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ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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April 28, 2008

By Fax and U.S. Mail

Mr. David S. Addington
Chief of Staff to the Vice President
Office of the Vice President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Addington:

I am in receipt of the April 18, 2008, letter from counsel to the Vice President responding to my invitation for your voluntarily appearance before the Committee. I was disappointed to receive such a legalistic and argumentative response to my invitation. I address counsel's particular concerns below, but let me first state once again that my invitation for your voluntary appearance remains open. I continue to hope that you will accept this opportunity to present your views and explain your actions to the public that you serve. As discussed below, counsel's letter has not identified any meaningful obstacles to your appearance, which I hope we can readily arrange without even considering the need for formal process. If I we are not able to reach such an accommodation sometime this week, however, I will have no choice but to consider the use of compulsory process.

Reason for the Invitation

Counsel's letter recites three broad quotations from the invitation letter describing the general scope of the hearing and states "[t]he Committee request seeks authoritative representation on the three subjects identified in the Committee request."¹ The letter further cautions that "[t]he Chief of Staff to the Vice President is an employee of the Vice President, and not the President, and therefore is not in a position to speak on behalf of the President,"²

¹April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum.

²April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum.

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apparently believing that you have been invited to testify as a policy representative of the President. Finally, counsel suggests a series of potential witnesses that she believes would be “appropriate” to call “in lieu of [the] invitation to the Chief of Staff to the Vice President.”³

These comments appear to reflect a serious misreading of my prior letter. Nowhere does that letter ask for “authoritative representation” on the quoted subjects, nor does it request any statement on behalf of the President. Instead, the letter quite directly asks you to share your “personal knowledge of key historical facts” and “professional expertise” with the Committee.⁴ Furthermore, while counsel has selected several quotations describing the broad subject matter of the proposed hearing to quote in the response letter, she has simply ignored the careful description of specific issues on which you have unique, personal knowledge about which the Committee would like to hear testimony. For example, the letter simply omits the central statement that “[a]s early as 2004, written reports described you as ‘a principal author of the White House memo justifying torture of terrorism suspects.’ Other sources describe you as participating in the preparation of the key legal memorandum concluding that the protections of the Geneva Conventions are ‘obsolete’ when considered against the exigencies of the struggle against global terrorism.”⁵ In my view, there clearly is ample reason for inviting you to testify.

Power of Congress to Conduct Oversight

I appreciate counsel’s citation to Barenblatt v. United States, 360 U.S. 109 (1959), a case in which the Supreme Court upheld the power of Congress to conduct the oversight at issue and affirmed the petitioner’s conviction for contempt of Congress based on his refusal to answer questions put by a Congressional committee. However, while counsel cites Barenblatt for the principle that some limits do exist on the oversight power, she seems to overlook the more fundamental description of the scope and breadth of the oversight power in the opinion. As explained by Justice Harlan:

The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power

³April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum.

⁴April 11, 2008, Letter from John Conyers, Jr. to David S. Addington.

⁵April 11, 2008, Letter from John Conyers, Jr. to David S. Addington (footnotes omitted).

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of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.⁶

On the issue of legislative authority, counsel's discussion of the Committee's purported lack of power "to regulate by a law what a Vice President communicates in the performance of the Vice President's official duties or what a Vice President recommends that a President communicate in the President's performance of official duties" simply has no bearing on the issues at hand. It is hard to know what aspect of the invitation has given rise to concern that the Committee might seek to regulate the Vice President's recommendations to the President. Especially since far more obvious potential subjects of legislation are plentiful, such as, at a minimum, revisions to U.S. law on torture and treatment of detainees -- including the federal torture statute,⁷ the federal War Crimes Act,⁸ and the Detainee Treatment Act of 2005,⁹ -- and possible revisions to the organization and functions of the Department of Justice, its Office of Legal Counsel,¹⁰ or other executive departments.

Counsel's letter asks for the basis under the Constitution and the House Rules for the Committee's inquiry. The constitutional basis for such oversight is discussed in McGrain v. Daugherty, 273 U.S. 135 (1927), and its progeny, including Barenblatt, and the Committee's authority to proceed is reflected in Rules X(1)(k), X(2), and XI of the Rules of the House of Representatives (110th Congress).

⁶Barenblatt v. United States, 360 U.S. 109, 111 (1959). This quotation also makes clear that counsel's statement that "the power of Congress under the Constitution to inquire (which Members of Congress and congressional employees often refer to by the term 'oversight') is coextensive with its power to legislate" is incomplete, as it omits the equally important constitutional foundation for oversight of the appropriations power. While the Judiciary Committee is not a direct appropriator, counsel's comment speaks broadly to the power of Congress. Congress of course provides funding for the Executive Branch, including Office of the Vice President, and could adjust that funding if it concluded, for example, that a Vice Presidential employee was improperly interfering with operations of other government agencies or for any other appropriate policy reason. The appropriations power thus should not be overlooked when considering Congressional authority.

⁷18 U.S.C. § 2340 et seq.

⁸18 U.S.C. § 2441.

⁹Pub. L. No. 109-148, §§ 1001-1006 (2005).

¹⁰28 U.S.C. § 510 et seq.

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Concerns About Privilege and Immunity

Finally, counsel raises concern that your testimony would not be useful to the Committee because it might be constrained by various privileges, and also refers briefly to the “question of immunity from testimony.”¹¹ As to immunity, Vice Presidential staff have previously testified before Congress and I am aware of no authority – and counsel’s letter cites none – for the proposition that such staff could be immune from testimony before Congress. While the issue of the immunity of senior advisors *to the President* is currently under litigation, there has been no suggestion that such immunity, even if recognized, would reach to the *Vice President’s* office, an entity that, as you well know, is constitutionally quite different from the Office of the President. As to privilege, such concerns are traditionally and appropriately raised in response to specific questions and not as a threshold reason to decline a Congressional Committee’s invitation to appear. I note that the sitting head of the Office of Legal Counsel Steven Bradbury recently testified before a Judiciary Subcommittee on issues related to Administration interrogation policy, so I have no doubt we can accommodate the concerns that counsel has raised. Given the scope of your reported actions and the subject of our inquiry, such as claims that you may have interacted with individuals in the Justice Department and the Department of Defense, including field military officers at Guantanamo Bay, it seems clear that many relevant questions exist that do not implicate executive privilege.

* * * * *

Despite the tenor of counsel’s letter, senior White House officials, including White House Counsels and Chiefs of Staff, and even the Chief of Staff to the Vice President, have previously testified before committees of Congress.¹² On October 17, 1974, I was present when President Ford himself testified before a House Judiciary subcommittee on issues related to the Nixon pardon. The invitation to appear is thus based on a long tradition of comity between the branches and our shared recognition that public officials ultimately serve and should be accountable to the American people. These principles have served our nation well, and I trust that you will not turn your back on them now.

¹¹ April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum. While the main privilege issues are addressed above, I assume that counsel’s citation to the “state secrets” privilege was an oversight as that is a judge-made litigation privilege that has no application before a Committee of Congress. Similarly, counsel’s stated concern that “inquiry by a House Committee concerning the Senate functions of the Vice President would not, in any event, be appropriate” seems especially out of place given the subject matter of the proposed hearing and the nature of the invitation to you.

¹² For example, White House Counsels Nussbaum, Cutler, Quinn, and Ruff, and Chiefs of Staff McLarty, Bowles, Podesta, and Neel all provided sworn testimony to the Congress during the 1990s. See, e.g., March 21, 2007, Letter from Chairman Henry A. Waxman to Chairman Patrick Leahy and Chairman John Conyers, Jr.

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Today we face a severe national challenge over charges related to the allegedly harsh treatment of detainees in U.S. custody, reportedly done with legal authorization of the Department of Justice and explicit approval from the highest officials in our government. These are serious matters that substantially impact our national security, the safety and well-being of our troops around the world, and our nation's legal and moral standing. As referenced in the invitation letter, multiple sources place you at the center of these momentous events. Thus:

- You are reported to have “assisted in the drafting” of the now-withdrawn August 1, 2002, interrogation memorandum issued by Jay Bybee and John Yoo in the Department of Justice Office of Legal Counsel.¹³ Another source states that you “helped shape” this memorandum.¹⁴
- You are “believed to have been written” a January 25, 2002, memorandum issued by White House counsel Alberto Gonzales that advised President Bush that the fight against terrorism “renders obsolete Geneva’s strict limitation on questioning of enemy prisoners and renders some of its provisions quaint.”¹⁵
- Reports state that some in the Justice Department complained that you improperly maintained a “private legal channel” to John Yoo at the Office of Legal Counsel.¹⁶
- Reports indicate that you participated in a “war council” along with the White House Counsel, the General Counsel to the Defense Department, and OLC Deputy John Yoo that shaped the “most important legal-policy decisions in the war on terror” outside of normal channels and “sometimes to the exclusion of the intragency process altogether “.¹⁷

¹³Sands, *The Green Light*, Vanity Fair, May 2008; See also Gelman and Becker, *Pushing the Envelope on Presidential Power*, Washington Post, June 25, 2007 (“In an interview, Yoo said that Addington, as well as Gonzales and deputy White House counsel Timothy E. Flanagan, contributed to the analysis.”).

¹⁴Ragavan, *Cheney’s Guy*, US News and World Report, May 21, 2006.

¹⁵Sands, *The Green Light*, Vanity Fair, May 2008; Mayer, *The Hidden Power*, The New Yorker, July 3, 2006.

¹⁶Gelman and Becker, *Pushing the Envelope on Presidential Power*, Washington Post, June 25, 2007.

¹⁷Goldsmith, *The Terror Presidency* at 22 (2007); Rosen, *Conscience of a Conservative*, New York Times, Sept 9, 2007.

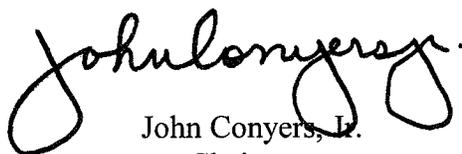
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- Military officials have stated that you took the lead during a September 2002 visit of high ranking administration lawyers to the detention facility at Guantanamo Bay, Cuba that “brought ideas” on interrogation methods from Washington sources to the facility.¹⁸
- According to one former high-ranking Administration lawyer who worked extensively on national-security issues, “the Administration’s legal positions were, to a remarkable degree, ‘all Addington.’”¹⁹

These reports describe an extraordinary change in the traditional lines of legal authority between the Department of Justice, the White House Counsel, and the President, placing you at the center of the Administration’s legal policy process on this most sensitive of national issues. Presumably, you believe that whatever actions you took were necessary and comported with the law; in such circumstances, I cannot imagine why you would decline to appear and set the record straight. The American people deserve no less.

We are certainly willing to accommodate your schedule and I hope that we can work together to arrange a specific time and date for this appearance if May 6 is not convenient. Please have your counsel contact the Judiciary Committee staff at (202) 225-3951 as soon as possible and no later than the close of business on Friday, May 2, 2008, to make these arrangements. Any further responses and questions should similarly be directed to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680).

Sincerely,



John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith
Hon. Jerrold Nadler
Hon. Trent Franks
Ms. Kathryn L. Wheelbarger

¹⁸Sands, *The Green Light*, Vanity Fair, May 2008.

¹⁹Mayer, *The Hidden Power*, The New Yorker, July 3, 2006.