



OFFICE OF THE VICE PRESIDENT  
WASHINGTON

April 18, 2008

Mr. Perry Apelbaum  
Chief of Staff and Counsel  
Committee on the Judiciary  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Apelbaum:

The letter of April 11, 2008 from the Chairman of the Committee on the Judiciary of the House of Representatives ("Committee request") informed the Office of the Vice President that the Committee plans to hold a hearing on May 6 to explore: (1) "issues regarding the nature and scope of Presidential power in a time of war;" (2) "the Administration's approach to these questions under U.S. and international law;" and (3) "United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces." The letter invited the Chief of Staff to the Vice President to appear at the hearing.

The Committee request seeks authoritative representation on the three subjects identified in the Committee request. The 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. With respect to Presidential power in wartime and related issues under U.S. and international law, the Attorney General or his designee would be the appropriate witness. Regarding interrogation of persons by U.S. intelligence agencies or the armed forces, the Director of National Intelligence or his designee and the Secretary of Defense or his designee, respectively, would be the appropriate witness. You may wish to invite the appropriate subordinates of the President in lieu of your invitation to the Chief of Staff to the Vice President.

As the U.S. Supreme Court made clear in Barenblatt v. United States, 360 U.S. 109 (1959), 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. The power of Congress to legislate is not limitless and therefore neither is the power to inquire. For example, Congress lacks the constitutional 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, and therefore those matters are not within the Committee's power of inquiry. In addition to a constitutional basis for a House inquiry, a particular committee of the House also

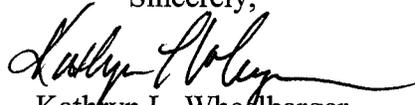
needs jurisdiction assigned by the House for the inquiry. It would be helpful to know from the Committee the scope of the Committee's inquiry and the legal basis for it.

Finally, even if, separate from any question of immunity from testimony, a case were to arise in which a voluntary appearance might be appropriate under the law, questions of privilege may arise with respect to information sought by questions, such as with respect to privileges protecting state secrets, attorney-client communications, deliberations, and communications among Presidents, Vice Presidents, and their advisers. For example, the amount of useful information a Committee of Congress would be likely to receive from a person who served as Counsel to the Vice President and then Chief of Staff to the Vice President concerning official duties is quite limited, given that a principal function of such a person is engaging in privileged communications, such as the giving of privileged advice. Also, inquiry by a House Committee concerning the Senate functions of the Vice President would not, in any event, be appropriate.

The Committee may wish to hold the Committee request in abeyance while it exhausts other sources for the kinds of information the Committee seeks, or the Committee may wish to forgo the Committee request altogether. If, however, the Committee wishes to pursue the Committee request, please advise of the time for which you have invited the Chief of Staff to the Vice President, and of the legal basis for the request under the Constitution and the House Rules. We look forward to receiving such information from the Committee to enable us to further evaluate the request and communicate with you. Please direct to me (Tel. (202) 456-9089, Fax (202) 456-0387) any further communications to the Office of the Vice President on this matter.

This letter is provided as a matter of comity, with respect for the constitutional role of the House of Representatives, and reserving all legal authorities and privileges that may apply.

Sincerely,



Kathryn L. Wheelbarger  
Counsel to the Vice President

cc: Mr. Sean McLaughlin  
Minority Chief Counsel  
Committee on the Judiciary