



U.S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

September 9, 2008

The Honorable John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This is to advise you of our significant concerns regarding the Committee's notice of action on a resolution to hold the Attorney General in contempt in connection with our responses to the Committee's subpoena, dated June 27, 2008, for 21 multi-part categories of documents regarding a variety of subjects. We also supplement here our previous responses to the subpoena, including our letter of July 31, 2008, and July 9, 2008.

Over the past year, the Department has provided thousands of pages of documents in response to Committee oversight requests for documents both in advance of the subpoena and in response to it. It has been our goal, whenever possible and consistent with our law enforcement responsibilities, to accommodate the Committee's information needs and we will continue to work toward that end. Requests that culminated in some subpoena categories, however, present extraordinarily difficult separation of powers issues, including the confidentiality of legal advice and internal deliberations relating to law enforcement matters. We request that the Committee defer any action relating to contempt while we continue our efforts to provide information responsive to your interests as we understand them, based upon discussions with your staff. We expect those efforts will move forward as set forth below and, while we may not reach agreement with regard to every category, we hope that we can reach agreements that satisfy your information needs and preserve the important principles at stake.

We have previously produced approximately 4887 pages of documents from the Civil Rights Division in response to the subpoena. Enclosed are an additional 681 pages of documents provided by the Division relating to communications with individuals and entities outside of the Department about the 2005 Georgia photo identification submission, category eight of the subpoena. In accordance with our discussions with staff, records of communications with the submitting authorities in Georgia are not within the scope of this category. There are no redactions in these documents.

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Based upon our consultation with staff about the Committee's particular interests in other Civil Rights Division records, we conducted a search for records responsive to the twelfth category of the subpoena as described in our letter, dated July 9, 2008. We have identified a small collection of responsive documents, from which we have redacted limited information that would identify personnel below the section chief level and some text about internal deliberations on substantive matters unrelated to the performance appraisal decisions. Since these materials, despite the redactions, implicate significant individual privacy interests, we would like to make them available for staff review at the Department at your convenience and pursuant to an agreement that will protect those privacy interests. While our public disclosure of these records might be prohibited by the Privacy Act, we are making them available to the Committee in response to your oversight request, consistent with 5 U.S.C. § 552a(b)(9).

We continue to search for records responsive to the Civil Rights Division categories of the subpoena and believe that additional documents will be available in the near future. Some of the records must be retrieved from other locations, given their age, and they may implicate significant confidentiality interests. We worked successfully with staff to revise category six to identify matters of interest to the Committee, and we hope to be in a position to provide responsive information in the near future.

We also are prepared to accommodate your interests in discrete questions relating to the New Hampshire Phone Jamming matter, the fourth subpoena category, through a briefing for Committee staff in the next several weeks. The briefing will respond to your information needs about the timing of the Tobin indictment, the decision not to indict the New Hampshire Republican Party, and the decision to intervene in the state civil case; it will likely include access to certain germane documents. A briefing on these matters would be entirely severable from any current law enforcement interests, which distinguishes them from the subpoena demands, in categories 13 through 21, regarding the prosecutions of former Governor Siegelman and Dr. Wecht. Over a year ago, we produced several hundred pages of public domain documents responsive to the Committee's written request and additional documents were made available for review by Committee staff on June 11, 2008. We also had previously advised Committee staff that we have not located and are not aware of any records reflecting communications with the White House, Members of Congress or congressional staff, or representatives of state or local political parties relating to these individuals.

We are not in a position to provide additional documents because these criminal cases remain pending. Former Governor Siegelman was convicted at trial in 2006 and his case is now pending appeal in the United States Court of Appeals for the Eleventh Circuit. Similarly, the prosecution of Dr. Wecht recently has been remanded by the United States Court of Appeals for the Third Circuit to the district court for further proceedings. The Tobin case is pending appeal in the United States Court of Appeals for the First Circuit. The Department disclosed the evidence supporting these prosecutions during their trial phases and the trial records should be

readily available to the Committee. Disclosure of the array of non-public documents regarding these prosecutions while they are pending, however, presents fundamental separation of powers issues and would compromise our law enforcement efforts. As the Attorney General indicated in your recent phone conversation, we cannot disclose documents reflecting core prosecutorial decision-making, such as prosecution memoranda, especially while a case remains pending. He believed that you appreciated the sensitivity of these issues and wanted to assure you that we share your view that prosecutorial decisions must be free from political influence. Indeed, the importance of integrity in such decisions underscores the need for our faithfulness to the longstanding policy of protecting non-public information about matters while they remain pending.

The outstanding items in the first subpoena category pertain to FBI interview reports of the President and the Vice President in connection with the Plame leak investigation. The Committee has been provided with the same access as the House Oversight and Government Reform Committee (HOCR) to other requested interview reports, which we understood to be your primary interest. HOCR did not demand the report of the President's interview and the President asserted executive privilege as to HOCR's subpoena for the report of the Vice President's interview and the reports of White House staff interviews.

The second category, relating to unclassified opinions by the Department's Office of Legal Counsel (OLC) issued since 2001, implicates significant Executive Branch confidentiality interests, as described in our letter of July 9, 2008. As you know, as part of an extraordinary accommodation of your interests in understanding the legal analysis supporting certain exceptionally sensitive national security programs, the Executive Branch has already made available to the Committee a large number of highly classified OLC opinions. In addition to those extraordinary accommodations, and in light of your specific and particularized interest, we are also now prepared to make available for the Committee's review the opinion of October 23, 2001, which is category three of the subpoena.

Maintaining the confidentiality of OLC legal advice for an appropriate period of time is often necessary to protect the integrity of Executive Branch decision-making, as well as the attorney-client relationships between OLC and other Executive Branch offices. Senior officials in the Executive Branch often ask OLC for advice on novel and complex legal issues and we believe that disclosure of the other opinions you have subpoenaed would discourage such officials from seeking legal advice at the very moment when it is most needed. Nevertheless, the Department recognizes that many OLC opinions address issues of broad relevance or interest to the Executive Branch, to Congress, and to the public, and it has long been the consistent policy of OLC to publish such opinions when publication is consistent with the legitimate confidentiality interests of the Executive Branch. Accordingly, OLC has in place a process whereby opinions are evaluated for publication. Consistent with that policy and practice, OLC anticipates that several of the opinions you have subpoenaed will likely be determined

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appropriate for publication in the near future. As an accommodation to the Committee, the Department is prepared to provide a copy of any such opinion to the Committee in advance of its publication.

Last, we have conducted a search of Department records designed to identify records responsive to subpoena category four, regarding the decision to appoint Rachel Paulose to the position of U.S. Attorney for the District of Minnesota. As we advised Committee staff, we concluded that our initial search was overly broad, which obliged us to redesign the process and we hope to supplement this response in the near future. We understood, based upon discussions with staff, that this was not a Committee priority and we have focused our search effort in other categories.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,



Keith B. Nelson  
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Lamar S. Smith  
Ranking Minority Member