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September 10, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

I appreciated Mr. Nelson's letter last night providing additional documents and promised accommodations in response to the subpoena that I issued to you on June 27, 2008. As you know, that subpoena was necessary because the Department of Justice had failed to produce a number of documents requested by the Committee, including many that had been requested more than a year earlier. While our staffs have made some progress towards resolving a number of document categories covered by the subpoena, the subpoena has not been complied with in key respects. As Mr. Nelson's letter requested, I have deferred action for now on a contempt of Congress resolution that had originally been on the Judiciary Committee agenda for today. I hope that we and our staffs can redouble our efforts and can reach an agreement concerning production of the remaining subpoenaed documents in advance of our meeting this week, and certainly before next week's Judiciary Committee markup.

As you know, the key documents that have not been produced in violation of the subpoena include the following:

1. **Reports of interviews of President Bush and Vice President Cheney conducted during the Plame-Libby investigation by Special Counsel Patrick Fitzgerald.** As Mr. Nelson points out, the President has claimed Executive Privilege in response to a subpoena for the interview report of Vice President Cheney issued by the Committee on Oversight and Government Reform. But these materials, which consist of interviews conducted by non-White House personnel, do not constitute advice given to the President and were not prepared in order to advise the President or conduct matters of state. They also were not created with any expectation or agreement of confidentiality, but instead were created for possible use in a

criminal investigation or public trial. Any claim of privilege regarding these investigative records is legally unsupportable, and there is no basis to withhold them from subpoena.

2. **Office of Legal Counsel Opinions.** I appreciate Mr. Nelson's commitment to make available the Office of Legal counsel opinion dated October 23, 2001, regarding the applicability of the fourth amendment to military activities inside the United States, and look forward to arranging that review promptly. The subpoena also calls for production of unclassified legal opinions on subjects such as national security, presidential power, and the civil and constitutional rights of U.S. citizens, and, failing their production, a listing of such opinions, but the Department has steadfastly refused to provide either the opinions or the required list. With these opinions, there is no concern regarding classification, and no claim of privilege has been raised. The Department has instead simply refused to make them available to the Committee, citing general concerns about the impact of disclosure on Departmental processes, which is clearly an insufficient basis for ignoring a subpoena. I appreciate that some of these memoranda are to be made public in the near future, but further efforts to accommodate our concerns are clearly needed in this area.

3. **Documents Regarding Siegelman and Wecht Prosecutions.** While the Department has made a small number of Siegelman documents available for confidential review, it has largely refused to produce any meaningful documents on the Siegelman and Wecht cases, on the grounds that the Department does not make prosecution memoranda and similar documents available as a matter of policy and that these prosecutions remain open, which raises extra sensitivities. As detailed in the letter I sent your predecessor on September 10, 2007, however, from Teapot Dome to the Gorsuch case to Ruby Ridge to the FBI Informants investigation, the Department has made prosecution memoranda, including those that may impact ongoing litigation, available to Congress on numerous occasions. This Committee also received extensive prosecution/declination memoranda in its oversight of the Reno Justice Department's campaign finance investigations. The claim that there is some formal or policy bar to making these materials available is simply not consistent with the historical record. Once again, I stand willing to consider reasonable accommodations, such as assurances of confidentiality where warranted and even limited review of some materials on Department premises only, but the blanket refusal to provide these materials in the face of a Committee subpoena is unacceptable.

4. **Documents Regarding Replacement of Minnesota US Attorney Thomas Heffelfinger.** During negotiations, our staffs had agreed that production of these documents could occur after others to be produced under the subpoena. However, given the Department's unwillingness to produce the remaining categories of documents, such an approach no longer makes sense. Accordingly, to avoid the need for formal action, these documents too must be produced, or at the least a commitment to a date certain for their production must be made, at once.

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5. **Documents Regarding Civil Rights Division Activities.** A number of responsive documents in this category have been produced, but despite numerous requests, the Department has declined to provide a schedule for the production of the remaining documents, some of which we requested more than a year ago. In particular, documents in categories 6 and 9 of the subpoena, concerning cases recommended to be brought by the Employment and Voting Sections of the Civil Rights Division and concerning Section 5 submissions relating to Louisiana's photo identification requirements and 1997 Texas voter registration issues, have not been provided. Accordingly, we must agree on a complete schedule for the production of these documents in order to avoid the need for further action on the subpoena.

In addition to these matters, I want to mention several other issues that I hope we can address later this week. These include the request for Department witnesses at a Subcommittee hearing on immigration issues about which you have received a separate letter, our ongoing request for an unredacted copy of FBI Director Mueller's notes relating to the Terrorist Surveillance Program and the proposed Attorney General Guidelines on FBI domestic activities, and the Department's efforts concerning the upcoming elections.

Thank you very much for your attention to this important matter. Please direct your response and any questions to the Judiciary Committee Office (tel: 202-225-3951; fax: 202-225-7680).

Sincerely,



John Conyers, Jr.
Chairman

cc: Hon. Lamar Smith
Hon. Linda Sánchez
Hon. Chris Cannon
Keith B. Nelson