998).

political gain—without regard for the impact of those leaks on the Committee, criminal investigations, or the rights of private citizens.

In November 1996, even before Mr. Burton was elected Chairman, the first leaks occurred. As Roll Call reported, "Burton confirmed that . . . one of his top aides leaked the confidential phone logs of former Commerce Department official John Huang . . . to the media."[98]

On February 21, 1997, two senior majority staff interviewed businesswoman Vivian Mannerud at her place of business and without her counsel present. The staff assured her that her interview would be used only for official business. On April 4, 1998, however, the New York Times, citing "congressional investigators," published a front-page story about contributions Ms. Mannerud allegedly solicited for Democrats from a convicted drug smuggler.[99]

Around August 1997, Chairman Burton or his staff appear to have leaked documents subpoenaed by the Committee to the plaintiffs suing the Federal Government to overturn the Interior Department's decision to deny a casino application in Hudson, WI. DNC employee David Mercer testified under oath at his deposition that he was contacted by a Milwaukee reporter and asked about certain documents in the Committee's possession. When Mr. Mercer asked how the reporter got the documents, the reporter told him that "investigators had released documents from the House committee to lawyers in the litigation, and then the lawyers in the litigation released it to the press."[100]

On February 27, 1998, Chairman Burton released his staff's notes of an interview with former Senate aide Steven Clemons even though his staff assured Mr. Clemons that the notes would not be made public without his consent. Following the release, Mr. Clemons issued a statement which said that "the notes have significant inaccuracies and misrepresentations about the important matters which were discussed."[101]

The most well publicized leak occurred when Chairman Burton released subpoenaed Bureau of Prisons tape recordings of Webster Hubbell's private phone conversations. At the time the tapes were produced to the Committee, the Justice Department wrote Chairman Burton that "[m]any of these audiotapes may implicate the personal privacy interests of Mr. Hubbell and other individuals. . . . We understand that the Committee appreciates the sensitivity of these audiotapes and will safeguard them accordingly."[102] Chairman Burton, however, ignored these warnings and leaked excerpts of the tapes to the media.

The content of the tapes were first leaked to the Wall Street Journal, which ran a story on them on March 19, 1998.[103] The leaked excerpts of conversations between Mr. Hubbell and his wife concerned family matters such as what Mrs. Hubbell should pre-

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[98] *Burton Admits Aide Leaked Huang Record,* Roll Call (Nov. 25, 1996).
[99] Letter from Representative Waxman to Chairman Burton (June 4, 1997).
[100] House Government Reform and Oversight Committee, Deposition of David Mercer, at 150 (Aug. 26, 1997).
[101] Steven Clemons, *Press Release* (Feb. 25, 1998).
[102] Letter from Assistant Attorney General Andrew Fois to Chairman Burton (July 2, 1997).
[103] Glenn R. Simpson, *As He Wasted Away, the Prisoner Had But One Thing On His Mind,* Wall Street Journal (Mar. 19, 1998).

pare for dinner—not criminal conduct nor any other matters relevant to the Committee's campaign finance investigation. After Mr. Waxman wrote to Chairman Burton to protest this leak of Committee documents,[104] Chairman Burton acknowledged being the source of the tapes, but claimed to have authorization from the Committee.[105] In fact, no such authorization had been granted to the Chairman.[106]

To compound the problem, Chairman Burton released selectively edited transcripts of additional conversations to the media on April 30, 1998. The excerpts omitted crucial portions of the conversations—including exculpatory statements—while highlighting damaging statements taken out of context. As Mr. Waxman wrote Chairman Burton, this second release of information from the Hubbell tapes also violated the Committee's Document Protocol.[107] Chairman Burton responded to criticism about this second release by releasing the tapes in their entirety, without regard for Mr. Hubbell's legitimate privacy concerns.

Finally, even if the Committee could provide credible assurance that the Freeh and La Bella memoranda would not be leaked, it would still be improper to provide the memoranda to the Committee. As discussed in part I.B., Congress has no role interjecting itself into prosecutorial decisions. These decisions should be made on the merits, without interference from congressional oversight committees. Allowing the Committee to obtain the memoranda before the Attorney General has completed her review would violate this important principle of separation of powers.

C. REDACTION OF GRAND JURY MATERIAL IS NOT SUFFICIENT

The majority claims that production of the prosecution memoranda is proper because the Committee will agree to allow the Justice Department to redact material that is derived from grand jury testimony. This is hardly a concession, since disclosure by the Justice Department of such material is prohibited by Federal Rule of Criminal Procedure 6(e). Such redactions, however, do not make disclosure of the memoranda proper.

Disclosure of non-6(e) information may be difficult in a memorandum that combines grand jury material with other information. Moreover, contrary to the majority's assertion, disclosure of non-6(e) information may be just as damaging to the Justice Department's investigation as disclosure of 6(e) material. As Attorney General Reno explained in a letter to Chairman Burton:

> According to Director Freeh, these memoranda offer a road map to confidential, ongoing criminal investigations. *Even excluding grand jury information—which you are not*

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[104] Letter from Representative Waxman to Chairman Burton (Mar. 20, 1998).

[105] Letter from Chairman Burton to Representative Waxman (Mar. 27, 1998).

[106] Letter from Representative Waxman to Chairman Burton (Apr. 2, 1998). Chairman Burton initially claimed that the tapes were entered into the Committee records on Dec. 10, 1997. However, there is no reference to such tapes in the transcript of the Committee hearing on that date. Chairman Burton later claimed that the tapes were entered into the record on Dec. 9, 1997. Though certain records relating to payments to Mr. Hubbell were entered into the record on that date, the hearing transcript does not refer to the tapes and cannot reasonably be interpreted to include tape recordings of Mr. Hubbell's private conversations, such as those released in March. *See* letter from Representative Waxman and Representative Lantos to Chairman Burton (Apr. 27, 1998).

[107] Letter from Representative Waxman to Chairman Burton (May 3, 1998).

seeking—such documents lay out the thinking, theories and strategies of our prosecutors and investigators, and the strengths and weaknesses of our cases.[108]

D. AN ASSERTION OF A CLAIM OF EXECUTIVE PRIVILEGE IS NOT NECESSARY

The majority has argued that it would not have voted for contempt if the President had invoked a claim of "executive privilege" over the prosecution memoranda. There was no reason, however, to insist on a claim of executive privilege in this case. As discussed in part II.B., the Attorney General made extraordinary efforts to accommodate the Committee. The Committee has a parallel obligation to seek to accommodate the legitimate law enforcement needs of the Attorney General. Regrettably, no such efforts were made in this case.

Moreover, it was entirely proper for Attorney General Reno to avoid a claim of executive privilege. The matters in the Freeh and La Bella memoranda may concern the President and persons associated with him. When the administration makes a claim of executive privilege, the person who retains the authority to support or overrule the assertion is the President. If the Attorney General had asserted executive privilege and the President did not overrule her, the President would have been accused by the majority of "covering up" evidence of his own potential wrongdoing. Moreover, the Attorney General could have been accused of jeopardizing the investigation by discussing the memoranda with the President or his counsel. Invoking executive privilege in this matter would have only inflamed this dispute.

E. FORMER ATTORNEYS GENERAL DO NOT SUPPORT THE CONTEMPT CITATION

At the Committee's August 4 hearing, Chairman Burton claimed that he and his staff had "talked to former attorneys general who concur with the actions we're taking."[109] When Mr. Waxman requested that the Chairman identify which former attorneys general support the Committee's subpoena for the prosecution memoranda, Chairman Burton refused, stating only that "my staff talked to at least three and I'm not going to divulge their names."[110]

After the August 4 hearing, the minority staff contacted former attorneys general for their opinions, and three of them—Griffin Bell, Nicholas Katzenbach, and Ramsey Clark—responded with letters stating their opposition to the Committee's actions.[111] A fourth, Elliot Richardson, stated his opposition in a voice mail message for the minority staff. After the Committee vote, when contacted by the media, two other former Attorneys General—Ben-

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[108] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998) (emphasis added).

[109] Remarks of Chairman Burton at hearing before House Committee on Government Reform and Oversight (Aug. 4, 1998).

[110] *Id.*

[111] Letter from Griffin B. Bell to Representative Waxman (Aug. 6, 1998); letter from Ramsey Clark to Representative Waxman (Aug. 5, 1998); letter from Nicholas deB. Katzenbach (Aug. 5, 1998) (all attached).

jamin Civiletti and Richard Thornburgh—publicly stated their opposition to forcing Ms. Reno to turn over the memoranda.[112]

The fact that no former attorneys general have publicly supported the Committee's actions is indicative of the tenuousness of the majority's position. As the Washington Post concluded in an August 10 editorial: "[T]he separation of powers is real, and Congress should not try to force the executive branch to yield these sensitive materials. And if it does so, Ms. Reno has an obligation to protect pending law enforcement investigations even at the cost of hindering Mr. Burton's oversight of her conduct. Mr. Burton's comments notwithstanding, our past attorneys general don't, by and large, seem to doubt that."[113]

HON. HENRY A. WAXMAN.
HON. TOM LANTOS.
HON. ROBERT E. WISE, JR.
HON. MAJOR R. OWENS.
HON. EDOLPHUS TOWNS.
HON. PAUL E. KANJORSKI.
HON. BERNARD SANDERS.
HON. CAROLYN B. MALONEY.
HON. ELEANOR HOLMES NORTON.
HON. CHAKA FATTAH.
HON. ELIJAH E. CUMMINGS.
HON. DENNIS J. KUCINICH.
HON. ROD R. BLAGOJEVICH.
HON. DANNY K. DAVIS.
HON. THOMAS H. ALLEN.
HON. HAROLD E. FORD, JR.

[Supporting documentation follows:]

[112] *Former Attorneys General,* Washington Post (Aug. 9, 1998).
[113] *Id.*

Office of the Attorney General
Washington, D. C. 20530

July 28, 1998

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

Dear Mr. Chairman:

This responds to your letter of July 23, and subpoena of July 24, seeking copies of a recent memorandum to the Attorney General from Charles La Bella and a November 1997 memorandum to the Attorney General from FBI Director Freeh. You previously requested the latter document and, in a joint letter to you of December 8, 1997, we explained why, as Attorney General and FBI Director, we were strongly opposed to releasing the Freeh memorandum to Congress. We continue to hold that position regarding the Freeh memorandum, and our reasoning applies with even greater force to the La Bella memorandum. As was stated then and is discussed below, we are prepared to work with the Committee, as we did in connection with the Freeh memorandum, to accommodate legitimate oversight and law enforcement concerns.

As stated in the Attorney General's letter to you of December 4, our position is based principally on the longstanding Department policy of declining to provide congressional committees with access to open law enforcement files. The rationale for this important policy is set forth in a 1986 memorandum by Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel during the Reagan Administration, which is quoted at length in the December 4 letter. Mr. Cooper was not the first to articulate this policy. Indeed, as Mr. Cooper notes in his memorandum, over fifty years ago Attorney General Robert H. Jackson informed Congress that:

> It is the position of the Department . . . that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest . . .

40 Op. Att'y Gen. 45, 46 (1941). Moreover, Attorney General Jackson's position was not new. His letter cited prior Attorney General letters taking the position that dated back to the beginning of the century (id. at 47-48).

The disclosure of these memoranda could provide a "road map" of the Department's investigation. The documents, or information that they contain, could come into the possession

of the targets of the investigation through inadvertence or deliberate act on the part of someone having access to them. The investigation could be seriously prejudiced by the revelation of the direction of the investigation, information about the evidence that the prosecutors have obtained, and assessments of the strengths and weaknesses of various aspects of the investigation. Indeed, disclosure of information such as is contained in this report could significantly impede the Task Force's criminal investigation and could conceivably preclude prosecution of some individuals. In addition, the reputation of individuals mentioned in a document like this could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution. As Attorney General Jackson observed:

> Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

Mr. Cooper's memorandum also noted that providing a congressional committee with confidential details about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecutions of criminal cases. Congress could second-guess tactical and strategic decisions, question witness interview schedules, debate conflicting internal recommendations, and generally attempt to influence the outcome of the criminal investigation. Such a practice would damage law enforcement efforts significantly and shake public confidence in the criminal justice system; decisions about the course of a criminal investigation must be made without reference to political considerations. As one Justice Department official noted,

> the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969), quoted in Cooper memorandum, 10 Op. O.L.C. at 76.

Finally, both memoranda are confidential assessments of the evidence gathered during an ongoing criminal investigation and the application of the law to that evidence. Each memorandum expresses the author's personal views and analysis of the law and facts. We strongly believe that this Attorney General, and all future Attorneys General, must have the benefit of the candid, confidential recommendations of the FBI Director and Department attorneys in order to discharge their duties effectively. If those who write such memoranda

believe that their advice and recommendations could be disclosed to Congress or the public, they will be reluctant to set forth their true views or to make such recommendations at all.

These concerns are particularly acute since the Attorney General is currently evaluating the La Bella memorandum. To provide these documents to Congress could create an unavoidable and unacceptable perception that the Congress is seeking to influence law enforcement decisions for political reasons.

We also note, as your subpoena anticipates, that the La Bella memorandum and sections of the Freeh memorandum rely heavily on information obtained by the grand jury during the criminal investigation which, as you know, we are prohibited from disclosing under Rule 6(e) of the Federal Rules of Criminal Procedure. The Rule 6(e) information in the memoranda is closely intertwined with other material.

We remain committed to seeking to accommodate the Committee's oversight responsibilities and information needs to the fullest extent that we can, consistent with our law enforcement responsibilities. We are prepared to make the same accommodation that the Committee agreed to last year with respect to the Freeh memorandum and, after the Attorney General has completed her evaluation of Mr. La Bella's recommendation, provide a confidential briefing on appropriate portions of the La Bella memorandum.

Sincerely,

Janet Reno
Attorney General

Louis J. Freeh, Director
Federal Bureau of Investigation

Enclosures

cc: The Honorable Henry A. Waxman
Ranking Minority Member

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

July 31, 1998

The Honorable Janet Reno
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington. D.C. 20530

Dear Madame Attorney General:

I am writing regarding the meeting you, FBI Director Freeh, and I attended today in Chairman Burton's office. During this meeting, Mr. Burton told you that he would not seek to hold you in contempt of Congress if you sought the appointment of an Independent Counsel to investigate the President. I was concerned by Mr. Burton's comments and believe that they should not be allowed to taint your decision making process.

As you know, you and FBI Director Freeh requested a meeting with Mr. Burton and me today to discuss Mr. Burton's threat to hold you in contempt of Congress unless you turn over the memorandum written by Charles La Bella, the out-going head of the Justice Department campaign finance task force. At the meeting, you and Director Freeh explained that you opposed turning over the memorandum because of the damage it would do to your criminal investigation and the chilling effect it would have on future criminal prosecutions.

Mr. Burton informed you that he disagreed with your decision not to appoint an Independent Counsel and that he thought you were trying to protect the President. He stated that if you do not turn over the memorandum, he would hold a Committee meeting next week at which he would seek to have you held in contempt of Congress. He said that he was sure he would have the votes to prevail at the Committee level. He also said that he would ask the full House of Representatives to vote on the Committee's contempt recommendation when the House reconvenes in September after the August recess.

During the meeting, you proposed an alternative to Mr. Burton. You said that you were still considering the La Bella memorandum, that you wanted other lawyers in the Department to review the memorandum, and that you wanted to make the best decision possible. You stated that your review of the issues would take you about three weeks to complete. You offered to meet with Mr. Burton and me after you had made your decision to explain your decision. You

indicated that you would be prepared to discuss the contents of the La Bella memorandum with Mr. Burton at that time, but that it would be inappropriate to do so before a decision was made.

I stated my view that the Committee should not ask Mr. La Bella and Director Freeh to testify at the scheduled hearing on August 3 and that Mr. Burton should not seek to hold you in contempt next week. Instead, I urged him to wait for three weeks to allow you to make your decision about whether to appoint an Independent Counsel on the merits.

Mr. Burton rejected these proposals. He reiterated that the Committee would vote next week to hold you in contempt and that the full House would consider the matter in September. He then expressly stated that he would not insist on seeing the La Bella memorandum and would not seek a House vote on contempt if you decided to seek appointment of an Independent Counsel before the House reconvenes in September.

It is obviously inappropriate -- and at a minimum a clear violation of the House ethics rules -- for a member of Congress to seek to coerce an executive branch official to reach a predetermined conclusion on a discretionary matter. But that is exactly what happened today.

The Chairman's remarks were a blatant attempt to influence your decision. You were told that you could avoid being held in contempt of Congress if you acceded to Mr. Burton's demands that you seek appointment of an Independent Counsel. Conditioning a contempt citation on your willingness to appoint an Independent Counsel is clearly coercive -- and I urge you not to be influenced by the Chairman's threat.

The ethics rules of the House provide unambiguous guidance. The opinions of the Committee on Standards of Official Conduct state that in communicating with the Executive Branch: "Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role."[1] In this case, Mr. Burton made a direct statement that he would cease his efforts to hold you in contempt if you appointed the Independent Counsel he seeks. As the ethics opinion indicates, this is an unacceptable abuse of power.

Mr. Burton's tactics are not subtle. He knows that you cannot turn over the La Bella memorandum. For the last 100 years, the consistent precedent of the Department of Justice has been to refuse congressional requests for internal memoranda that contain the recommendations of federal prosecutors. As the Reagan Justice Department wrote, "the Department of Justice has an obligation flowing from the Due Process Clause to ensure that the fairness of the decision making with respect to the prosecutorial function is not compromised by excessive congressional

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[1]Committee on Standards of Official Conduct, Advisory Opinion No. 1 (Jan. 26, 1970).

pressure."[3] This fundamental obligation would be violated if members of Congress were briefed and consulted about prosecutorial decisions before these decisions are made. Moreover, if you violated the longstanding Justice Department precedent in this instance, you and future Attorneys General would be compelled to do so in countless future cases.

Thus, Mr. Burton is seeking to place you in an untenable position. In effect, he has given you only two choices: (1) become the first Attorney General in history to be held in contempt of Congress because you cannot turn over the La Bella memorandum or (2) appoint the Independent Counsel that he demands.

I do not know whether you should appoint an Independent Counsel or not. Early last year, as your investigation was just beginning, I called upon you to appoint an Independent Counsel. Because I am not privy to the extensive evidence you have gathered since then, I do not know whether it is still appropriate to do so. But what I do know is that your decision should be made on the merits -- not tainted by intimidation from Chairman Burton.

Sincerely,

Henry A. Waxman
Ranking Minority Member

cc: The Honorable Dan Burton
The Honorable Louis J. Freeh
Members of the Committee on Government Reform and Oversight

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[3]Opinion of Assistant Attorney General Cooper (Apr. 28, 1986).

Office of the Attorney General
Washington, D.C. 20530

August 4, 1998

The Honorable Dan Burton
Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

After reviewing your letter of August 3 and the press statements by members of your staff over the weekend, it is clear that the Committee's primary focus is my decisionmaking on the question of the appointment of an independent counsel. That is why I called you this morning and requested an opportunity to be heard at the Committee's hearing.

In light of your rejection of my request to be heard, let me explain the points I would have made had you permitted me to testify this morning.

I greatly respect the system of checks and balances that our founding fathers established. They wisely assigned each branch of government a distinct and limited role. One of Congress's most important roles is to oversee the work of the Executive Branch in order to better carry out its legislative duties. Among our most important functions are prosecuting criminals, making sure innocent people are not charged, and punishing wrongdoing.

When there is disagreement between the branches, our task as public servants is to find solutions that permit both branches to do their jobs. That is why I offered to testify this morning and why Director Freeh and I came up to visit with you last week -- to try to reach an accommodation with the Committee which allows you to pursue your oversight responsibilities while minimizing any interference with our ongoing criminal investigation.

As you know, the Department of Justice is conducting an investigation into allegations of criminal activity surrounding the financing of the 1996 presidential election. That investigation has charged 11 persons, and is still very much ongoing. We have more leads to run down, more evidence to obtain and analyze, and more work to do. More than 120 dedicated prosecutors, agents and staff are working on this investigation every day. And many targets, suspects and defense lawyers are watching our every move, hoping for clues that will tip them off and help them escape the law's reach.

Mr. Chairman, you have demanded that I provide two memoranda to the Committee. One was written by Director Freeh last fall, the other by Mr. La Bella and Mr. DeSarno. We have reviewed your request very seriously. Our concerns are set forth in the letter Director Freeh and I sent to you on July 28.

Last week, Director Freeh and I again offered an accommodation that we believe protects both your oversight role and our prosecutorial responsibilities. We explained that this memo is extensive, that I need to review it carefully and thoroughly, and that when I finish my review, I may or may not decide to trigger the Independent Counsel Act. The Justice Department is willing to provide the leadership of the Committee with a confidential briefing on appropriate portions of the La Bella memorandum after I have had an opportunity to evaluate it fully, in approximately three weeks.

According to Director Freeh, these memoranda offer a road map to confidential, ongoing criminal investigations. Even excluding grand jury information -- which you are not seeking -- such documents lay out the thinking, theories and strategies of our prosecutors and investigators, and the strengths and weaknesses of our cases. They talk about leads that need further investigation, and places where we've reached dead ends. Criminals, targets and defense lawyers alike can all agree on one thing -- they would love to have a prosecutor's plans.

Mr. La Bella's memorandum provides an overview of the investigation at this time. I am reviewing it with an open mind. If I do make a decision to appoint an independent counsel after you have taken an internal memo still under review, how will anyone believe that my decision was independent -- as the law requires? Indeed, to provide this memorandum to the Committee would be a grave disservice to an independent counsel if one were appointed and could undermine his or her ability to carry out an effective criminal investigation.

There are sound public policy reasons as well as law enforcement reasons why we cannot provide this document to the Committee. Suppose, for example, a Congressional committee wants to stop us from prosecuting someone the committee supports. What's to stop the committee from threatening Department lawyers with contempt, forcing them to produce their internal memos and making them public to everyone including the defendant's legal team? To demand the prosecutor's documents while the case is in progress would irreversibly taint our principles of justice and could harm the reputations of innocent people or even place witnesses in danger of retaliation. Such policies also would subject every prosecution decision to second-guessing and accusations that Congressional pressure affected the Justice Department's decisionmaking.

Even when conducting vigorous oversight, Congress has respected the principle that law enforcement must be free from even the appearance of partisan political tampering. And the Justice Department has adhered to this position for the better part of a century, under presidents from Teddy Roosevelt to Ronald Reagan–and under FBI Directors from J. Edgar Hoover to Louis Freeh.

More than 50 years after they were written, I ask you to consider the words of Attorney General Robert H. Jackson, who later served on the Supreme Court:

> It is the position of the Department...that all investigative reports are confidential documents of the executive department of the government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Twelve years ago, the head of the Justice Department's Legal Counsel during President Reagan's administration, Charles J. Cooper added other concerns, including:

> ...well founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.

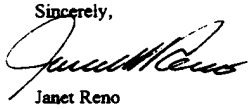
I know that you have cited several examples that you believe contradict these longstanding opinions. But we have analyzed your examples, and none of them deal with the demand you have made: to turn over law enforcement sensitive documents during a pending criminal investigation.

Mr. Chairman, we have worked very hard to respond to Congressional oversight requests. Since I became Attorney General, I and many other members of this Department have testified dozens of times, turned over thousands of documents, answered thousands of letters and provided countless briefings on matters large and small. As our campaign finance investigation has progressed, we have made every effort and taken extraordinary steps to accommodate your Committee's needs while protecting the integrity of the investigation. We have provided extensive testimony and briefings, including private briefings this winter about the contents of an internal memo by FBI Director Louis Freeh.

If future Attorneys General know that the innermost thinking behind their toughest law enforcement decisions will become fodder for partisan debate, then we risk creating a Justice Department and an FBI that tacks to political winds instead of following the facts and the law wherever they lead. If future law enforcement professionals cannot provide advice that is candid and confidential, we will have a government of "yes" men who advocate what is popular instead of what is right. And if future Congresses can poll the Attorney General's advisors or line attorneys in order to ferret out and promote opinions they approve of, then every controversial law enforcement decision will be tainted in the public's eyes. All of these concerns are most acute when Congress demands information and seeks to pressure me on a sensitive law enforcement matter that I have not yet made.

Given the importance of this matter, I would appreciate your including this letter in the hearing record. Thank you.

Sincerely,



Janet Reno

cc: The Honorable Henry Waxman
Ranking Minority Member

NICHOLAS DEB. KATZENBACH

908 GREAT ROAD
PRINCETON, NJ 08540

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Hon. Henry Waxman
House Committee on Government
Reform and Oversight
U.S. House of Representatives
Washington, D. C.

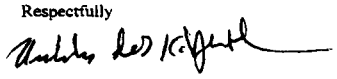
August 5, 1998

Dear Congressman:

You have asked my opinion as to whether the House can properly subpoena internal investigative reports, or advice from subordinates of the Attorney General based upon such reports, from the Department of Justice. The answer is clearly not. Indeed, it is hard to imagine a less appropriate subject for a subpoena or one more calculated to politicize the Department. History is replete with instances where Congress has disagreed with the Attorney General as to the law. But disagreement as to the law is scarcely a justification for abuse of the subpoena process or threats of contempt..

I happen to agree with General Reno as to the law on the facts publicly known. But whether she is right or wrong is not relevant, and certainly it is not the Attorney General's job simply to agree with the recommendations of subordinates. For Congress to attack her independent judgment by use of subpoena and contempt is simply the wrong way to resolve a disagreement of this kind and would do great damage to the integrity of the Department.

Respectfully



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August 5, 1998

Hon. Henry A. Waxman
Committee on Government
Reform and Oversight
511 Ford House Office Building
Washington, DC 20515

BY FAX 202 226-3348

Dear Congressman Waxman,

It would create a serious threat to constitutional government, the rule of law and individual rights for Congress to hold the Attorney General of the United States in contempt of Congress for refusing to turn over to the Congress investigative materials and departmental recommendations based on them in an ongoing Department of Justice investigation.

If Constitutional separation of powers, integrity and effectiveness in the execution of the laws and the individual rights of witnesses, investigative staffs, their supervisors and persons under investigation, or whose names come up in connection with investigations are to be protected, Congress must let the Attorney General perform the duties of that office without demanding investigative materials, or staff recommendations in an ongoing investigation.

Sincerely,

Ramsey Clark

Ramsey Clark

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August 6, 1998

VIA FAX

Honorable Henry A. Waxman
Chair, House Government Reform
and Oversight Committee
2204 Rayburn House Office Building
Washington, D.C. 20515-0529

Dear Congressman Waxman:

As a former Attorney General, I would like to go on record as being opposed to Congress holding Attorney General Reno in contempt for not producing memoranda sent to her from FBI Director Louis Freeh and Justice Department prosecutor Charles LaBella.

I believe it is of paramount importance to preserve the confidentiality of internal communications between the Attorney General and advisors or investigators in order to ensure that such advisors feel free to render candid advice that is not swayed by public opinion or fear of future disclosure to Congress.

Congress has oversight power, but it should not be used to explore prosecutorial data, including memoranda which underlie theAttorney General's exercise of the discretion delegated to her under the President's constitutional duty and power to faithfully execute the law. This was my unfailing position while serving as Attorney General.

Yours sincerely,

Griffin B. Bell

GBB/bk

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** TOTAL PAGE.02 **

ADDITIONAL VIEWS OF HON. THOMAS M. BARRETT

I agree with views presented in sections I through III of the minority report.

HON. THOMAS M. BARRETT.