



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

May 17, 2000

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to the Committee's subpoena, received on May 12, 2000, seeking certain Department records relating to Loral Space and Communications Ltd. ("Loral") and Hughes Electronics Corporation ("Hughes"). We intend to cooperate fully with the part of the subpoena seeking documents on the *closed* investigation of the Campaign Finance Task Force ("CFTC") regarding the Presidential waiver in 1998 to permit Loral to export a satellite to the Peoples' Republic of China ("PRC"). We cannot, however, comply with the part of the subpoena seeking the files of the United States Attorney's Office for the District of Columbia ("U.S. Attorney's Office") for its *open* criminal investigation into the separate matter of the role Loral and Hughes played in a possible technology transfer to the PRC in 1996 following the failure of a satellite launch from the PRC earlier that year.*

Providing *open* criminal investigative files to Congress would undermine public and judicial confidence in the criminal justice process and would be in complete contravention of the Department's policy of declining congressional requests for non-public information about pending investigations. This policy is neither new nor partisan. It is based on the longstanding belief of top Department officials, both Democrat and Republican alike, that the Department's ability to discharge its responsibilities for the fair administration of justice would

* The closed CFTC investigation and the open U.S. Attorney's Office investigation have always been completely separate. The U.S. Attorney's investigation is directed only towards the possible technology transfer in 1996 and not to any matters concerning the 1998 waiver or the possible impact of campaign contributions on the granting of waivers to launch satellites or on which agency should have jurisdiction over licensing decisions for satellite launches. The Department has already provided the Committee with more than 400 pages of documents relating to the CFTC investigation, including all documents we have identified that are responsive to subparagraph B of the Committee's subpoena, and we are continuing to search for responsive documents.

be compromised by the disclosure to Congress of open investigative files. Almost 60 years ago, Attorney General Robert H. Jackson, relying on positions taken by many of his predecessors, informed Congress that:

It is the position of the Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y. Gen. 45, 46 (1941) ("Jackson Op.").

The rationale underlying this policy was further explicated in a 1986 published opinion of the Office of Legal Counsel ("OLC") issued by Charles J. Cooper, OLC's Assistant Attorney General during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted in his opinion that providing a congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. *Id.* at 76, citing Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, OLC, Re: Submission of Open CID Investigation Files, at 2 (Dec. 19, 1969) ("[T]he Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."). Moreover, providing open investigative files in response to a congressional subpoena could give rise to a claim, by defense counsel or others, of improper congressional influence over the criminal justice process should it turn out that an indictment was returned in the matter after Congress had obtained access to the files.

The danger of such congressional influence was one of the principal reasons the Framers of the Constitution enshrined the concept of the separation of powers in the Constitution. The Framers of the Constitution regarded the combination of the powers of government as "the very definition of tyranny." *The Federalist* No. 47, at 301 (Madison) (Clinton Rossiter ed., 1961). They were particularly concerned about the threat of combining the power to legislate and the power to execute the law. They agreed with Montesquieu that "there can be no liberty" "[w]hen the legislative and executive powers are united in the same person or body." *Id.* at 303.

The disclosure of the files of the U.S. Attorney's Office's open criminal investigation, which is apparently what is sought by the Committee's subpoena, would be extremely damaging

from a law enforcement perspective as well. Such a disclosure would reveal the investigative reports and other evidence that has been collected in the investigation, as well as the internal documents setting out investigative strategies and plans. These materials would provide a "road map" of the ongoing investigation to the targets of the investigation and to anyone else with access to them. As Attorney General Jackson observed:

Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

Jackson Op. at 46.

The Committee's subpoena would also require the Department to produce grand jury material covered by the non-disclosure provision of Rule 6(e) of the Federal Rules of Criminal Procedure. As you know, the production of any such material would be in violation of the law. Thus, while we would obviously remove grand jury material from the scope of any production, the remaining documents that were responsive to the Committee's subpoena would still provide a "road map" of a portion of the Department's criminal investigation.

We have received no statement on behalf of the Committee as to why it believes it has a need for documents relating to this ongoing criminal investigation. We understand that proponents of the subpoena may contend that the U.S. Attorney's Office is not investigating quickly enough, or that it does not intend to seek an indictment even if the evidence and Principles of Federal Prosecution support one. This speculation is entirely without merit, as the U.S. Attorney's letters to Senator Specter, dated April 21 and May 10, 2000, have previously explained. In any event, the Framers sought to avoid such contemporaneous second-guessing of the executive branch by the legislative branch through the separation of powers principle. In light of that principle and the dangers to the criminal justice system it is designed to forestall, we cannot conceive of any interest that would justify providing the files of an ongoing criminal investigation to Congress.

In closing, I appreciate the fact that you have expressed a willingness to consider an accommodation "for structuring the production of the open case materials so as to have as little impact on the open case as possible." When it comes to *ongoing* criminal investigations, however, I do not believe that an accommodation along the lines you might envision is possible

that would not do violence to the paramount interests set forth above. Nonetheless, as always, I would be happy to discuss this matter with you further and consider alternative ways of satisfying your oversight needs.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet Reno".

Janet Reno

cc: Honorable Arlen Specter
Honorable Robert G. Torricelli
Honorable Charles E. Grassley