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

July 16, 2012

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Senator Grassley:

This responds to your letter of June 29, 2012, to Ronald C. Machen, Jr., the United States Attorney for the District of Columbia, regarding the Department's decision, consistent with established legal principles adopted by administrations of both political parties, not to pursue criminal prosecution against the Attorney General for acting in accordance with the President's invocation of executive privilege.

I am responding to your letter because it raises Department-wide legal questions best addressed by the Deputy Attorney General and not by an individual U.S. Attorney, although U.S. Attorney Machen has asked that I convey to you his concurrence with the position articulated below and in my enclosed letter to Speaker John A. Boehner dated June 28, 2012. I note that, in 2008, when the Department declined to prosecute two officials in the Bush White House who were the subject of a contempt of Congress citation by the House of Representatives, that decision was conveyed to the Speaker of the House of Representatives by the Attorney General and not by the U.S. Attorney for the District of Columbia.

My letter to Speaker Boehner set forth well-settled precedent for the Department's decision not to pursue the recent contempt citation, including an opinion drafted during the Reagan administration by Assistant Attorney General for the Office of Legal Counsel Theodore Olson and the Department's reliance on that opinion in the 2008 matter noted above. These precedents are authoritative expressions of Justice Department legal interpretation regarding such matters.

Simply put, the Attorney General's response to the subpoena issued by the House Committee on Oversight and Government Reform does not constitute a crime in light of the President's assertion of executive privilege. That assertion is conclusive within the Executive Branch and thus binding on the Department, including individual U.S. Attorneys. As Assistant Attorney General Olson explained, "the fundamental balance required by the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 (1984) ("*Prosecution for Contempt of Congress*"). Thus, "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." *Id.* at 102.

The Olson opinion restates and confirms "the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential claims of executive privilege." *Id.* at 129. That has been the Department position at least since 1956, when Deputy Attorney General (subsequently Attorney General) William P. Rogers explained that "in the context of Presidential assertions of the privilege, the contempt of Congress statute was 'inapplicable to the executive departments.'" *Id.* (quoting *Hearings Before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 2d Sess. 2933 (1956)).

The Department has consistently adhered to the position articulated in the Olson opinion. Most recently, as noted, Attorney General Mukasey relied on the Olson opinion when he declined to prosecute White House officials for contempt of Congress in 2008 in light of President George W. Bush's assertion of executive privilege. *See* Letter for Nancy Pelosi, Speaker, from Michael Mukasey, Attorney General, at 1-2 (Feb. 29, 2008) (enclosed); *see also, e.g.*, 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) ("Benczkowski Letter") (enclosed) (informing congressional committee that Department's position as articulated in *Prosecution for Contempt of Congress* would apply to the White House officials if held in contempt of Congress); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) (opinion of Assistant Attorney General Walter Dellinger) ("[T]he criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege.").

This settled legal position compelled the Department's decision to refrain from pursuing any criminal prosecution on the recent contempt citation. As Assistant Attorney General Olson concluded, "[t]he President, through a United States Attorney, need not, indeed *may* not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege." *Prosecution for Contempt of Congress*, 8 Op. O.L.C. at 141 (emphasis added).

Sincerely,

James M. Cole
Deputy Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Chairman