



Office of the Deputy Attorney General
Washington, D.C. 20530

June 28, 2012

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

As you know, the President has asserted executive privilege and directed the Attorney General not to release certain documents that are responsive to the subpoena issued to the Attorney General by the Committee on Oversight and Government Reform ("Committee") in connection with its investigation into Operation Fast and Furious. That directive was based on a legal opinion from the Department of Justice advising that the assertion of privilege would be legally proper. *See* Letter for the President from Eric H. Holder, Jr., Attorney General (June 19, 2012).

Notwithstanding the President's directive, on June 20, 2012, the Committee adopted a resolution recommending that the House of Representatives cite the Attorney General for contempt. On June 22, 2012, the Committee referred its report on the resolution to the full House. And on June 28, 2012, the House adopted a contempt resolution, which calls upon you to refer the report to the United States Attorney for the District of Columbia for prosecution under the contempt of Congress statute, 2 U.S.C. §§ 192, 194.

Across administrations of both political parties, the longstanding position of the Department of Justice has been and remains that we will not prosecute an Executive Branch official under the contempt of Congress statute for withholding subpoenaed documents pursuant to a presidential assertion of executive privilege. The fullest explanation of the legal basis for the Department's position was provided during the Reagan Administration by Assistant Attorney General for the Office of Legal Counsel Theodore Olson. Mr. Olson's opinion explained that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) ("*Prosecution for Contempt of Congress*"). The Department has consistently adhered to this position ever since. *See, e.g., Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) ("application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress") (citing *Prosecution for Contempt of Congress*).

The Department relied on this longstanding position in 2008, during the George W. Bush administration, when it declined to prosecute two White House officials who were the subject of a contempt of Congress referral from the House of Representatives. Attorney General Michael Mukasey informed Speaker Nancy Pelosi that, in accord with “the Department of Justice’s longstanding position taken during Administrations of both parties, ... the Department has determined that the non-compliance by [the White House officials] with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute [them].” Letter for Nancy Pelosi, Speaker, from Michael B. Mukasey, Attorney General at 1-2 (Feb. 29, 2008). To support his decision, Attorney General Mukasey relied explicitly on Mr. Olson’s *Prosecution for Contempt of Congress* opinion, *see id.* at 1, and enclosed a letter the Department had sent the Committee the prior year more fully setting forth the Department’s position, *see* Letter for John Conyers, Jr., Chairman, Committee on the Judiciary, from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Office of Legislative Affairs (July 24, 2007). Both of these letters are enclosed.

Consistent with this uniform position and practice, the Department has determined that the Attorney General’s response to the subpoena issued by the Committee on Oversight and Government Reform does not constitute a crime, and therefore the Department will not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General.

Please do not hesitate to contact me if you would like to discuss this matter further.

Sincerely,



James M. Cole
Deputy Attorney General

Enclosures

cc: The Honorable Nancy Pelosi
The Honorable Darrell E. Issa
The Honorable Elijah E. Cummings