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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 8, 2008

The Honorable Michael B. Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

On June 16, 2008, the Committee on Oversight and Government Reform issued a subpoena to you for the production of documents relevant to the Committee's investigation of the leak of the covert identity of CIA officer Valerie Plame Wilson. You have neither complied with this subpoena by its returnable date nor asserted any privilege to justify withholding documents from the Committee. In light of your actions, I am writing to inform you that the Committee will meet on July 16, 2008, to consider a resolution citing you for contempt of Congress. I strongly urge you to comply with the duly issued subpoena before then.

For more than one year, the Oversight Committee has been seeking documents from the Department of Justice relevant to our investigation into the leak of Ms. Wilson's identity. Special Counsel Patrick Fitzgerald has cooperated with the Committee's investigation, providing documents directly to the Committee and releasing others to you for production to the Committee. Two of the documents that Mr. Fitzgerald has provided to you for production to the Committee are the reports of the FBI interviews of President Bush and Vice President Cheney. Despite the Committee's repeated requests, you have consistently refused to provide these reports to the Committee or unredacted versions of the reports of FBI interviews with White House staff. In response to the Committee's June 16 subpoena, you wrote: "we are not prepared to provide or make available any reports of interviews with the President or Vice President from the leak investigation" because of "core Executive Branch confidentiality interests and fundamental separation of powers principles."

In deference to your concerns and in a further attempt at accommodation, the Committee will not seek access to the report of the FBI interview of President Bush at this time. The report of the FBI interview with Vice President Cheney needs to be produced, however. The Vice President's former chief of staff, I. Lewis "Scooter" Libby, told the FBI that it is "possible" that the Vice President instructed him to disseminate to the press information about the identity of

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Ms. Wilson. The Committee cannot complete its inquiry into this serious matter without the report of the Vice President's FBI interview.

The arguments you have raised for withholding the interview report are not tenable. When the FBI interview with the Vice President was conducted, the Vice President knew that the information in the interview could be made public in a criminal trial and that there were no restrictions on Special Counsel Fitzgerald's use of the interview. Mr. Fitzgerald clarified this key point last week, writing to the Committee that "there were no agreements, conditions, and understandings between the Office of Special Counsel or the Federal Bureau of Investigation and either the President or Vice President regarding the conduct and use of the interview or interviews."

Vice President Cheney's attorneys have consistently maintained that he is not an "entity within the executive branch." Whether this unusual claim is accurate or not, I am aware of no freestanding vice presidential communications privilege, let alone one that covers voluntary and unrestricted conversations with a special counsel investigating wrongdoing. There certainly was no such understanding when our Committee sought the FBI interview report of an interview with Vice President Gore. The Justice Department produced the interview to the Committee despite the fact that it contained discussion of official White House business.

In his closing remarks in the criminal trial of Mr. Libby, Special Counsel Fitzgerald stated: "There is a cloud over what the Vice President did that week." Your cooperation in this matter could go a long way to dispelling this notion or perhaps confirming Mr. Fitzgerald's fears. Either way, this Committee and the American people are entitled to know what happened. For similar reasons, you should also produce the unredacted versions of the interviews with White House staff that the Committee has subpoenaed.

Background

On July 16, 2007, I wrote to Special Counsel Patrick Fitzgerald to request documents from the Special Counsel investigation that are relevant to the Oversight Committee's investigation into the leak of the identity of Valerie Plame Wilson, a covert CIA agent. The Committee's letter included a request for "transcripts, reports, notes, and other documents relating to any interviews outside the presence of the grand jury" of President George W. Bush, Vice President Richard B. Cheney, and members of the White House staff.¹

On August 16, 2007, and September 6, 2007, Special Counsel Fitzgerald produced a number of documents responsive documents to the Committee. These documents consisted of FBI interviews of federal officials who did not work in the White House, as well as interviews of

¹ Letter from Henry A. Waxman, Chairman, to Patrick J. Fitzgerald, Special Counsel (July 16, 2007).

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relevant private individuals.² Mr. Fitzgerald did not provide any records of interviews with White House officials because of objections raised by the White House. As he explained in a January 18, 2008, letter to the Committee:

my responsibilities as Special Counsel encompass making decisions on matters normally incident to the execution of prosecutorial authority for the assigned matter, including making determinations of what information is protected by the rules of grand jury secrecy. However, I have concluded that neither the December 2003 delegation nor the February 2004 clarification delegated to me the authority of the Attorney General to provide counsel to the White House concerning the assertion of executive branch confidentiality interests in response to possible Congressional oversight, or to represent such executive branch interests in responding to an oversight request. ...

Accordingly, the Office of Special Counsel will complete our work providing responsive documents to the White House and other appropriate agencies after assuring ourselves that such materials are not protected by grand jury secrecy. We will also continue to transmit to you the materials to which the White House or other agencies do not assert executive branch confidentiality interests. To the extent there are materials we forward to the White House for which the executive branch asserts confidentiality interests, we will not be acting as attorneys for the executive branch in that regard. I am advised that the Department's Office of Legislative Affairs will correspond with you ... regarding those interests.³

On December 3, 2007, I wrote to you to request that you make an "independent judgment" as the Attorney General and produce the White House interview reports and the other requested materials.⁴ I renewed this request on December 18, 2007.⁵

On January 18, 2008, you agreed to allow Committee staff to review redacted versions of reports of FBI interviews of White House staff, but refused to permit any access to the interview

² Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (Aug. 16, 2007); Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (Sept. 6, 2007).

³ Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (Jan. 18, 2008).

⁴ Letter from Henry A. Waxman, Chairman, to Michael B. Mukasey, Attorney General (Dec. 3, 2007).

⁵ Letter from Henry A. Waxman, Chairman, to Michael B. Mukasey, Attorney General (Dec. 18, 2007).

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reports of the President and Vice President, citing “serious separation of powers and heightened confidentiality concerns.”⁶

On June 3, 2008, I wrote you to inform you that the review of the redacted versions of the FBI interviews of White House staff raised questions about the conduct of both the President and Vice President. Accordingly, I renewed the Committee’s request for the interview reports of the President and Vice President, as well as unredacted versions of some of the interview reports shown to Committee staff.⁷

On June 11, 2008, you responded to my June 3, 2008, letter by again refusing to produce the interview reports of the President and Vice President based again on alleged “serious separation of powers and heightened confidentiality concerns.”⁸

On June 16, 2008, the Committee issued a subpoena requiring the production of the interview reports of the President and Vice President, unredacted versions of five interview reports previously shown to Committee staff, and all remaining responsive documents that had not been determined to be subject to grand jury secrecy rules, with a return date of June 23, 2008.

On June 24, 2008, after producing some additional interview reports unrelated to White House personnel, you informed the Committee by letter that the Justice Department would not “provide or make available any reports of interviews with the President or the Vice President from the leak investigation.”⁹ The Department’s letter asserted that “communications of the President and the Vice President with their staffs relating to official Executive Branch activities lie at the absolute core of executive privilege.”¹⁰ The letter suggested that you might be willing to provide the Committee with additional access to the redacted portions of interviews with White House staff, but efforts by the Committee staff to arrange for a review of these passages have proven unsuccessful.

At no point has the President formally asserted executive privilege over these documents.

⁶ Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (Jan. 18, 2008).

⁷ Letter from Henry A. Waxman, Chairman, to Michael B. Mukasey, Attorney General (June 3, 2007).

⁸ Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (June 11, 2008).

⁹ Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (June 24, 2008).

¹⁰ *Id.*

The Committee's Need for the Vice President's Interview Report

In deference to your concerns, the Committee will not seek access to the FBI interview of President Bush at this time. I hope you will appreciate that this is a significant accommodation given that the Committee is entitled to the President's FBI report and there is precedent to support its production to Congress.

The Vice President's interview, however, is another matter. In Mr. Libby's interview with the FBI, which you made available to the Committee, Mr. Libby said that it was "possible" that the Vice President instructed him to leak the identity of Ms. Wilson.¹¹ Since Ms. Wilson was a covert CIA officer, this would be an exceptionally serious breach of national security if it occurred. According to a statement cleared for public release by CIA Director Michael Hayden, Ms. Wilson "worked on some of the most sensitive and highly secretive matters handled by the CIA," including "the prevention of the deployment and use of weapons of mass destruction against the United States," and "faced significant risks to her personal safety and her life," with the result that the disclosure of her covert status "placed her professional contacts at greater risk" and "undermined the trust and confidence with which future CIA employees and sources hold the United States."¹² The Committee cannot responsibly investigate this matter without access to the Vice President's interview with the FBI.

Other evidence before the Committee also raises questions about Vice President Cheney's conduct. The leak of the CIA employment of Valerie Plame Wilson followed the publication of a *New York Times* op-ed column authored by her husband, former Ambassador Joseph Wilson, who had traveled to Niger to investigate allegations that Iraq had sought uranium from Africa.¹³ According to trial testimony of Cathie Martin, the Assistant to the Vice President for Public Affairs, she, Mr. Libby, and the Vice President all participated in a press strategy to discredit Ambassador Wilson's account.¹⁴ Moreover, it appears that it was the Vice President who first informed Mr. Libby about Ms. Wilson's CIA employment.¹⁵

¹¹ FBI Report of Interview of I. Lewis Libby (Nov. 26, 2003).

¹² Opening Statement of Henry A. Waxman, *Hearings on Disclosure of CIA Agent Valerie Plame Wilson's Identity and White House Procedures for Safeguarding Classified Information*, 110th Cong. (Mar. 16, 2007).

¹³ Joseph Wilson, *What I Didn't Find in Africa*, *New York Times* (July 6, 2003).

¹⁴ Testimony of Cathie Martin (Jan. 25, 2005), *United States v. Libby*, 495 F.Supp.2d 49 (D.D.C. 2007).

¹⁵ Grand Jury Testimony of I. Lewis Libby (Mar. 5, 2004), *United States v. Libby*, 495 F.Supp.2d 49 (D.D.C. 2007).

The conduct of the Vice President after the release of Ms. Wilson's identity also raises serious concerns. Scott McClellan, the former White House press secretary, has said: "[the] Vice President directed me to go out there and exonerate Scooter Libby"¹⁶ and "the top White House officials who knew the truth — including Rove, Libby, and possibly Vice President Cheney — allowed me, even encouraged me, to repeat a lie."¹⁷ Needless to say, it would be a breach of the public trust if the Vice President personally directed Mr. McClellan to mislead the public.

Special Counsel Fitzgerald has recognized that the criminal prosecution of Mr. Libby inevitably left major questions about Vice President Cheney unanswered. In his closing remarks to the jury, he said:

There is a cloud over what the Vice President did that week. He wrote those columns. He had those meetings. He sent Libby off to Judith Miller at the St. Regis Hotel. At that meeting, the two-hour meeting, the defendant talked about the wife. We didn't put that cloud there. That cloud remains.¹⁸

The Committee's investigation seeks to penetrate this cloud surrounding Vice President Cheney's conduct. The Committee also seeks to answer important questions about how the White House safeguards national security secrets and responds to breaches, and to make legislative recommendations to ensure appropriate handling of classified information by White House officials, including officials in the Office of the Vice President. This oversight cannot be completed without the production of the FBI interview report with the Vice President. It also requires production of the unredacted reports of the FBI interviews with other White House staff.

No Valid Basis for Withholding

In contrast to the Committee's compelling oversight needs, there is no valid basis for continuing to withhold Vice President Cheney's interview and the unredacted versions of the interviews with White House staff. Contrary to the Department's letter, the Committee is not seeking previously undisclosed communications between the President and his staff "relating to official Executive Branch activities" that may "lie at the absolute core of executive privilege."¹⁹

¹⁶ *The Today Show*, NBC (May 28, 2008).

¹⁷ Scott McClellan, *What Happened: Inside the Bush White House and Washington's Culture of Deception* (2008).

¹⁸ Closing Argument for the Prosecution (Feb. 20, 2007), *United States v. Libby*, 495 F.Supp.2d 49 (D.D.C. 2007).

¹⁹ Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (June 24, 2008).

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Rather, it is seeking information which the President and Vice President previously disclosed to the FBI without asserting privilege of any kind — executive or otherwise.

Mr. Fitzgerald removed any doubt about this important point last week. He wrote the Committee that “there were no agreements, conditions, and understandings between the Office of Special Counsel or the Federal Bureau of Investigation and either the President or Vice President regarding the conduct and use of the interview or interviews.”²⁰

It is now clear that the Vice President knew when the interview was conducted that its contents could be made public in a criminal trial. This makes any assertion of a “confidentiality interest” untenable. Executive privilege cannot be asserted over the contents of communications voluntarily disclosed outside the White House.²¹

The Oversight Committee has specific precedent on this issue. During the Clinton Administration, the Committee received reports of the FBI interviews of both President Clinton and Vice President Gore. Your letter acknowledges this precedent, but states that the Clinton Administration precedent is “fundamentally different” because “the Clinton Administration interview reports presumably did not involve ... communications concerning official White House business.”²² In fact, your speculation about presumed differences is misplaced. The FBI interview with Vice President Gore did involve several official matters, including the award of federal contracts and grants.

The Committee is not seeking to examine sensitive questions of foreign policy or national security. Instead, our focus is understanding what role, if any, the Vice President and others in the White House played in the leak of the identity of a covert CIA officer and what steps, if any, the Vice President and others took to investigate and respond to the leak after it occurred. There is no reason to believe that the Special Counsel’s interview went beyond these questions and into areas relating to presidential decisionmaking about foreign policy or national security.

I am not aware of any precedent in which executive privilege has been asserted over communications between a vice president and his staff about vice presidential decisionmaking. Courts have carved out a presidential communications privilege, but they have limited it quite narrowly to communications had directly with the President or certain advisers directly on his behalf about presidential decisionmaking. Moreover, the communications in this case were communications with a special counsel investigating the behavior of Executive Branch officials.

²⁰ Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (July 3, 2008).

²¹ *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997).

²² Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (June 24, 2008).

These communications would not be protected by a privilege even if they were conversations by the President himself.

There is a particular irony in the resistance of the Vice President to production of his interview report. As the Committee revealed last year, the Office of the Vice President has taken the position that the Vice President is not an "entity within the executive branch."²³ This position was reaffirmed last month when the Vice President's Chief of Staff, David Addington, testified before the Judiciary Committee that "the Vice President belongs neither to the executive nor the legislative branch."²⁴ If the Vice President is indeed outside the executive branch, as he seems to contend, it is hard to understand what basis there could be for asserting executive branch confidentiality interests in his communications.

Finally, the claim that compliance with the subpoena "would significantly impair the Department's ability to conduct future law enforcement investigations" by causing future Presidents and Vice Presidents to "insist that they will only testify pursuant to a grand jury subpoena and subject to the grand jury secrecy provision" is also unavailing.²⁵ In this instance, President Bush and Vice President Cheney cooperated voluntarily with the Special Counsel despite recent precedent in which the interview reports of President Clinton and Vice President Gore were provided to the Oversight Committee. Future presidents and vice presidents will surely do the same.

Conclusion

The Committee has waited almost a full year for the Justice Department to produce the documents responsive to the Committee's request. You have had ample opportunity to provide the documents, and White House counsel has had ample opportunity to review the withheld documents for executive privilege concerns. Yet despite the issuance of a subpoena by the Committee, you are persisting in withholding responsive documents that the Committee needs to meet its oversight and legislative duties without any assertion of executive privilege by the President.

²³ Letter from Henry A. Waxman, Chairman, to Richard B. Cheney, Vice President (June 21, 2007).

²⁴ House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Hearing on From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III*, 110th Cong. (June 26, 2008).

²⁵ Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (June 24, 2008).

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I regret that your failure to produce responsive documents has created this impasse, but Congress has a constitutional duty to conduct oversight of the executive branch. Therefore, unless all responsive documents, with the exception of the FBI interview report of President Bush, are provided to the Committee or a valid assertion of executive privilege is made, the Committee will meet on July 16 to consider a resolution citing you in contempt. I strongly urge you to reconsider your position and comply with the duly issued subpoena.

If you have any questions, please contact me personally or ask your staff to contact David Rapallo or Theodore Chuang of the Committee staff at (202) 225-5420.

Sincerely,



Henry A. Waxman
Chairman

cc: Tom Davis
Ranking Minority Member