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CONTINUING INVESTIGATION INTO THE U.S. ATTORNEYS CONTROVERSY AND RELATED MATTERS (PART III)

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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INVITED WITNESS

Harriet Miers, former White House Counsel, Member at Locke, Liddell, & Sapp PLLC
[Note: Ms. Miers declined to appear at this hearing.]

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CONTINUING INVESTIGATION INTO THE U.S. ATTORNEYS CONTROVERSY AND RELATED MATTERS (PART III)

THURSDAY, JULY 12, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, the Honorable Linda T. Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Conyers, Johnson, Lofgren, Delahunt, Watt, Cohen, Cannon, Jordan, Keller, Feeney, and Franks.

Staff present: Perry Apelbaum, Staff Director and Chief Counsel; Eric Tamarkin, Majority Counsel; Daniel Flores, Minority Counsel; and Anita Johnson, Chief Administrative Officer.

Ms. SÁNCHEZ. The Committee on the Judiciary's Subcommittee on Commercial and Administrative Law will now come to order.

I am extremely disappointed and deeply concerned that former White House counsel Harriet Miers has apparently chosen to forego this opportunity to give her account of the firing of the U.S. attorneys and the potential politicization of the U.S. Department of Justice.

Through extensive interviews and review of documents, it appears clear that Ms. Miers played a significant role in the Bush administration's decision to fire at least nine U.S. attorneys.

For example, documents released by the Department of Justice demonstrate that Ms. Miers was involved in the earliest known conversations on the matter, including her recommendation to consider the unprecedented midterm replacement of all 93 U.S. attorneys.

Acknowledging the jurisdiction and proper role of the Congress in investigating the U.S. attorney firings, the White House had previously offered to allow Ms. Miers to talk with this Committee on the condition that it not be under oath and that there be no transcript, so I presume that her testimony is not a grave threat to the interests of the executive branch.

It is curious that the White House is now asserting a blanket claim of executive privilege and has directed Ms. Miers to not even appear today before the Subcommittee.

In fact, there is ample precedent of presidential advisors from both political parties testifying before Committees and Subcommittees of Congress. According to a report by the nonpartisan Congressional Research Service, presidential advisors have testified before Congress at least 74 times since 1944. Even a sitting president, President Gerald Ford, testified before this Committee about his rationale for pardoning President Richard Nixon.

More recently, White House advisors in the Clinton administration frequently testified before Congress. Former White House counsel Beth Nolan explained to the Subcommittee that she testified before congressional Committees four times: three times while serving as White House counsel and once as former White House counsel.

Even President Bush has allowed close advisors such as Thomas Ridge, then Assistant to the President for Homeland Security, and Condoleezza Rice, then Assistant to the President for National Security Affairs, to testify before Congress.

In contrast to his current assertion with regard to Ms. Miers, the President did not raise the issue of executive privilege when he wanted Mr. Ridge or Ms. Rice to tout a White House legislative priority before Congress.

It seems that the President's inconsistent position on allowing senior advisors to testify may reflect his concern about what the advisor might say, rather than a steadfast adherence to the concept of executive privilege.

Through our patient and good-faith efforts to negotiate with the White House on this matter, we have been trying to avoid a constitutional confrontation between the executive and the legislative branches. The White House could have prevented an escalation by engaging in reasonable negotiation. Unfortunately, Ms. Miers and the White House have chosen a path of confrontation instead of cooperation.

The framers of our Constitution created a system of checks and balances to make sure that no branch of government could escape scrutiny and accountability. They gave Congress the responsibility to provide oversight of the executive branch. The truth is that we are here today because this Congress takes that obligation seriously.

I would now, at this time, like to recognize my colleague Mr. Cannon, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair.

Former Democratic Speaker Jim Wright once said, "One must be constantly aware of the importance of maintaining a little suspense." It appears my friends in the majority have forgotten that lesson, because there is no suspense here.

We knew that Ms. Miers would not come today. We know she had been instructed by the President not to appear. We know she had been instructed not to testify. We know she had been instructed not to provide documents.

We know that this investigation is proceeding only because it has been sold on the basis of a string of fallacies.

The first fallacy: We don't know who put the U.S. attorneys on the list.

But we do. The fact is, Kyle Sampson did, after checking with top Justice officials in the know and drawing a consensus from their opinions. When the list was final, he gave it to the Attorney General as a final recommendation. None of this was illegal or unethical.

Fallacy two: We don't know who decided to fire the U.S. attorneys.

But, of course, we do. The attorney general did. Only in Washington can politicians feign shock and disbelief at political appointees being fired by another political appointee.

Fallacy three: We don't know why the attorneys were fired.

The fact is we do, and none of those reasons appears to have been about hindering prosecution of Republicans or obstructing justice. The witnesses have consistently articulated innocent reasons why the U.S. attorneys were fired, including not vigorously prosecuting the President's priorities like ending illegal immigrant smuggling and prosecuting gun crimes. The attorney general stands behind the decisions to this day, as does the deputy attorney general.

Fallacy four: We don't know if the U.S. attorneys were fired to protect Republicans from prosecution and guarantee prosecution of Democrats.

The fact is we do. David Margolis, the top career official sitting at the pinnacle of the Justice Department, didn't detect a whiff of any such shenanigans and says, "Anyone who would have suggested them would have gotten his"—that is, David Margolis's—"sharp stick in the eye."

Even the Democrats' contract investigator told the minority that, "If David Margolis said it happened that way, it did. You can take it to the bank," he advised. We are paying $250,000 for this man's advice; we probably should take it.

Fallacy five: We don't know enough about what the White House did, and they won't tell us.

The fact is, we know plenty, and the White House has long offered to tell us more. The Democrats just don't like what they hear.

The truth appears to be simple: The White House's involvement in the Justice Department's review was neither nefarious nor in-depth. The White House awaited the results of the process conducted for the attorney general by Kyle Sampson and others, offered input when asked, and at some point asked how it was going. Nothing uncovered thus far in any way indicates anything illegal, unethical or untoward.

This week, our staff once again spent hours—this week, we spent hours interviewing Kyle Sampson, and he could hardly have made it clearer that the White House did not meddle in the dismissal of the U.S. attorneys to seek partisan advantage in prosecutions. I commend the interview to all Members' immediate attention and evaluation.

So we don't genuinely need Ms. Miers's information, and we don't need an executive privilege showdown. I think we know enough right now to call out the accusations of the White House wrongdoing for what they are: smoke and mirrors.

There is something we do need. Teetering on the brink of threat and contempt proceedings, we need the majority to drop the smoke-

screen of their accusations and present real, hard evidence, if they have it. We might get to a showy court confrontation if we vote for contempt, but we don't win in court unless we have evidence.

And here I speak as a Member of the House and not as a partisan. This is of vital importance, I think, to me personally and to this institution.

As every Member knows, to overcome the presidential privilege, it is necessary to demonstrate with specificity why it is likely that the subpoenaed materials contain important evidence and why this evidence, or equivalent evidence, is not practically available from another source.

In short, the courts will call on us to show the information sought is demonstrably critical to the responsible fulfillment of the Committee's functions.

So I challenge the majority right now to present evidence—evidence, and only evidence—to the American people and the minority.

I challenge the majority to cite and produce specific passages of hearing testimony, interview testimony, or documents that demonstrate that there remains, in this case, a critical question that has been left unanswered and can be answered only by information from Ms. Miers or other White House sources.

If you can't do that today after 5 months of incessant investigation, nearing 10,000 pages of documents, a myriad of interviews and 13 prior hearings, how then can any of us here in Congress, or out in the public, believe that this investigation is anything other than a preposterous, prefabricated, partisan sham?

How can we conclude this controversy is anything other than a gigantic spin game frittering away the precious time of this 110th Congress, of which we have precious little, to address the monumental problems confronting the nation?

Spinning is rebuffed at the courthouse door. When the spinning stops, the courts, having observed the facts, don't hesitate to say that the emperor has no clothes. If we go to court, we fear that that will be the result in this case, much to the embarrassment of the 110th Congress.

It is time for the majority to stop swaggering its power in this Congress, to clothe itself in prudence and to back off this pointless constitutional showdown, or provide evidence to the contrary.

Thank you, Madam Chairman. I yield back.

Ms. SÁNCHEZ. The time of the gentleman has expired. Thank you for your statement.

I would now like to recognize Mr. Conyers, a distinguished Member of the Subcommittee and the Chairman of the Committee on the Judiciary. Mr. Conyers?

Mr. CONYERS. Thank you, Madam Chair.

This is quite interesting. I will just submit my statement, because I am still catching my breath after Mr. Cannon's—I think it was six or maybe more myths that he was propounding.

And we are here today because we issued a subpoena. That is why we are here. Not that we knew or didn't know that Ms. Miers was coming or not. She told us she was originally, and then somehow or someone changed her mind.

So when he asked the majority to submit evidence that would prove what it is we are looking for, that is what we were holding the hearing for.

This would have been the very first White House witness to show up, even though she is an ex-White House witness. I am just wondering if the White House can call a former employee and tell them not to show up?

It seems to me that we are proceeding under as reasonable and modest an approach as we can possibly make. And it is in that spirit that I congratulate the Subcommittee, majority Members and minority Members, for being here.

This is important. Are congressional subpoenas to be honored, or are they optional? And apparently, we have to run this out—not to prove or assert or with any swagger do anything unusual; we are still trying to get to the bottom of this.

Now, if it has already been resolved, then I will be pleased to look at any documents that make it unnecessary to hold these hearings.

The Judiciary Committee has more responsibilities than any other Committee in the Congress. In the first 6 months of the 110th Congress, we passed 37 bills, far more than any other Judiciary Committee has in the last 12 years.

And so, I am rather proud of our legislative accomplishments. But there are other things we can do besides find out if Ms. Miers considers herself subject to the subpoena process like every other American.

And I return my time. Thank you.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Today would have marked a significant transition in our continuing investigation into the U.S. Attorney controversy because, for the first time, we would have had a White House witness: former White House Counsel Ms. Harriet Miers.

To date we have received credible evidence relating to potential obstruction of justice, false statements to Congress, and unlawful politicization of the Department of Justice, accompanied by the resignation of nearly a dozen senior officials. Notwithstanding the strong evidence pointing to the White House's involvement in these matters, we still have received their same unacceptable "take it or leave it" offer from White House Counsel Fielding. This is one of the main reasons why this Committee on June 13th had to resort to the step of subpoenaing Ms. Miers.

Ms. Miers is critically important in furthering our investigation. During the course of our investigation up to this point, we have received documents from the Department of Justice detailing Ms. Miers's involvement in the overall termination process, including, for example:

- an e-mail that Kyle Sampson sent in which he explained that Tim Griffin's appointment was important to Ms. Miers and Karl Rove; and
- e-mails attaching multiple draft firing lists that were sent to Ms. Miers in the White House Counsel's office as they were being developed over a two year period.

Despite this obvious evidence of the White House's involvement in the termination process, the White House has asserted an absolute, blanket executive privilege, covering documents and the testimony of witnesses, including Ms. Miers. I am disturbed by this broad assertion of the privilege. Their assertion of the privilege also is relatively unprecedented because the privilege historically applies to advice given directly to the President, and it has been limited to specific communications only, not broad categories of information as asserted by this White House.

I was particularly concerned to learn only yesterday of Ms. Miers's refusal to comply with the Committee's subpoena by failing to appear at today's hearing, explaining that it was at the direction of the White House itself. Ms. Sanchez and I faxed a letter to her counsel yesterday hoping that she would in fact appear, but unfortunately we got a negative response and I do not see her here this morning. I am disappointed by this development, especially in light of former White House advisor Sara Taylor's appearance and testimony yesterday before the Senate Judiciary Committee. Non-compliance with this subpoena is a serious matter that will undoubtedly cause us to consider further actions. It is regrettable that this process has reached this point, but we are determined to get the truth and uphold the law concerning this very serious matter.

Ms. SÁNCHEZ. I would like to thank the Chair.

Without objection, other Members' opening statements will be included in the record.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Harriet Miers's defiance of a Congressional subpoena based on direction from the White House has no factual or legal support. As a lawyer, Ms. Miers should know that the President's claim of executive privilege in directing her not to even appear, much less testify, before this Subcommittee is disingenuous and unsupported by precedent. Ms. Miers is no longer an executive branch official, but a private citizen who is not free to defy a subpoena to appear and testify before a Congressional committee. Moreover, during the Clinton Administration, White House Counsels routinely testified before Congressional committees in public and under oath as part of congressional investigations into White House policy decisions. Similarly, other high-ranking White House officials have testified on the record before Congress in the past. The Administration's claim of privilege is overbroad. Ms. Miers and all other relevant White House officials must comply with Congress's subpoenas.

Ms. SÁNCHEZ. And, without objection, the Chair will be authorized to declare a recess or adjournment of the proceeding.

Ms. Miers has evidently, as her counsel indicated in his recent letters, failed to appear today to answer questions and produce relevant documents in accordance with her obligations under the subpoena served to her on June 13th.

If she does appear, we will resume our hearing as intended. But the last word we have from her counsel is that she will not, and indeed she is not present here. So we will proceed now on that basis.

According to letters that we have received from her counsel, her refusal is based on letters she has received from current White House counsel Fred Fielding asserting related claims of executive privilege and immunity. Many of these claims had already been raised and communicated to us previously.

We have given all these claims careful consideration, and the Chair is prepared to rule that those claims are not legally valid and that Ms. Miers is required, pursuant to the subpoena, to be here now and to produce documents and answer questions.

After I rule, I will entertain a motion to sustain this ruling, but first, I would like to set forth the grounds for it. They are as follows.

First, the claims of privilege and immunity are not properly asserted.

Ms. Miers is no longer an employee of the White House and is simply relying on a claim of presidential executive privilege and

immunity communicated by the current White House counsel. No one here is here on behalf of the White House raising that claim.

In previous cases when a private party, such as Ms. Miers, has been subpoenaed and the executive branch has objected on privilege grounds, the private party has respected the subpoena and the executive branch has been obliged to go to court to seek to prevent compliance with the subpoena.

We have not even received a statement from the President himself asserting privilege, even though Chairman Conyers has asked for one. The courts have stated that a personal assertion of executive privilege by the President is legally required for the privilege claim to be valid.

For instance, the Schmults case stated that even a statement from a White House counsel that he is authorized to invoke executive privilege is "wholly insufficient to activate a formal claim of executive privilege," and that such a claim must be made by the President as head of the agency, the White House.

Second, we are aware of absolutely no possible proper basis for Ms. Miers refusing even to appear today as required by the subpoena. The White House counsel's letter to Ms. Miers's attorney and her attorney's letters to the Subcommittee fail to cite a single case in support of the notion that a witness under Federal subpoena may simply decline to show up at a hearing.

Indeed, no court decision that we are aware of supports the White House's astounding claim that a former White House official has the option of refusing to even appear in response to a congressional subpoena.

To the contrary, the courts have made clear that no present or former government official, including the President, is so above the law that he or she may completely disregarding a legal directive such as the Committee's subpoena.

And in keeping with this principle, both present and former White House officials have testified before Congress numerous times, including incumbent and former White House counsels.

For example, I mentioned earlier that Beth Nolan has told our Subcommittee that she appeared before congressional Committees four times on matters directly related to her duties as White House counsel, three of those times while she was still serving in that position.

As I also mentioned earlier, a Congressional Research Service study documents some 74 instances where White House advisors have testified before Congress since World War II.

Moreover, even the 1999 Office of Legal Counsel opinion referred to in Mr. Fielding's July 10th letter refers only to current White House advisors and not to former advisors, and it acknowledges that the courts might not agree with its conclusion as to current advisors.

Such Justice Department opinions, including the new one issued just yesterday to try to support this claim, are not the law. They state only the executive branch's own view of the law and have no legal force whatsoever.

It is also noteworthy that both of the Justice Department opinions relied on by the White House and Ms. Miers fail to cite a single court case in support of their novel legal conclusion.

Just yesterday, another former White House advisor, Sara Taylor, appeared before the Senate Judiciary Committee pursuant to subpoena and testified about at least some of the relevant facts in this matter, despite the White House's assertion of executive privilege.

This White House's asserted right to secrecy goes beyond even Richard Nixon, who initially refused to allow his White House counsel, John Dean, to testify before Congress on almost exactly the same grounds being asserted now, but then agreed that Mr. Dean and other White House officials could testify.

Third, the White House has failed to demonstrate that the information we are seeking from Ms. Miers's testimony and documents, as called for by the subpoena, is covered by executive privilege. We were not expecting Ms. Miers to reveal any communications to or from the President himself, which is the most commonly recognized scope of the presidential communications privilege.

In fact, as recently as June 28th, a senior White House official at an authorized background briefing specifically stated that the President had no personal involvement in receiving advice about the firing of the U.S. attorneys or in approving or adjusting the list. Ms. Taylor testified yesterday that she was not aware of any personal involvement by the President.

We are seeking information from Ms. Miers and other White House officials about their own communications and their own involvement in the process.

The White House claims that executive privilege nevertheless applies because it also covers documents and testimony by White House staff who advise the President, apparently based on the *Espy* decision.

But the *Espy* court made clear that its expansion of the presidential communications privilege applied only when information is sought in a judicial proceeding, and should not be read as in any way affecting the scope of the privilege in the congressional-executive context. And the *Espy* court also made clear that the privilege extends only to communications from or to presidential advisors in the course of preparing advice for the President.

But the White House has maintained that the President never received any advice on and was not himself involved in the U.S. attorney firings. The presidential communications privilege, even as expanded by the *Espy* case, simply does not apply here.

Fourth, with respect to our subpoena's request for documents from Ms. Miers, the courts have required a party raising a claim of privilege to provide a descriptive, full and specific itemization of various documents being claimed as privileged and precise and certain reasons for preserving their confidentiality. These words are from the *Smith v. FTC* case and the *Black v. Sheraton* case.

Here, no such itemized privilege log has been provided by Ms. Miers or her counsel. In effect, the White House is telling Congress and the American people that documents and testimony are privileged without deigning to explain why. In other words, the White House is saying simply, "Trust us. We will decide."

Fifth, even assuming that the information we have asked for fell within the scope of a properly asserted executive privilege, any

such privilege is outweighed by the compelling need for the House and the public to have access to this information.

As the Supreme Court held in *U.S. v. Nixon,* claims of executive privilege are not absolute and depend on a balancing of the need for privilege versus the need for the information being sought. Here, the balance clearly weighs against sustaining any privilege claim.

The privilege claims here are weak. In addition to the points I have made already, it is important to note that the claims by the White House are not limited to specific discussions or documents, but are an attempt at a blanket prohibition against any documents being provided and any testimony from present or former aides whatsoever, including concerning communications with people outside the executive branch altogether.

And the need for information we seek from the White House here is very strong. We have tried extensively to obtain information from other sources, including reviewing thousands of documents provided by the Justice Department and hearing testimony or conducting on-the-record interviews with 20 current or former Department of Justice officials.

Yet we still don't know, for example, how or why or by whom Mr. Iglesias was put on the list to be fired. We still don't know what actions, if any, were taken by Karl Rove or other White House officials on the firing of Mr. Iglesias.

Similar questions remain unanswered about the firing of other U.S. attorneys and about the involvement of White House officials in the misleading information provided to Congress on this subject.

Why is this important? For several reasons.

For one, the evidence obtained thus far raises serious concerns about whether Federal laws have been broken in the U.S. attorney matter, including laws prohibiting obstruction of justice, laws like the Hatch Act against retaliating against Federal employees for improper political reasons, and laws prohibiting misleading or obstructing Congress.

The courts have made clear that executive privilege is generally overcome when the information sought concerns government misconduct. Indeed, the court in the *Espy* case stated that when there is any reason to believe government misconduct occurred, the deliberative process element of executive privilege disappears altogether.

In addition, obtaining more complete information on what happened in the U.S. attorney matter may well reveal problems warranting new legislation by Congress.

This is a well-recognized ground for authorizing Congress to obtain executive branch information, as the Supreme Court stated in the case of *McGrain v. Daugherty.* Indeed, we have already passed legislation changing the rules for interim appointments of U.S. attorneys as an outgrowth of our investigation so far.

The White House claims that Congress's role is limited because the appointment of U.S. attorneys is done by the President with the Senate's approval. And that is true; however, only because of a law passed by Congress itself.

Under the Constitution, both the courts and the Department itself have recognized that U.S. attorneys are considered inferior of-

ficers, and that rules for their appointment and removal are not vested in the full discretion of the President but can be set by Congress, just as we did recently in passing the law on interim appointments of U.S. attorneys.

Finally, even assuming it is never proven that any laws were broken here, the evidence already clearly indicates an abuse of power and legal authority by this Administration in the U.S. attorneys matter. Investigating and exposing such abuses is clearly within the oversight authority of Congress and justifies obtaining the kind of information that we seek.

And the Supreme Court ruled in the *Watkins* case 50 years ago, Congress has broad power to investigate the Administration of existing laws and to expose corruption, inefficiency, or waste or similar problems within the executive branch.

Regardless of whether laws were broken, it is clearly important for Congress and for the American people to know, for example, whether any of these U.S. attorneys were fired because they refused to bring vote fraud or other cases that Republicans wanted for partisan reasons, or because they pursued corruption or other cases against Republicans.

For all the foregoing reasons, I hereby rule that Ms. Miers's refusal to comply with the subpoena and appear at this hearing and to answer questions and provide relevant documents regarding these concerns cannot be properly justified on executive privilege or related immunity grounds. These reasons are without prejudice to one another and to any other defects that may, after further examination, be found to exist in the asserted privilege.

The Chair would now entertain a motion to uphold the Chair's ruling regarding Ms. Miers's failure to appear and recording her failure to answer questions and provide relevant documents.

Mr. CONYERS. Madam Chairperson, so moved.

Ms. SÁNCHEZ. Does any Member seek recognition to speak on the motion?

Mr. CANNON. Madam Chair?

Ms. SÁNCHEZ. Mr. Cannon is recognized for 5 minutes to speak on the motion.

Mr. CANNON. Thank you.

I appreciate the lengthy statement of purpose behind the motion and have duly noted the many points.

But it seems to me that what this really is going to come down to, and my major personal concern, is the prerogatives of the House and where we go, not only in this matter, but as a body.

Certainly, there are many precedents that you have referred to, eloquently. But fundamentally, the question here is, is there a showing of wrongdoing sufficient that the courts are going to uphold this subpoena? And if we don't have sufficient evidence that will allow the courts to uphold the subpoena, we do huge damage to this body.

So, for instance, historically, there is a dearth of court decisions because the two bodies—that is, the Congress and the White House, the executive body—have worked and pushed and shoved back and forth. That has given this body a great deal of latitude and the ability to get more of what we have wanted.

So, for instance, the White House has offered to have Ms. Miers testify or be interviewed and allow us to search for information that might show some criminality that would give the courts justification for the subpoena that would override the assertion by the White House of executive privilege.

Not having interviewed Ms. Miers leaves us with some questions but with no hard evidence of criminality.

So you have the John Dean case, where there was pretty terrific, obvious, and open and public evidence of criminality, and the White House was going to lose that battle.

If we pursue a subpoena in the context where we don't have evidence of criminality and we lose the battle, we then don't have the stature in the future with any other Administration, Democratic or Republican, to press our concerns and oversight.

Now, the Chair does know that I have been highly critical of the minority when we were in the majority because we didn't do the kind of oversight that I thought we should be doing. I am terrifically concerned that what we do today is going to have a monumental effect on our ability as an institution in the future to do oversight, and that because, unlike the Dean case or many of the other cases, distinguished from virtually all the cases that you have mentioned, what we don't have here is evidence of criminality. And you can't go to the courts essentially and say, "We don't know what we don't know. Therefore, give us a subpoena so we can find out."

I would like to hear—and I would like to yield the gentlelady my remaining time, maybe by way of colloquy so we can discuss this—what is the evidence that we are going to give the courts that will be compelling for them to rule in the favor of this body in support of our subpoena?

Ms. SÁNCHEZ. If the gentleman is concerned about the institution of Congress and our ability to continue to conduct oversight and to have Administrations be responsive to answering for any of these questions, he would be supporting the ruling that witnesses cannot simply refuse to appear before the Subcommittee.

It is unprecedented that they would exert blanket privilege and say, "We don't even need to show up." I think it is——

Mr. CANNON. Well, let me try and refine the question a little bit, because I, generally speaking, agree with that statement.

But here we have the constitutional privilege, which is clear in the Constitution and in the concept of the separation of powers. And so, while we have a right to understand, they have a right to internal discussion.

They, in fact, gave us the opportunity to discuss this with Harriet Miers. We didn't do that in the context of the offer made by the White House.

How do we justify to a court that, "We don't know what we don't know, and therefore let us have carte blanche," when the White House has a very clear constitutional position that needs to be overcome with evidence that we provide?

Mr. CONYERS. Could my friend yield just briefly?

Mr. CANNON. I yield.

Mr. CONYERS. Because I appreciate the tenor of your remarks and the fact that you are concerned about the House and its pre-

rogatives being compromised if we move too rashly. I take as a compliment that you think that we are moving more actively than previous congresses, in the Judiciary.

Mr. CANNON. That is what I intend, by the way.

Mr. CONYERS. You meant that.

Mr. CANNON. I said that complimentarily.

Mr. CONYERS. Sincerely, okay.

Ms. SÁNCHEZ. The time of the gentleman has expired, and I would——

Mr. CONYERS. Could we give him 2 more minutes?

Ms. SÁNCHEZ. I ask unanimous consent.

And, without objection, so ordered.

Mr. CANNON. I continue to yield.

Mr. CONYERS. I just wanted to make this simple point because there will be maybe other discussion.

We can't produce the evidence of misconduct because the witness won't come. I mean, she might have put our minds to rest about what we are concerned about.

So far, there have been no White House contacts with us, and the take-it-or-leave-it offer that you referred to would be unacceptable to a high school student. I mean, no transcripts, no oath, no nothing. We could meet in a pub and have refreshments and do that.

And the final point, of course, is there is no clear, constitutional prerogative of the White House.

And I thank the gentleman for yielding.

Mr. CANNON. I agree with the gentleman that there is no clear, constitutional prerogative. But there is a long history of that prerogative, and my concern is the diminishment of our power in the context of that prerogative.

But let me just—about the meeting in a pub, the fact that they have suggested no transcripts does not mean that, if the witness lies, that she can't be prosecuted. There were no transcripts of the Scooter Libby discussions, among other things.

I think the point of the no transcripts was to maintain as much of the privilege as is possible by the White House and——

Ms. SÁNCHEZ. Mr. Cannon, your time has almost expired.

Mr. CANNON. May I just ask the Chair for clarification? On this motion, is it for an assertion of absolute immunity, or what are we doing here?

Ms. SÁNCHEZ. The motion——

Mr. CANNON. Do we have a written motion?

Ms. SÁNCHEZ. The motion rejects the claims of immunity and executive privilege as a rationale for Ms. Miers not presenting herself for testimony.

And the time of the gentleman has expired.

Does any other Member——

Mr. CANNON. By way of parliamentary inquiry, does——

Ms. SÁNCHEZ. The gentleman will state it.

Mr. CANNON. She has only asserted absolute immunity. Are we talking about general immunity here or——

Ms. SÁNCHEZ. The motion is to sustain the ruling of the Chair on the claim of executive privilege and immunity.

Mr. CANNON. Is that absolute immunity—on the claim of absolute immunity?

Ms. SÁNCHEZ. Yes.

Mr. CANNON. And nothing else?

Ms. SÁNCHEZ. And executive privilege as well. It is all of the assertions that we have received in the correspondence from her and White House counsel Mr. Fielding.

Does any other Member——

Mr. CANNON. Pardon me, Madam Chairman. I am still attempting to clarify this. Is this only as to the assertions in her letter?

Ms. SÁNCHEZ. The assertions in her communications and the communications from White House counsel Mr. Fielding regarding her testimony.

Does that clarify? We have the correspondence we can provide you with.

Mr. CANNON. Yes, I would very much like to have——

Ms. SÁNCHEZ. Or you have received it, I am told.

Mr. CANNON. But we want to know which in particular, if that is——

Ms. SÁNCHEZ. All of them. All of the above. Does that sufficiently answer your inquiry, Mr. Cannon?

Mr. CANNON. This is, of course, a complex issue. We are just, sort of, considering it on our side for a moment, if you would just allow a second.

Ms. SÁNCHEZ. Wonderful. You may consider, and we will move to Mr. Cohen, who seeks recognition.

Mr. Cohen is recognized for 5 minutes.

Mr. COHEN. Thank you, Madam Chair.

Mr. CANNON. Thank you, Madam Chair. Let me just—pardon me, Mr. Cohen. Let me just say that we are satisfied with the Chair's statements.

Ms. SÁNCHEZ. Thank you.

Mr. Cohen, you are recognized for 5 minutes.

Mr. COHEN. Thank you, Madam Chair.

I am indeed only in my first 6 months or so here, and I may be missing something. But I know in my first 6 months here how much of a privilege it is to serve in the United States Congress. This is the highest legislative body in the country and most significant in the world.

And I can't fathom a private citizen getting a subpoena to come before this body and not showing up, the idea that we are all talking about what she might say or what she may not say and what this issues. And what we have got here is an empty chair.

I mean, that is as contemptuous as anybody can be of the government, of the process, of the country, because we represent the country. And when this Committee issues a subpoena, people are supposed to come forth. And if they have a counsel to say that they have a privilege, the counsel is supposed to assert it. They are not supposed to stay home.

And the President—or the emperor—— [Laughter.]

I know Mr. Cannon wasn't necessarily referring to our President when he says, "The emperor has no clothes," but one could not think of anything but the emperor—cannot tell private citizens to

flout the law. And that is apparently what has happened. And that is wrong.

And I support the Chair in bringing this motion, and I support the Chair in bringing a contempt citation. Because this is as contemptuous as you can be of the United States of America.

We just had our Fourth of July holiday. This is the greatest country on the face of the Earth, and you don't not show up. This is a Garry Trudeau cartoon live. We are only missing the feather. That is what we are looking at. And it is embarrassing.

You know, Harriet Miers had 18 minutes of tape that she eliminated. At least after those 18 minutes Harriet Miers was around. This is, you know, Nixon part two.

It is amazing to me, Madam Chair, that anybody can question this as a member of this body. This is an affront to each of us: Republican, Democrat, Libertarian. And I am proud to be a member of this body, and I resent the fact that this lady is not here.

Thank you.

Mr. CANNON. Would the gentleman yield?

Mr. COHEN. I yield the balance of my time back to the Chair.

Ms. SÁNCHEZ. Thank you.

Does any other Member seek recognition?

Mr. Keller is recognized for 5 minutes.

Mr. KELLER. Thank you, Madam Chairman.

I would like to address three points: the first, the policy reason for why we have an executive privilege.

We have an executive privilege for the same reason that we have a husband-wife privilege, that we have an attorney-client privilege. We want folks to be honest and candid with each other. That is the best thing for society.

And let me give you an example why that is important in the context of the White House asserting an executive privilege.

Many of my colleagues on the other side of the aisle believe that the situation in Iraq is going in the wrong direction, and some have said that the President is taking us over a cliff, in their words.

Now, under that scenario, would you prefer to have a situation in the Oval Office with the President surrounded by a group of yes men? Or would you like him to have advisors there who are willing to talk to him truthfully and candidly about their concerns, even if what they have to say is critical or contrary to what he believes?

I believe the best thing for the United States is candor, and that is exactly why we have an executive privilege.

Without the executive privilege, the advisor would be pretty darn hesitant to say or write anything which is critical or contrary to what the President believes, because they would know that it could be used by political opponents in Congress to score cheap political points.

And, of course, such a tactic would be very helpful to the opponents to score political points, but it would also be very hurtful to the institution of the presidency, because it would chill the ability of the President to get honest and candid advice.

That is why President Bush's administration has invoked the executive privilege. It is also why other Democrat administrations have said the same thing.

In the Clinton administration, Attorney General Janet Reno wrote, "Subjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to his constitutionally assigned functions."

In the Carter administration, his assistant attorney general, John Harmon, wrote, "The President and his immediate advisors are absolutely immune from testimonial compulsion by a congressional committee."

And William Rehnquist, when he was working in the Nixon administration wrote, "The President and his immediate advisors not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee."

Now, what are the legal standards here? Under the controlling precedent of the U.S. Supreme Court and the D.C. Court of Appeals, the people seeking this information must specifically demonstrate, number one, that this evidence is not available with due diligence through other means; and number two, that there is a likelihood that the subpoenaed material will contain important evidence.

This blatantly fails both prongs. First, the information sought is easily available through other means with due diligence, because the President has made available Harriet Miers for an interview. The Democrats have decided not to seek that information. Second, there is no proof whatsoever that Harriet Miers likely holds some smoking gun with respect to the U.S. attorney situation. So, in both cases, both prongs are not met.

Now, finally, I heard from Chief Justice Sánchez that, "I hereby rule that executive privilege does not apply." Well, it is not for her to make that decision. The U.S. Supreme Court is the ultimate arbiter of the Constitution, and they have already ruled in *U.S. v. Nixon* that there is an implied privilege under Article II of the Constitution for a President to invoke executive privilege to protect the effectiveness of the executive decision-making process.

And so I suspect after this controversy resolves in a few days, we will see a court challenge and we will have the U.S. Supreme Court rule. And whatever they rule, we will accept it; they are the ultimate arbiters of the Constitution.

But I firmly believe that the President is acting not just to protect himself or his Administration, he is acting to protect the presidency and future Presidents, whatever men and women may hold that position. And that is why I would oppose the motion.

I yield back the balance of my time.

Ms. SÁNCHEZ. Thank you.

Mr. Johnson is recognized for 5 minutes.

Mr. JOHNSON. Yes, I move to strike the last word, Madam Chair.

Ms. SÁNCHEZ. The gentleman is recognized.

Mr. JOHNSON. Madam Chair, I support the motion sustaining the ruling of the Chair.

Today, the Administration and the Republicans on this Committee continue to stonewall this Committee's efforts to investigate the unprecedented en masse firings of almost 10 percent of this

country's United States attorneys, which was done apparently for nefarious reasons.

I don't know what is more stunning: the fact that this Administration maintains little apparent respect for the rule of law or that it continues to operate with a willful disregard for any measure of accountability.

Claiming executive privilege, Harriet Miers—a licensed, practicing attorney, a former White House counsel and a past nominee to the United States Supreme Court—has defied a subpoena. And this impedes our ability as a Committee from exercising our responsibility to provide oversight by investigating apparent White House political influence and interference with the administration of justice by the Bush Justice Department.

The fact is, we still don't know who orchestrated this unprecedented decision to fire these attorneys. And for the Administration to use the executive privilege to cover even the statements of former White House employees is indeed quite disturbing.

But after repeated efforts to obtain communications from the White House and the Republican National Committee, it should not come to anyone's surprise that this Administration is simply trying to hide facts.

The Administration is free to fire U.S. attorneys, but it is not free to obstruct justice, to interfere with corruption cases or manipulate elections by firing U.S. attorneys.

This contemptuous conduct by witness Harriet Miers cannot be tolerated. The witness has shown great respect and disregard for this body by disregarding a lawfully issued subpoena requiring her to tender documents and offer testimony.

For these reasons, Madam Chair, I support the motion sustaining the ruling of the Chair.

Mr. CANNON. Would the gentleman yield?

Mr. JOHNSON. I yield back.

Mr. CANNON. Would the gentleman yield?

Ms. SÁNCHEZ. The gentleman has yielded back his time.

I believe anybody——

Mr. FEENEY. Yes, Madam Chair?

Ms. SÁNCHEZ. Mr. Feeney is recognized for 5 minutes.

Mr. FEENEY. Thank you. I move to strike the last word.

And I think it is useful to remind ourselves why we are here. We are here because of the never-ending saga of Congress investigating the President's dismissal of political appointees.

We have forgotten that President Clinton dismissed 100 percent, not 10 percent, 100 percent of his attorney generals, all 93 of them.

We have forgotten that because we haven't found any wrongdoing. We are going to continue to investigate until we create some wrongdoing.

And I am sort of shocked that the Chair is about to rule and the Committee, apparently a majority, is going to sustain a ruling that overturns Supreme Court precedents and flies in the fact, as Congressman Keller pointed out, of every attorney general who has weighed in on this subject.

There is a presumptive privilege that the President has that surrounds his immediate advisors. And while Article II doesn't specifically mention the words "executive privilege," it is an inherent and

implied and necessary power for any chief executive to be able to get candid advice from his advisors that surround him.

Now, the particular individual that you are trying to get at today to undermine the executive's critical privilege and need to get candid advice happened to be his counsel.

Every American citizen has an attorney-client privilege so that any American can be free to tell candidly the facts to his or her attorney and get candid advice back. That attorney cannot be compelled to testify about the advice that he gave the client; otherwise you would undermine the right to counsel and representation.

What the Committee is about to rule is that the President of the United States cannot share the same attorney-client privilege as any other American has. And you are going to undermine the entire executive branch's prerogatives and need to consult with their own counsel on a candid basis.

What lawyer in the White House would be candid with his or her President if they know that someday, some investigative committee, in front of T.V. cameras, is going to haul that lawyer down here and ask every bit of advice that attorney ever gave to the President of the United States? If I were the President's attorney, I know that I would be preparing for a future T.V. show, not helping the President do his job in a candid manner.

And I find it shocking that, while we have very clear Supreme Court precedent in this area, communications by the President and his immediate advisors—I don't know who could be a more important immediate advisor than the President's counsel—the President and his immediate advisors' communications are presumptively privileged.

And as Congressman Keller laid out, the District Court of Appeals, in "In Re: Sealed Case," has said that to overcome that privilege, Congress has the burden, and you need to establish conclusively two things: that the subpoenaed materials are likely to contain important evidence—there has no crime been alleged here.

There is no criminal case like the Nixon case, which established these important privileges. There is no demonstration that there is any evidence that is going to be produced by Ms. Miers or anybody else's testimony or documents from the White House.

The second prong of that test is that you have to demonstrate that this evidence is not available with due diligence elsewhere.

The White House has continually offered to provide Ms. Miers a chance to speak to this Committee on an informal basis, so that they do not have to invoke executive privilege. They have gone out of their way to show comity and respect for a fellow branch of government.

And despite that, we continue to throw rotten tomatoes at the White House because we do not like the fact that we can't find a crime or wrongdoing on the part of the dismissal of 10—or eight U.S. attorneys.

And I will conclude once again by reminding everybody how we got here. We got here because we are investigating the dismissals of political appointees. President Clinton dismissed 93 of 93, and there were no investigations, no allegations of wrongdoing. The President dismissed eight or 10 and we are still here. And my

guess is we will be here in October and probably March and February of next year.

With that, any additional time I would like to yield to the Ranking Member, Mr. Cannon.

Mr. CANNON. I thank the gentleman.

In the few moments that remain, let me make just a couple of points.

In the first place, some very harsh things were said about Harriet Miers and her contemptuous contempt.

Let me just read from the letter to her by the majority: "A refusal to appear before the Subcommittee tomorrow could subject Ms. Miers to contempt proceedings, including, but not limited to, proceedings under 2 USC Section 194, and the inherent contempt authority of the House of Representatives."

In other words, that is a threat that the sergeant in arms could arrest her while she is here, and that was taken seriously as a threat.

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. CANNON. And, with that, I yield back to the gentleman, who I suspect will yield back to Madam Chair.

Ms. SÁNCHEZ. The time of the gentleman has expired.

Ms. Lofgren is recognized for 5 minutes.

Ms. LOFGREN. Thank you, Madam Chair. And I support the motion.

You know, I was just remembering my efforts several decades ago when I was on the staff of a Member of the Judiciary Committee during the Nixon impeachment inquiry. And, of course, Mr. Conyers was then a Member of the Committee. And it reminded me that Nixon, at one point, famously argued that—I think this is a quote—"Everything the President does is legal."

And it appears that this Administration is apparently adding, "Everything the President, his advisors and his former advisors say or do is privileged," and that is not the state of the law.

I was actually prepared to go through a lengthy discourse on the law, but I think the Chairperson has done that quite well. I was going to get into a little tiff over the, I thought, rather snide and belittling comments of our colleague, calling our Chairperson "Chief Justice Sánchez." But then I finally decided, you know, that is not bad, because she did actually pretty adequately cite the law.

This is an important issue. We know that at some point Ms. Miers suggested firing all 93 U.S. attorneys. We don't really know how we got from 93 to eight, or I would say nine, counting Mr. Graves. And that is a mystery.

Here is the problem: You can fire people for any reason, but you can't fire them for an improper reason.

And the question really is whether the power and authority of the Department of Justice was used on the basis of purely partisan reasons, whether the full weight and authority of the Federal Government to prosecute individuals for crimes or to use the authority of that department—which we entrust as a nation with great discretion and believe must be utilized with tremendous integrity—whether that process was used improperly.

We know from Mr. von Spakovsky's e-mails that there was an attempt to cut deals with other Federal agencies regarding the inter-

pretation of Federal voting laws. We think we know that Mr. Schlozman brought voter fraud prosecutions—well, we do know that he brought the prosecution right before an election, then that he was not truthful to the Senate about who directed him to bring those prosecutions.

There is a shadow over the Department of Justice as a result of all of this. And the Congress has an obligation to determine where this concern about misuse of government authority for partisan purposes leads.

Now, one could assume that Mr. Fielding, acting on the President's behalf, has claimed complete privilege and immunity. He asserts that we may learn nothing and that maybe this whole thing leads farther than Ms. Miers into the White House. I don't know that we can assume that based only on the wildly extravagant assertions of privilege that we have received.

I do know that we would not be discharging our responsibility today if we were to simply drop this.

We seem to be dealing with the most secretive and least transparent Administration in recent memory. I never thought in 1973, 1974, that we would be dealing with a President that made President Nixon look good. But here we are.

We should follow the Nixon precedents, which is what the Chairperson of the Subcommittee has outlined, and proceed as she has outlined. And I do support her motion and thank her for her leadership.

And I yield back.

Ms. SÁNCHEZ. Thank you.

Any other Members seek recognition?

The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Thank you, Madam Chair.

Madam Chair, one of the disadvantages of sitting down here at the end is that just about everything good has already been said. And I want to truly associate myself with Mr. Keller's remarks and Mr. Feeney's remarks. I think that they presented an incredibly compelling rationale for what we are really here for.

The fact is that this is not a partisan issue. In 1999, in an opinion for President Clinton, Janet Reno concluded that the counsel to the President—the counsel to the President, which is what Harriet Miers is now—"serves as an immediate advisor to the President and is therefore immune from compelled congressional testimony."

The rationale for immunity was more accurately and more clearly explained by Theodore Olson in a memo to Deputy Attorney Schmults in 1982: The rationale for immunity is plain. The President is the head of one of the independent branches of the Federal Government. If a congressional Committee could force the President's appearance, fundamental separation-of-power principles, including the President's independence and autonomy from Congress, would be threatened.

As the Office of Legal Counsel has explained, the President is a separate branch of government. He may not compel congressmen to appear before him. What if the President tried to compel one of us to appear at the White House, or maybe just our chief of staff? That would work great.

As a matter of separation of powers, Congress may not compel him to appear before it.

Madam Chair, to breach this immunity power of the President is a recipe for total chaos. And if this Committee goes forward, there will be a court case, and we will be embarrassed, and congressional prerogatives will be diminished.

And every time we have asked any of the witnesses here of a pertinent nature if there was ever any influence from the White House to fire someone or threaten to fire someone as a U.S. attorney because of justice issues or because of trying to affect a particular case, every one of them have stated categorically no.

And this is just outrageous, and I think that we really embarrass ourselves today.

And, with that, I am going to go ahead and yield to the Ranking Member.

Mr. CANNON. I thank the gentleman.

First of all, I would like to ask unanimous consent to admit into the record a series of documents. One is the July 10, 2007, memo from OLC; the July 10 and July 9 and the June 28, 2007, White House counsel letters; June 27, 2007, acting Attorney General opinion; a September 16, 1999, Attorney General opinion; and a February 8, 1979, White House counsel opinion.

Ms. SÁNCHEZ. Without objection, so ordered.

[The information referred to follows:]

THE WHITE HOUSE

WASHINGTON

July 10, 2007

Dear Mr. Manning:

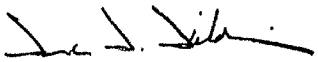
On behalf of your client, former Counsel to the President Harriet E. Miers, you have asked us whether, in view of the President's assertion of Executive Privilege over Ms. Miers' testimony relating to the U.S. Attorneys matter, she must appear at the House Judiciary Committee meeting scheduled for Thursday, July 12, 2007.

We have been advised by the Department of Justice that Ms. Miers has absolute immunity from compelled Congressional testimony as to matters occurring while she was a senior advisor to the President. *See* Attachment A (*Memorandum for the Counsel to the President re: Immunity of Former Counsel to the President from Compelled Congressional Testimony*, dated July 10, 2007). As the Department's opinion points out, "[t]he President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee." *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno). That immunity arises from the President's position as head of the Executive Branch and from Ms. Miers' former position as a senior advisor to the President. Ms. Miers cannot be compelled to appear before Congress because "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to his constitutionally assigned functions." 23 Op. O.L.C. at 5. As Congress is aware, this constitutional immunity exists to protect the institution of the Presidency and, as the Department's opinion illustrates, this position has been shared by numerous Administrations, Republican and Democratic, for more than 60 years.

Therefore, in view of this constitutional immunity, I respectfully request that you inform Ms. Miers that the President has directed her not to appear at the House Judiciary Committee hearing on Thursday, July 12, 2007.

Please contact me if you have any questions or would like to discuss these issues.

Sincerely,



Fred F. Fielding
Counsel to the President

George T. Manning, Esq.
Noel J. Francisco, Esq.
Jones Day
51 Louisiana Ave., NW
Washington, DC 20001

ATTACHMENT

U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

July 10, 2007

MEMORANDUM FOR THE COUNSEL TO THE PRESIDENT

Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony

You have asked whether Harriet Miers, the former Counsel to the President, is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the House of Representatives. The Committee, we understand, seeks testimony from Ms. Miers about matters arising during her tenure as Counsel to the President and relating to her official duties in that capacity. Specifically, the Committee wishes to ask Ms. Miers about the decision of the Justice Department to request the resignations of several United States Attorneys in 2006. *See* Letter for Harriet E. Miers from the Hon. John Conyers, Jr., Chairman, House Committee on the Judiciary (June 13, 2007). For the reasons discussed below, we believe that Ms. Miers is immune from compulsion to testify before the Committee on this matter and, therefore, is not required to appear to testify about this subject.

Since at least the 1940s, Administrations of both political parties have taken the position that "'the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.'" *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno) (quoting Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977)). This immunity "is absolute and may not be overborne by competing congressional interests." *Id.*

Assistant Attorney General William Rehnquist succinctly explained this position in a 1971 memorandum:

> The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.

Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("*Rehnquist Memo*"). In a 1999 opinion for President Clinton, Attorney General Reno concluded that the Counsel to the President "serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony." *Assertion of Executive Privilege*, 23, Op. O.L.C. at 4.

The rationale for the immunity is plain. The President is the head of one of the independent Branches of the federal Government. If a congressional committee could force the President's appearance, fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened. As the Office of Legal Counsel has explained, "The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, at 2 (July 29, 1982) ("*Olson Memorandum*").

The same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers. Given the numerous demands of his office, the President must rely upon senior advisers. As Attorney General Reno explained, "in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.[1] Thus, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned functions." *Id.*; *see also Olson Memorandum* at 2 ("The President's close advisors are an extension of the President.").[2]

The fact that Ms. Miers is a former Counsel to the President does not alter the analysis. Separation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers. Former President Truman explained the need for continuing immunity in November 1953, when he refused to comply with a subpoena directing him to appear before the House Committee on Un-American Activities. In a letter to that committee, he warned that "if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President." *Texts of Truman Letter and Velde Reply*, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 12, 1953 letter by President Truman). "The doctrine

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[1] In an analogous context, the Supreme Court held that the immunity provided by the Speech or Debate Clause of the Constitution to Members of Congress also applies to congressional aides, even though the Clause refers only to "Senators and Representatives." U.S. Const. art I, § 6, cl. 1. In justifying expanding the immunity, the Supreme Court reasoned that "the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Any other approach, the Court warned, would cause the constitutional immunity to be "inevitably . . . diminished and frustrated." *Id.* at 617.

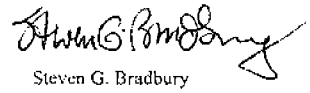
[2] *See also History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 771-72 (1982) (documenting how President Truman directed Assistant to the President John Steelman not to respond to a congressional subpoena seeking information about confidential communications between the President and one of his "principal aides").

would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes." *Id.* In a radio speech to the Nation, former President Truman further stressed that it "is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President." *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. Times, Nov. 17, 1953, at 26.

Because a presidential adviser's immunity is derivative of the President's, former President Truman's rationale directly applies to former presidential advisers. We have previously opined that because an "immediate assistant to the President may be said to serve as his alter ego . . . . the same considerations that were persuasive to former President Truman would apply to justify a refusal to appear [before a congressional committee] by . . . a former [senior presidential adviser], if the scope of his testimony is to be limited to his activities while serving in that capacity." Memorandum for the Counsel to the President from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972).

Accordingly, we conclude that Ms. Miers is immune from compelled congressional testimony about matters, such as the U.S. Attorney resignations, that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity, and therefore she is not required to appear in response to a subpoena to testify about such matters.

Please let me know if we may be of further assistance.



Steven G. Bradbury
Principal Deputy Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

July 9, 2007

Dear Chairman Leahy and Chairman Conyers:

I write in response to your letter of June 29, 2007.

Let me begin by conveying a note of concern over your letter's tone and apparent direction in dealing with a situation of this gravity. We are troubled to read the letter's charge that the President's "assertion of Executive Privilege belies any good faith attempt to determine where privilege truly does and does not apply." Although we each speak on behalf of different branches of government, and perhaps for that reason cannot help having different perspectives on the matter, it is hoped you will agree, upon further reflection, that it is incorrect to say that the President's assertion of Executive Privilege was performed without "good faith."

As the letter from the Acting Attorney General explained in considerable detail, the assertion of Executive Privilege here is intended to protect a fundamental interest of the Presidency: the necessity that a President receive candid advice from his advisors and that those advisors be able to communicate freely and openly with the President, with each other, and with others inside and outside the Executive Branch. In the present setting, where the President's authority to appoint and remove U.S. Attorneys is at stake, the institutional interest of the Executive Branch is very strong. The Acting Attorney General's letter clearly identifies the subject matter of the deliberations and communications at issue and provides an extensive treatment of the issues implicated by the subpoenas and the legal basis for the President's assertion of Executive Privilege.

Your letter does not dispute these principles. It does not take issue with the practical fact that, in order to fulfill his constitutional functions, the President, no less than Members of Congress and federal judges, needs the protection of a principle that shields his close advisors from open-ended inquiry by another branch of government. The letter does not challenge the exclusive character of the President's appointment and removal power, nor does the letter attempt to establish a constitutional basis for the Committees' inquiry into this matter. Although the letter sets forth certain generalizations relating to Congress's investigatory authority, it does not explain how that authority extends to White House communications about the possible dismissal and replacement of U.S. Attorneys. And, even if Congress's authority might be deemed to extend that far, the question remains whether the Committees have demonstrated that the information sought here is demonstrably critical to the responsible fulfillment of the Committees' legislative functions.

In response to your inquiry concerning the mechanics of the President's assertion of the privilege, you may be assured that the President's assertion here comports with prior practices in similar contexts, and that it has been appropriately documented. I do hope that your Committees

will appreciate that I write on behalf of the President and therefore understand that my letter of June 28, 2007 precisely expresses the President's position on this matter.

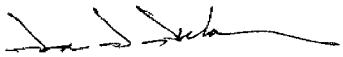
Your letter also "direct[s]" the President to provide certain additional information to the Committees before 10:00 a.m. on July 9, 2007. The letter goes on to say that a very detailed "privilege log" is necessary "to facilitate ruling on" claims of Executive Privilege and your letter thereafter announces an intention to "take the necessary steps to rule on [the President's executive] privilege claims." We are aware of no authority by which a congressional committee may "direct" the Executive to undertake the task of creating and providing an extensive description of every document covered by an assertion of Executive Privilege. Given the descriptions of the materials in question that have already been provided, this demand is unreasonable because it represents a substantial incursion into Presidential prerogatives and because, in view of the open-ended scope of the Committees' inquiry, it would impose a burden of very significant proportions.

One final observation underscores the preordained futility of any White House compliance with this demand. When your letter states that your Committees "will take the necessary steps to rule on [the President's] privilege claims and appropriately enforce our subpoenas" and that *the Committees will enforce their subpoenas "[w]hether or not [they] have the benefit of the information"* (emphasis added), only one conclusion is evident: the Committees have already prejudged the question, regardless of the production of any privilege log. In such circumstances, we will not be undertaking such a project, even as a further accommodation.

As noted in my previous letter, as we remain at the present impasse, the President feels compelled to assert Executive Privilege with respect to the testimony sought from Sara M. Taylor and Harriet E. Miers covering White House consideration, deliberations or communications, whether internal or external, relating to the possible dismissal or appointment of United States Attorneys, including consideration of possible responses to congressional and media inquiries on the United States Attorneys matter, consistent with the advice provided by the Acting Attorney General. The President has instructed me to notify you and the counsel for Ms. Taylor and Ms. Miers of his decision and to inform counsel of his direction to Ms. Taylor and Ms. Miers not to provide this testimony.

I renew again the President's offer: in the absence of subpoenas he remains willing to provide you with information as previously offered. And I likewise convey the President's request that further interbranch relations in this matter be distinguished by respect for the constitutional principles of both institutions and marked by a presumption of goodwill on all sides.

Respectfully yours,



Fred F. Fielding
Counsel to the President

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

The Honorable John Conyers, Jr.
United States House of Representatives
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

June 28, 2007

Dear Chairman Leahy and Chairman Conyers:

On June 13, 2007, the White House received two subpoenas from your Committees requesting documents relating to the replacement of United States Attorneys, calling for the documents to be produced by June 28, 2007. I write at the direction of the President to advise and inform you that the President has decided to assert Executive Privilege and therefore the White House will not be making any production in response to these subpoenas for documents. In addition, Chairman Leahy subpoenaed documents from former Deputy Assistant to the President and Director of Political Affairs Sara M. Taylor, with the same return date of June 28, 2007. Chairman Conyers has subpoenaed documents from former Counsel to the President Harriet E. Miers, with a return date of July 12, 2007. Counsel for Ms. Taylor and Ms. Miers have been informed of the President's decision to assert Executive Privilege and have been asked to relay to Ms. Taylor and Ms. Miers a direction from the President not to produce any documents.

With respect, it is with much regret that we are forced down this unfortunate path which we sought to avoid by finding grounds for mutual accommodation. We had hoped this matter could conclude with your Committees receiving information in lieu of having to invoke Executive Privilege. Instead, we are at this conclusion.

At the outset of this controversy, the President attempted to chart a course of cooperation. It was his intent that Congress receives information in a manner that accommodated Presidential prerogatives. The Department of Justice, for its part, has produced or made available for review more than 8,500 pages of documents, including scores of documents containing communications with White House personnel. In addition, the Attorney General, Deputy Attorney General, Principal Associate Deputy Attorney General, Attorney General's former Chief of Staff, former White House Liaison, and other senior Department officials have testified in public hearings and, in some instances, submitted to interviews with Committee staff. As a result, your Committees have received an extraordinary amount of information regarding the U.S. Attorney replacement issue by way of accommodation.

In keeping with the established tradition of Congress and the Executive Branch working together to accommodate each others' interests, the President was willing to go even further in response to your inquiries. At his direction, we proposed and offered to provide you with documents containing communications between the White House and Department of Justice regarding the request for the resignation of the U.S. Attorneys in question, as well as documents containing communications on the same subject between the White House staff and third parties, including Congress. We also offered to make available for interviews the President's former Counsel; current Deputy Chief of Staff

and Senior Advisor; Deputy Counsel; former Director of Political Affairs; and a Special Assistant to the President in the Office of Political Affairs.

The President's offer reflected his desire to cooperate and accommodate. It was designed to provide your Committees with additional documents, and the rare opportunity to participate in interviews and question close advisors to the President about the matters under inquiry. With the benefit not only of the enormous amount of information you received from the Department of Justice, but also additional White House documents, you would have been able to further inquire about these matters.

To be sure, the President's offer also took care to protect fundamental interests of the Presidency and the constitutional principle of separation of powers. Specifically, the President was not willing to provide your Committees with documents revealing internal White House communications or to accede to your desire for senior advisors to testify at public hearings. The reason for these distinctions rests upon a bedrock Presidential prerogative: for the President to perform his constitutional duties, it is imperative that he receive candid and unfettered advice and that free and open discussions and deliberations occur among his advisors and between those advisors and others within and outside the Executive Branch. Presidents would not be able to fulfill their responsibilities if their advisors—on fear of being commanded to Capitol Hill to testify or having their documents produced to Congress—were reluctant to communicate openly and honestly in the course of rendering advice and reaching decisions. These confidentiality interests are especially strong in situations like the present controversy, where the inquiry seeks information relating to the President's powers to appoint and remove U.S. Attorneys – authority granted exclusively to the President by the Constitution.

The principles at stake here are of the utmost importance and find meaningful parallels in any number of other settings. For example, Messrs. Chairmen, I am sure you would wish to protect the confidentiality of deliberations between Members of Congress and their staff. So, too, do I believe that most judges would be quick to stress the importance to their decision-making processes of maintaining the confidentiality of their deliberations with their colleagues and law clerks. So, too, here: for the Presidency to operate consistent with the Constitution's design, Presidents must be able to depend upon their advisors and other Executive Branch officials speaking candidly and without inhibition while deliberating and working to advise the President. The doctrine of Executive Privilege exists, at least in part, to protect such communications from compelled disclosure to Congress, especially where, as here, the President's interests in maintaining confidentiality far outweigh Congress's interests in obtaining deliberative White House communications. I refer you to the attached opinion from the Acting Attorney General to the President, discussing this in further detail as well as informing him as to the appropriateness of an assertion of Executive Privilege in these circumstances.

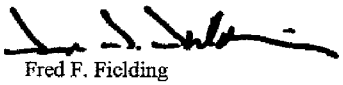
Further, it remains unclear precisely how and why your Committees are unable to fulfill your legislative and oversight interests without the unfettered requests you have made in your subpoenas. Put differently, there is no demonstration that the documents and

information you seek by subpoena are critically important to any legislative initiatives that you may be pursuing or intending to pursue.

By contrast, the President has frequently, plainly, and completely explained that his position, and now his decision, is rooted in a need to protect the institution of the Presidency. The President's assertion of Executive Privilege is not designed to shield information in a particular situation, but to help protect the ability of Presidents to ensure that decisions reflect and benefit from the exchange of informed and diverse viewpoints and open and frank deliberations. Issuing subpoenas and seeking to compel the disclosure of information in lieu of accepting the President's reasonable offer of accommodation has led to confrontation.

Consistent with the analysis of the Acting Attorney General, the President is satisfied that the testimony sought from Sara Taylor and Harriet Miers is subject to a valid claim of Executive Privilege and is prepared to assert the Privilege with respect to that testimony if the matter cannot be resolved. However, the President has further instructed me to confirm that while unwilling to submit to subpoenas compelling the production of documents and testimony, in the absence of any subpoenas he continues to be willing to provide you with information as previously offered. In short, the President requests that your inquiry proceed in a balanced manner, respectful of important constitutional principles of both institutions, rather than through confrontation. It is hoped you will reconsider your present position, accept the President's offer, and bring closure to this controversy so we may all return to more productive activity on behalf of the Nation.

Respectfully yours,



Fred F. Fielding
Counsel to the President

Attachment

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

The Honorable John Conyers
United States House of Representatives
Washington, D.C. 20515

U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

June 27, 2007

The President
The White House
Washington, D.C. 20500

Dear Mr. President,

The Senate Committee on the Judiciary and the House Committee on the Judiciary recently issued five subpoenas in connection with their inquiries into the resignation of several United States Attorneys in 2006. Broadly speaking, four of the five subpoenas seek documents in the custody of current or former White House officials ("White House documents") concerning the dismissal and replacement of the U.S. Attorneys. In addition, two of the five subpoenas demand testimony about these matters from two former White House officials, Harriet Miers, former Counsel to the President, and Sara Taylor, former Deputy Assistant to the President and Director of Political Affairs.

You have requested my legal advice as to whether you may assert executive privilege with respect to the subpoenaed documents and testimony concerning the categories of information described in this letter. It is my considered legal judgment that you may assert executive privilege over the subpoenaed documents and testimony.

I.

The documents that the Office of the Counsel to the President has identified as responsive to the subpoenas fall into three broad categories related to the possible dismissal and replacement of U.S. Attorneys, including congressional and media inquiries about the dismissals: (1) internal White House communications; (2) communications by White House officials with individuals outside the Executive Branch, including with individuals in the Legislative Branch; and (3) communications between White House officials and Department of Justice officials. The Committees' subpoenas also seek testimony from Ms. Miers and Ms. Taylor concerning the same subject matters, and the assertion of privilege with respect to such testimony requires the same legal analysis.

The Office of Legal Counsel of the Department of Justice has reviewed the documents identified by the Counsel to the President as responsive to the subpoenas and is satisfied that the documents fall within the scope of executive privilege. The Office further believes that Congress's interests in the documents and related testimony would not be sufficient to override an executive privilege claim. For the reasons discussed below, I concur with both assessments.

A.

The initial category of subpoenaed documents and testimony consists of internal White House communications about the possible dismissal and replacement of U.S. Attorneys. Among other things, these communications discuss the wisdom of such a proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals. These types of internal deliberations among White House officials fall squarely within the scope of executive privilege. One of the underlying purposes of the privilege is to promote sound decisionmaking by ensuring that senior Government officials and their advisers speak frankly and candidly during the decisionmaking process. As the Supreme Court has explained, "A President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see also* Letter for the President from John Ashcroft, Attorney General, *Re: Assertion of Executive Privilege with Respect to Prosecutorial Documents* at 2 (Dec. 10, 2001) (available at http://www.usdoj.gov/ olc/executiveprivilege/htm) ("The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations."); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 2 (1999) (opinion of Attorney General Janet Reno) ("[N]ot only does executive privilege apply to confidential communications to the President, but also to 'communications between high Government officials and those who advise and assist them in the performance of their manifold duties.'") (quoting *Nixon*, 418 U.S. at 705). These confidentiality interests are particularly strong where, as here, the communications may implicate a "quintessential and nondelegable Presidential power," such as the authority to nominate or to remove U.S. Attorneys. *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997); *Assertion of Executive Privilege*, 23 Op. O.L.C. at 2-3 (finding that executive privilege protected Department and White House deliberations related to decision to grant clemency).

Under D.C. Circuit precedent, a congressional committee may not overcome an assertion of executive privilege unless it establishes that the documents and information are "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of Congress's legitimate legislative responsibilities. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution.").

As a threshold matter, it is not at all clear that internal White House communications about the possible dismissal and replacement of U.S. Attorneys fall within the scope of *McGrain* and its progeny. The Supreme Court has held that Congress's oversight powers do not reach "matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). The Senate has the authority to approve or reject the appointment of officers whose appointment by law requires the advice and consent of the Senate (which has been the case for U.S. Attorneys since the founding of the Republic), but it is for the President to decide whom to nominate to such positions and whether to remove such officers once appointed. Though the President traditionally consults

with Members of Congress about the selection of potential U.S. Attorney nominees as a matter of courtesy or in an effort to secure their confirmation, that does not confer upon Congress authority to inquire into the deliberations of the President with respect to the exercise of his power to remove or nominate a U.S. Attorney.[1] Consequently, there is reason to question whether Congress has oversight authority to investigate deliberations by White House officials concerning proposals to dismiss and replace U.S. Attorneys, because such deliberations necessarily relate to the potential exercise by the President of an authority assigned to him alone. *See Assertion of Executive Privilege*, 23 Op. O.L.C. at 3-4 ("[I]t appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision [because the decision to grant clemency is an exclusive Executive Branch function]."); *Scope of Congressional Oversight and Investigative Power With Respect to the Executive Branch*, 9 Op. O.L.C. 60, 62 (1985) (congressional oversight authority does not extend to "functions fall[ing] within the Executive's exclusive domain").

In any event, even if the Committees have oversight authority, there is no doubt that the materials sought qualify for the privilege and the Committees have not demonstrated that their interests justify overriding a claim of executive privilege as to the matters at issue. The House Committee, for instance, asserts in its letter accompanying the subpoenas that "[c]ommunications among the White House staff involved in the U.S. Attorney replacement plan are obviously of paramount importance to any understanding of how and why these U.S. Attorneys were selected to be fired." Letter for Fred F. Fielding, Counsel to the President, from the Hon. John Conyers Jr., Chairman, House Judiciary Committee at 2 (June 13, 2007). But the Committees never explain how or why this information is "demonstrably critical" to any "legislative judgments" Congress might be able to exercise in the U.S. Attorney matter. *Senate Select Comm.*, 498 F.2d at 732. Broad, generalized assertions that the requested materials are of public import are simply insufficient under the "demonstrably critical" standard. Under *Senate Select Committee*, to override a privilege claim the Committees must "point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials." *Id.* at 733.

Moreover, any legitimate oversight interest the Committees might have in internal White House communications about the proposal is sharply reduced by the thousands of documents and dozens of hours of interviews and testimony already provided to the Committees by the Department of Justice as part of its extraordinary effort at accommodation.[2] This information

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[1] *See, e.g.*, *Public Citizen v. Department of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring) ("[T]he Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment."); *Myers v. United States*, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

[2] During the past three months, the Department has released or made available for review to the Committees approximately 8,500 pages of documents concerning the U.S. Attorney resignations. The Department

has given the Committees extraordinary—and indeed, unprecedented—insight into the Department's decision to request the U.S. Attorney resignations, including the role of White House officials in the process. *See, e.g., History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 758-59, 767 (1982) (documenting refusals by Presidents Jackson, Tyler, and Cleveland to provide information related to the decision to remove Executive Branch officials, including a U.S. Attorney).

In a letter accompanying the subpoenas, the House Committee references the alleged "written misstatements" and "false statements" provided by the Department to the Committees about the U.S. Attorney dismissals. *See* Letter for Fred F. Fielding, Counsel to the President, from the Hon. John Conyers Jr., Chairman, House Judiciary Committee at 2 (June 13, 2007). The Department has recognized the Committees' interest in investigating the extent to which Department officials may have provided inaccurate or incomplete information to Congress. This interest does not, however, justify the Committees' demand for White House documents and information about the U.S. Attorney resignations. Officials in the Department, not officials in the White House, presented the challenged statements, and as noted, the Department has provided unprecedented information to Congress concerning, *inter alia*, the process that led to the Department's statements. The Committees' legitimate oversight interests therefore have already been addressed by the Department, which has sought to provide the Committees with all documents related to the preparation of any inaccurate information given to Congress.

Given the amount of information the Committees already possess about the Department's decision to remove the U.S. Attorneys (including the involvement of White House officials), there would be little additional legislative purpose served by revealing internal White House communications about the U.S. Attorney matter, and, in any event, none that would outweigh the

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has included in its productions many sensitive, deliberative documents related to the resignation requests, including e-mails and other communications with White House officials. The Committees' staffs have also interviewed, at length and on the record, a number of senior Department officials, including, among others, the Deputy Attorney General, the Acting Associate Attorney General, the Attorney General's former chief of staff, the Deputy Attorney General's chief of staff, and two former Directors of the Executive Office for U.S. Attorneys. During these interviews, the Committees' staffs explored in great depth all aspects of the decision to request the U.S. Attorney resignations, including the role of White House officials in the decisionmaking process. In addition, the Attorney General, the Deputy Attorney General, the Principal Associate Deputy Attorney General, the Attorney General's former chief of staff, and the Department's former White House Liaison have testified before one or both of the Committees about the terminations and explained, under oath, their understanding of such involvement.

The President has also made significant efforts to accommodate the Committees' needs. More than three months ago, the Counsel to the President proposed to make senior White House officials, including Ms. Miers, available for informal interviews about "(a) communications between the White House and persons outside the White House concerning the request for resignations of the U.S. Attorneys in question; and (b) communications between the White House and Members of Congress concerning those requests," and he offered to give the Committees access to White House documents on the same subjects. Letter for the Hon. Patrick Leahy, United States Senate, et al., from Fred F. Fielding, Counsel to the President at 1-2 (Mar. 20, 2007). The Committees declined this offer. The Counsel to the President has since reiterated this offer of accommodation but to no avail. *See* Letter for the Hon. Patrick Leahy, United States Senate, and John Conyers Jr., United States House of Representatives, from Fred F. Fielding, Counsel to the President at 1 (Apr. 12, 2007); Letter for the Hon. Patrick Leahy, United States Senate, the Hon. John Conyers Jr., United States House of Representatives, and the Hon. Linda T. Sanchez, the United States House of Representatives, from Fred F. Fielding, Counsel to the President at 1-2 (June 7, 2007).

President's interest in maintaining the confidentiality of such internal deliberations. *See Senate Select Comm.*, 498 F.2d at 732-33 (explaining that a congressional committee may not obtain information protected by executive privilege if that information is available through non-privileged sources). Consequently, I do not believe that the Committees have shown a "demonstrably critical" need for internal White House communications on this matter.

B.

For many of the same reasons, I believe that communications between White House officials and individuals outside the Executive Branch, including with individuals in the Legislative Branch, concerning the possible dismissal and replacement of U.S. Attorneys, and possible responses to congressional and media inquiries about the dismissals, fall within the scope of executive privilege. Courts have long recognized the importance of information gathering in presidential decisionmaking. *See, e.g., In re Sealed Case*, 121 F.3d at 751-52 (describing role of investigation and information collection in presidential decisionmaking). Naturally, in order for the President and his advisers to make an informed decision, presidential aides must sometimes solicit information from individuals outside the White House and the Executive Branch. This need is particularly strong when the decision involved is whether to remove political appointees, such as U.S. Attorneys, who serve in local districts spread throughout the United States. In those situations, the President and his advisers will be fully informed only if they solicit and receive advice from a range of individuals. Yet the President's ability to obtain such information often depends on the provider's understanding that his frank and candid views will remain confidential. *See Nixon*, 418 U.S. at 705 ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."); *In re Sealed Case*, 121 F.3d at 751 ("In many instances, potential exposure of the information in the possession of an adviser can be as inhibiting as exposure of the actual advice she gave to the President. Without protection of her sources of information, an adviser may be tempted to forego obtaining comprehensive briefings or initiating deep and intense probing for fear of losing deniability.").

That the communications involve individuals outside the Executive Branch does not undermine the President's confidentiality interests. The communications at issue occurred with the understanding that they would be held in confidence, and they related to decisionmaking regarding U.S. Attorney removals or replacements or responding to congressional or media inquiries about the U.S. Attorney matter. Under these circumstances, the communications retain their confidential and Executive Branch character and remain protected. *See In re Sealed Case*, 121 F.3d at 752 ("Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the [presidential communications component of executive] privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves.").[3]

[3] Moreover, the Department has previously conveyed to the Committees its concern that there would be a substantial inhibiting effect on future informal confidential communications between Executive Branch and Legislative Branch representatives if such communications were to be produced in the normal course of congressional oversight.

Again, the Committees offer no compelling explanation or analysis as to why access to confidential communications between White House officials and individuals outside the Executive Branch is "demonstrably critical to the responsible fulfillment of the [Committees'] functions." *Senate Select Comm.*, 498 F.2d at 731. Absent such a showing, the Committees may not override an executive privilege claim.

C.

The final category of documents and testimony concerns communications between the Department of Justice and the White House concerning proposals to dismiss and replace U.S. Attorneys and possible responses to congressional and media inquiries about the U.S. Attorney resignations. These communications are deliberative and clearly fall within the scope of executive privilege.[4] *See supra* at 2. In this case, however, the Department has already disclosed to Congress a substantial amount of documents and information related to White House communications about the U.S. Attorney matter. Consequently, in assessing whether it would be legally permissible to assert executive privilege, it is useful to divide this category into three subcategories, each with slightly different considerations: (1) documents and testimony related to communications between the Department and White House officials that have not already been disclosed by the Department; (2) documents concerning White House-Department communications previously disclosed to the Committees by the Department; and (3) testimony from current or former White House officials (such as the testimony sought from Ms. Miers or Ms. Taylor) about previously disclosed White House-Department communications. After carefully considering the matter, I believe there is a strong legal basis for asserting executive privilege over each of these subcategories.

The President's interest in protecting the confidentiality of documents and information about undisclosed White House-Department communications is powerful. Most, if not all, of these communications concern either potential replacements for the dismissed U.S. Attorneys or possible responses to inquiries from Congress and the media about the U.S. Attorney resignations. As discussed above, the President's need to protect deliberations about the selection of U.S. Attorneys is compelling, particularly given Congress's lack of legislative authority over the nomination or replacement of U.S. Attorneys. *See In re Sealed Case*, 121 F.3d at 751-52. The President also has undeniable confidentiality interests in discussions between White House and Department officials over how to respond to congressional and media inquiries about the U.S. Attorney matter. As Attorney General Janet Reno advised the President in 1996, the ability of the Office of the Counsel to the President to assist the President in responding to investigations "would be significantly impaired" if a congressional committee could review "confidential documents . . . prepared in order to assist the President and his staff in responding to an investigation by the [committee] seeking the documents." *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996). Despite extensive communications with officials at the Department and the White House, the

[4] To the extent they exist, White House communications approving the Department's actions by or on behalf of the President would receive particularly strong protection under executive privilege. *See, e.g., In re Sealed Case*, 121 F.3d at 752-53 (describing heightened protection provided to presidential communications).

Committees have yet to articulate any "demonstrably critical" oversight interest that would justify overriding these compelling confidentiality concerns.

There are also legitimate reasons to assert executive privilege over White House documents reflecting White House-Department communications that have been previously disclosed to the Committees by the Department. As discussed, these documents are deliberative in nature and clearly fall within the scope of executive privilege. The Department's accommodation with respect to some White House-Department communications does not constitute a waiver and does not preclude the President from asserting executive privilege with respect to White House materials or testimony concerning such communications. The D.C. Circuit has recognized that each Branch has a "constitutional mandate to seek optimal accommodation" of each other's legitimate interests. *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). If the Department's provision of documents and information to Congress, as part of the accommodation process, eliminated the President's ability to assert privilege over White House documents and information concerning those same communications, then the Executive Branch would be hampered, if not prevented, from engaging in future accommodations. Thus, in order to preserve the constitutional process of interbranch accommodation, the President may claim privilege over documents and information concerning the communications that the Department of Justice has previously disclosed to the Committees. Indeed, the relevant legal principles should and do encourage, rather than punish, such accommodation by recognizing that Congress's need for such documents is reduced to the extent similar materials have been provided voluntarily as part of the accommodation process.

Here, the Committees' need for White House documents concerning these communications is weak. The Committees already possess the relevant communications, and it is well established that Congress may not override executive privilege to obtain materials that are cumulative or that could be obtained from an alternative source. *See Senate Select Comm.*, 498 F.2d at 732-33 (holding public release of redacted audio tape transcripts "substantially undermined" any legislative need for tapes themselves); *Assertion of Executive Privilege*, 23 Op. O.L.C. at 3-4 (finding that documents were not demonstrably critical where Congress could obtain relevant information "through non-privileged documents and testimony"). Accordingly, the Committees do not have a "demonstrably critical" need to collect White House documents reflecting previously disclosed White House-Department communications.

Finally, the Committees have also failed to establish the requisite need for testimony from current or former White House officials about previously disclosed White House-Department communications. Congressional interest in investigating the replacement of U.S. Attorneys clearly falls outside its core constitutional responsibilities, and any legitimate interest Congress may have in the disclosed communications has been satisfied by the Department's extraordinary accommodation involving the extensive production of documents to the Committees, interviews, and hearing testimony concerning these communications. As the D.C. Circuit has explained, because "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability," Congress will rarely need or be entitled to a "precise reconstruction of past events" to carry out its legislative

responsibilities. *Senate Select Comm.*, 498 F.2d at 732.[5] On the other hand, the White House has very legitimate interests in protecting the confidentiality of this information because it would be very difficult, if not impossible, for current or former White House officials testifying about the disclosed communications to separate in their minds knowledge that is derived from the Department's disclosures from knowledge that is derived from other privileged sources, such as internal White House communications. Consequently, given the President's strong confidentiality interests and the Committees' limited legislative needs, I believe that White House information about previously disclosed White House-Department communications may properly be subject to an executive privilege claim.

II.

In sum, I believe that executive privilege may properly be asserted with respect to the subpoenaed documents and testimony as described above.

Sincerely,

Paul D. Clement
Solicitor General and Acting Attorney General

[5] *See also Senate Select Comm.*, 498 F.2d at 732 (explaining that Congress "frequently legislates on the basis of conflicting information provided in its hearings"); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 159 (1989) ("Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials.").

Assertion of Executive Privilege With Respect To Clemency Decision

Executive privilege may properly be asserted in response to a congressional subpoena seeking documents and testimony concerning the deliberations in connection with President's decision to offer clemency to sixteen individuals.

Executive privilege may properly be asserted in response to a congressional subpoena seeking testimony by the Counsel to the President concerning the performance of official duties on the basis that the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.

September 16, 1999

THE PRESIDENT
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have requested my legal advice as to whether executive privilege may properly be asserted in response to several subpoenas issued by the Committee on Government Reform and Oversight of the House of Representatives to the White House, the Department of Justice, and certain White House and Department officials seeking documents and testimony concerning your decision to offer clemency to sixteen individuals.

I.

The documents and testimony proposed to be subject to a claim of executive privilege consist of (1) advice and other deliberative communications to the President and (2) deliberative documents and communications generated within and between the Department of Justice and the White House in connection with the preparation of that advice. Documents falling into the former category consist of memoranda and other documents submitted to you by officials and components of the Department and offices within the White House concerning the clemency decision. The documents falling into the latter category include documents containing confidential advice, analysis, recommendations and statements of position that the Pardon Attorney generated in connection with the clemency review, or that other executive branch officials and employees submitted to the offices of the Pardon Attorney or the Deputy Attorney General in connection with that review. For the reasons set forth below, it is my legal judgment that executive privilege may properly be asserted with respect to the foregoing documents and with respect to testimony by Department and White House officials concerning the deliberations in connection with your clemency decision.

Advice to the President and other deliberative communications and materials fall within the scope of executive privilege. See generally United States v. Nixon, 418 U.S. 683, 705-13 (1974); Nixon v. Administrator of General Services, 433 U.S. 425, 446-55 (1977). The Supreme Court has recognized

> the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling

> to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

United States v. Nixon, 418 U.S. at 708. It is thus well established that not only does executive privilege apply to confidential communications to the President, but also to "communications between high Government officials and those who advise and assist them in the performance of their manifold duties." Id. at 705.

The White House staff and the Department of Justice act as confidential advisors to the President as part of the clemency review process, and executive privilege has long been understood to protect confidential advice generated during that process. Under controlling case law, in order to justify a demand for information protected by executive privilege, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See McGrain v. Daugherty, 273 U.S. 135, 160 (1927) (Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

The Committee's letter to the Department, dated September 10, 1999, which requested the designation of a witness for the Committee's hearing, indicated that the hearing is entitled "Clemency for the FALN: A Flawed Decision?" and that the Committee is "specifically interested in hearing about information germane to the process of the . . . grant of executive clemency" regarding the sixteen individuals. A compelling argument can be made, however, that Congress has no authority whatever to review a President's clemency decision. "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." Barenblatt v. United States, 360 U.S. 109, 111-12 (1959). The granting of clemency pursuant to the pardon power is unquestionably an exclusive province of the Executive Branch. U.S. Const., Art. II, § 2, cl. 1. See United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("To the executive alone is intrusted the power of pardon"); see also Public Citizen v. Department of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (reaffirming that pardon power is "commit [ted] . . . to the exclusive control of the President").

In exercising his clemency power, the President may seek to obtain the views of various advisors as he deems appropriate. Historically, he has sought the advice of the Department of Justice. In response to previous inquiries, the Department has repeatedly emphasized the exclusivity of the President's pardon power. In a letter responding to a request for pardon papers by the Chairman of the House Committee on Claims in 1919, the Attorney General refused to provide Congress with the Attorney General's report, observing:

> [T]he President, in his action on pardon cases, is not subject to the control or supervision of anyone, nor is he accountable in any way to any branch of the government for his action, and to establish a precedent of submitting pardon papers to Congress, or to a Committee of Congress, does not seem to me to be a wise one.

Letter from A. Mitchell Palmer, Attorney General, to Hon. George W. Edmonds, Chairman, House Committee on Claims (Sept. 25, 1919). This position was reasserted by the Pardon Attorney in 1952 in response to an inquiry from Senator Styles Bridges concerning the publication of details of clemency cases. Noting that "the President's exercise of the pardoning power is not subject to statutory regulation or control," the Pardon Attorney explained that,

> [i]n the exercise of the pardoning power, the President is amenable only to the dictates of his own conscience, unhampered and uncontrolled by any person or branch of Government. In my judgment it would be a serious mistake and highly detrimental to the public interest to permit Congress, or any Branch thereof, to encroach upon any prerogative, right or duty of the President conferred upon him by the Constitution, or to assume that he is in the slightest respect answerable to it for his action in pardon matters.

Letter from Daniel Lyons, Pardon Attorney, to Hon. Styles Bridges, U.S. Senator (Jan. 10, 1952) (citation and internal quotation marks omitted). The Executive Branch has on occasion provided Congress with information relating to particular clemency decisions, but to our knowledge it has done so only voluntarily and without conceding congressional authority to compel disclosure.

Accordingly, it appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision. In any event, even if the Committee has some oversight role, I do not believe its oversight needs would be viewed by the courts as outweighing the President's interest in the confidentiality of the deliberations relating to his exercise of this exclusive presidential prerogative. Conducting the balancing required by the case law, see Senate Select Committee, 498 F.2d at 729-30; United States v. Nixon, 418 U.S. at 706-07, I do not believe that access to documents relating to or testimony about these deliberations would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee, 498 F.2d at 731. Indeed, this conclusion is confirmed by the fact that the Committee can satisfy any oversight need to investigate the impact of the clemency decision on law enforcement goals by obtaining information concerning the individuals offered clemency and any threat they might pose through non-privileged documents and testimony.

II.

The Counsel to the President is one of several individuals subpoenaed to provide testimony to the Committee. Much, but not necessarily all, of what the Counsel might be asked to testify about at the Committee's hearing would presumably fall within the scope of information that would be covered by your assertion of executive privilege over deliberations leading up to your clemency decision. However, there is a separate legal basis that would support a claim of executive privilege for the entirety of the Counsel's testimony, thereby eliminating any need for her to appear at the hearing. Executive privilege is assertable in response to a congressional subpoena seeking testimony by the Counsel to the President concerning the performance of official duties on the basis that the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.

It is the longstanding position of the executive branch that "the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee."[1] This position is constitutionally based. As Assistant Attorney General Theodore Olson observed in 1982:

> The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President.[2]

Accordingly, "[n]ot only can the President invoke executive privilege to protect [his personal staff] from the necessity of answering questions posed by a congressional committee, but he can also direct them not even to appear before the committee."[3]

An often-quoted statement of this position is contained in a memorandum by then-Assistant Attorney General William Rehnquist:

> The President and his immediate advisers -- that is, those who customarily meet with the President on a regular or frequent basis -- should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.[4]

It is our understanding that the Counsel to the President falls within Assistant Attorney General Rehnquist's description of the type of Presidential advisers who are immune from testimonial compulsion.

Given the close working relationship that the President must have with his immediate advisors as he discharges his constitutionally assigned duties, I believe that a court would recognize that the immunity such advisers enjoy from testimonial compulsion by a congressional committee is absolute and may not be overborne by competing congressional interests. For, in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities. Subjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions. Because such a result would, in my view, violate the constitutionally mandated separation of powers principles, it would seem to follow that compelling one of the President's immediate advisers to testify on a matter of executive decision-making would also raise serious constitutional problems, no matter what the assertion of congressional need.

At a minimum, however, I believe that, even if a court were to conclude that the immunity the Counsel to the President enjoys from testimonial compulsion by a congressional committee is subject to a balancing test, you may properly instruct the Counsel that she need not appear in response to the present congressional subpoena. In my view, a court would, at a minimum find that the constitutional interests underlying the

immunity outweigh Congress' interest, if any, in obtaining information relating to the particular process followed, or the advice and other communications the President received, in connection with the President's exercise of his exclusive constitutional authority to grant clemency.

In conclusion, it is my legal judgment that executive privilege may properly be asserted with respect to the entirety of the testimony of the Counsel of the President, based on the immunity that position has with respect to compelled congressional testimony.

Janet Reno
Attorney General

1. Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: Executive Privilege, at 5 (May 23, 1977).

2. Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, at 2 (Jul. 29, 1982) (discussing subpoena for testimony of the Counsel to the President). See also Memorandum from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters, at 6 (Dec. 21, 1972) (since "[a]n immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . . . a former staff member"); Letter from Edward C. Schmults, Deputy Attorney General, at 2 (Apr. 19, 1983) ("[O]ur concern regarding your desire for the sworn testimony of [the Counsel to the President] is based upon important principles relative to the powers, duties and prerogatives of the Presidency. We share with previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff.").

3. Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: Dual-purpose Presidential Advisers, Appendix at 7 (Aug. 11, 1977).

4. Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff", at 7 (Feb. 5, 1971).

THE WHITE HOUSE

WASHINGTON

February 8, 1979

MEMORANDUM FOR THE WHITE HOUSE STAFF

FROM: ROBERT LIPSHUTZ

SUBJECT: Congressional Testimony by Members of the White House Staff

The role of a White House aide is that of an adviser to the President. Frank and candid discussions between the President and his personal staff are essential to the effective discharge of the President's Executive responsibilities. Discussions of this type take place only if their contents are kept confidential.

A personal aide to the President does not have independent authority or responsibility. He or she generally acts as an agent of the President in implementing a Presidential instruction.

While the investigative power of Congressional committees is extremely broad, the personal staff of the President is immune from testimonial compulsion by Congress. This immunity is grounded in the Constitutional doctrine of separation of powers.

The concept of immunity does not apply to all Presidential advisers. Those advisers who are vested with statutory obligations (such as Dr. Frank Press) must be available to testify. Presidential advisers who hold dual roles, one of which is defined by a statute, are available to Congressional committees, but only to testify relative to their responsibilities under the statute and not with respect to any matter arising in the course of their official position of advising or formulating advice for the President.

The Constitution and court decisions make it clear that the President may properly regard his personal staff immune from an obligation to testify before a Congressional committee.

If you have any questions regarding this, contact Margaret McKenna on extension 6611.

Mr. CANNON. Thank you.

You know, today the majority has the votes. We are going to do what the majority wants to do, I think even as opposed to the counsel from the minority here.

There has been a lot of over-the-top talk, I think, in this hearing, calling this Administration Nixon part two or the most closed, nontransparent Administration in history.

Those kinds of comparisons are not going to help us make the case in court. The case is going to have to be made on evidence. Despite the characterizations of both sides, the minority and the majority, the courts are going to decide this based upon the evidence. And that is going to require evidence of criminality.

Not having evidence because Harriet Miers doesn't appear after having been threatened with arrest is not going to be the basis for the issuance of a subpoena. I would hope that the majority would reconsider.

That being the case, I hope they have a plan for mitigating the effect of going to court and having a decision that significantly limits what we are doing.

And finally, let me just point out that you could have asked Ms. Miers all the questions—can I have order, Madam Chair?

We could have asked Ms. Miers questions if we just agreed to have her come voluntarily, and then all of the things that we are saying we don't know, we could have at least known what her position was, her position that would have been subjected to criminality if she had lied, and been able to make decisions based on that.

The refusal to meet with her and ask questions, combined with the absolutely clear answers that we have had from Kyle Sampson, who, as recently as this week, was asked all these questions with great particularity—and we had very clear answers that the White House was not involved in, that Harriet Miers was not involved—those are going to be the basis for not having a court support the position that the majority is now proposing.

Ms. SÁNCHEZ. Time of the gentleman has expired.

Mr. CANNON. And I urge opposition to the motion.

Thank you, Madam Chair, and I yield back.

Ms. SÁNCHEZ. The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Madam Chair.

And the Chairman of the full Committee has asked that I yield to him briefly, and I will do so.

Mr. CONYERS. Thank you so much, Mel.

First of all, I wanted to commend the Subcommittee on its judicial and thoughtful approach in evaluating this matter, and I commend both the Democrats and the Republicans.

The other thing that must go on the record: Ladies and gentlemen, if we do not enforce this subpoena, no one will ever have to come before the Judiciary Committee again.

And I thank the gentleman for yielding.

Mr. WATT. I thank the gentleman for his comments.

Mr. FEENEY. Would the gentleman yield to me for a brief question for my respected Chairman?

Ms. SÁNCHEZ. The time belongs to Mr. Watt.

Mr. WATT. I am happy to yield to Mr. Feeney.

Mr. FEENEY. I thank you. And I will be brief.

Mr. Chairman, I have the greatest respect for you, but I don't recall the last witness who had a letter from the President of the United States reminding that witness that she had been his chief counsel and that she was instructing her as his prerogative, with executive privilege, not to appear in front of this Committee.

If the Chairman thinks that is going to be a regular occurrence, I would have concern about undermining this. But I don't believe that is going to happen every day, and I don't recall it has every happened before.

Mr. CONYERS. It happened yesterday in the Senate Judiciary Committee. [Laughter.]

Ms. SÁNCHEZ. The time belongs to Mr. Watt.

Mr. WATT. I thank all the Members for their respective interventions on my time. And if that necessitates me seeking additional time at the end, I hope they will be as generous with me.

Let me just say, Madam Chair, that I rise in support of the motion that has been made to sustain your ruling. And I adopt in its entirety the Chair's statement of reasons that the ruling that she made is justified.

I have tried to be as balanced in this process as I could. As I indicated to Mr. Cannon in a previous hearing, I started with the presumption that the President has the prerogative, the authority, to hire and fire attorneys general and that I suspected, at the outset of these hearings, that we were going nowhere fast.

But as we have peeled back layer after layer after layer, my suspicions have not been validated. They have been aroused, and I have become more and more and more suspicious. And this last shoe that dropped yesterday, the refusal to allow Ms. Miers to appear here today, even to assert her claimed privilege, or the President's claimed privilege, is kind of the last insult.

Representative Scott and I sat through the last impeachment process, and in the middle of that impeachment process we made a pact that we would always apply the same standards to Democratic and Republican Presidents alike because we have a constitutional responsibility as Members of this Committee.

I take seriously the presumptive privilege that the President has. But I think this President has abused that presumptive privilege, and the American people now recognize that they don't presume that his privilege extends nearly as far as the President asserts that it extends.

I don't believe that he is entitled to that continuing presumption without question——

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. CANNON. May I ask unanimous consent that the gentleman be granted an additional 2 minutes?

Ms. SÁNCHEZ. Without objection.

Mr. WATT. I ask unanimous consent that I be granted an additional 3 minutes, which is what was taken from me at the outset.

Ms. SÁNCHEZ. Is there any objection?

Without objection, so ordered.

You may continue, Mr. Watt.

Mr. WATT. I can't give him that presumption anymore because this is the same President who told me that he was going to be a different kind of President, and reneged on that promise.

This is the same President who has relied on Cheney, the Vice President, who, on his behalf, I presume he is claiming this privilege also but who has now taken the position that he is not part of the executive branch.

He is the same President who lied to Congress and to the American people about the reasons for going to war; the President who has jailed and put people in jail without even bringing any charges against them and rendered them to other countries for questioning.

He is the same President that exposed the CIA agents by revealing their identity and then turned around and pardoned the person who lied about whether he had justification for doing that, or his reasons for doing that.

He is the same President who declared victory on an aircraft carrier 5 years ago and has us still in the middle of a war.

This is a President who I have trouble giving any presumptions to anymore. And I believe the American people are having trouble giving him any presumptions anymore.

I cannot accept the standards that prevailed for the last 6 years of oversight of this President. We have a responsibility to oversee the conduct of this President. And the President is sticking his thumb in our eye and saying, "I have some privilege or—"

Mr. CANNON. Madam Chair, I have sat here trying not to respond, but I believe the gentleman's words are unparliamentary. He has called the President a liar. He has talked about the President sticking his thumb in the eye of people. I believe that is unparliamentary language and ask that his words be taken down.

Ms. SÁNCHEZ. I will allow the gentleman to proceed, but I would remind all Members to please proceed in a manner befitting of the decorum of this Committee.

And, Mr. Watt, you may conclude with the remainder of your time.

Mr. WATT. I think I will just yield back the balance of my time. [Laughter.]

I think the American people know what we are dealing with here: an imperial President who thinks he is above the law. And we have a responsibility to say to the American people and to this President——

Mr. CANNON. I reluctantly——

Mr. WATT [continuing]. That he is not above the law——

Mr. CANNON. But, Madam Chair, these are unparliamentary words.

Mr. WATT. These are not unparliamentary words.

Mr. CANNON. They are.

Mr. WATT. These are——

Ms. SÁNCHEZ. The Committee will be in order.

Mr. Cannon, you are recognized.

Mr. CANNON. The gentleman has—my friend and colleague and a person whom I admire greatly, I am reluctant to do this, but we have rules of decorum in Congress, and the gentleman has gone beyond what those rules allow several times.

And the relevant rule is, "A member may refer to political motives of the President in debate. However, personal criticism, innuendo, ridicule or terms of opprobrium are not in order."

The gentleman's words are clearly out of order, and I ask the Chair that his words be taken down.

Ms. SÁNCHEZ. The Chair believes that the words of the gentleman, although harsh, were not unparliamentary. And since he has graciously yielded back the balance of his time, your objection will be noted for the record.

Does any other Member who has not yet spoken wish to be recognized?

Mr. CANNON. Madam Chair, I insist that the gentleman's words be taken down——

Ms. SÁNCHEZ. The ruling of the Chair——

Mr. CANNON [continuing]. And struck from the record.

Ms. SÁNCHEZ. The ruling of the Chair is that the words were not parliamentary——

Mr. CANNON. They weren't parliamentary; I agree with the Chair.

Ms. SÁNCHEZ. Pardon me. The ruling of the Chair—let me restate that—were not unparliamentary.

Mr. CANNON. Madam Chair, I appeal the ruling.

Ms. LOFGREN. I move to lay on the table the motion to appeal the ruling of the Chair.

Ms. SÁNCHEZ. The measure to appeal the Chair's ruling has been—a motion to table the appeal of the ruling of the Chair has been made.

The question is on the motion to table.

All those in favor will say, "Aye."

Those opposed?

In the opinion of the Chair, the ayes have it.

Mr. CANNON. On that, I asked a recorded vote.

Ms. SÁNCHEZ. A recorded vote is requested. The clerk will report the roll.

The CLERK. Mr. Conyers?

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers votes aye.

Mr. Johnson?

Mr. JOHNSON. Aye.

The CLERK. Mr. Johnson votes aye.

Ms. Lofgren?

Ms. LOFGREN. Aye.

The CLERK. Ms. Lofgren votes aye.

Mr. Delahunt?

Mr. DELAHUNT. Aye.

The CLERK. Mr. Delahunt votes aye.

Mr. Watt?

Mr. WATT. Pass.

The CLERK. Mr. Watt passes.

Mr. Cohen?

Mr. COHEN. Aye.

The CLERK. Mr. Cohen votes aye.

Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon votes no.

Mr. Jordan?

Mr. JORDAN. No.

The CLERK. Mr. Jordan votes no.

Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller votes no.

Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney votes no.

Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks votes no.

Ms. Sánchez?

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez votes aye.

Ms. SÁNCHEZ. Are there any other Members who wish to vote?

The clerk will report the roll.

The CLERK. Madam Chair, six Members voted aye, five Members voted nay.

Ms. SÁNCHEZ. The motion to table the—to overrule the ruling of the Chair is tabled.

There being no more——

Mr. CANNON. Madam Chair, may I just ask unanimous consent to admit to the record three items: two letters from Jones Day, one dated July 10, 2007, one July 11, and one to Mr. George Manning, I believe from the majority Chair of the Committee and the Subcommittee.

I thank you.

Ms. SÁNCHEZ. Without objection, so ordered.

[The information referred to follows:]

JONES DAY

1420 PEACHTREE STREET, N.E. • SUITE 800 • ATLANTA, GEORGIA 30309-3053

GEORGE T. MANNING
PARTNER-IN-CHARGE

gtmanning@jonesday.com
404-581-8400

JP269370

July 10, 2007

Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

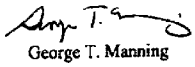
Honorable Linda T. Sanchez
Chairwoman, Subcommittee on Commercial and Administrative Law
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Congressional Inquiry into U.S. Attorneys Matters

Dear Mr. Conyers and Ms. Sanchez:

I am in receipt of your July 10, 2007 letter. With all due respect, in my conversation with Elliot Mincberg, the majority committee counsel with whom I spoke, I did not confirm that Ms. Miers will appear on Thursday to testify before the Subcommittee on Commercial and Administrative Law. Rather, at committee counsel's suggestion, I discussed some logistical arrangements should Ms. Miers appear. The President's previous instructions to Ms. Miers are set forth in my July 9, 2007 letter. In addition, the Counsel to the President has recently informed Ms. Miers that in view of the immunity of the President's senior advisors "'from testimonial compulsion by a Congressional committee' ... the President has directed [Ms. Miers] not to appear at the House Judiciary Committee hearing on Thursday, July 12, 2007." Letter from Fred F. Fielding to George T. Manning, July 10, 2007 (attached hereto). Accordingly, I must respectfully inform you that Ms. Miers will not appear at the July 12, 2007 hearing.

Very truly yours,



George T. Manning

cc: Hon. Lamar S. Smith
Hon. Chris Cannon
Fred F. Fielding, Esq.

JONES DAY

1420 PEACHTREE STREET, N.E. • SUITE 800 • ATLANTA, GEORGIA 30309-3053

GEORGE T. MANNING
PARTNER-IN-CHARGE

gtmanning@jonesday.com
404-581-8400

JP269370 July 11, 2007

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Washington, D.C. 20515

Re: Congressional Inquiry into U.S. Attorneys Matters

Dear Mr. Conyers and Ms. Sanchez:

I am in receipt of your July 11, 2007 letter. I must respectfully take issue with your characterization of Ms. Miers' circumstances and her intent. Ms. Miers has promptly and appropriately responded to the Committee's subpoena. She has been explicitly directed in correspondence from Counsel to the President dated June 28, July 9, and July 10, 2007 to neither testify nor appear at tomorrow's hearing of the Subcommittee on Commercial and Administrative Law. With all due respect, this dispute is between the Executive and Legislative branches. What is truly at stake here are the rights and privileges of two co-equal branches of government in our system of separated powers.

Accordingly, in view of the President's directions, Ms. Miers will not appear at the July 12, 2007 hearing.

Very truly yours,

George T. Manning

cc: Hon. Lamar S. Smith
Hon. Chris Cannon
Fred F. Fielding, Esq.

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Congress of the United States
House of Representatives

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2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

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July 11, 2007

BY FAX AND U.S. MAIL

Mr. George Manning
Jones Day
1420 Peachtree St., NE, Suite 800
Atlanta, GA 30309-3053

Dear Mr. Manning:

We write in response to your letter dated July 10, which was not faxed to us until 7:15 pm last night. We are disappointed and very concerned by your statement that, based upon a July 10 letter to you from White House Counsel Fred Fielding, your client Harriet Miers intends to disregard the subpoena that was duly issued to her by the Committee on the Judiciary, and refuse even to appear at tomorrow's hearing of the Subcommittee on Commercial and Administrative Law. A congressional subpoena, such as the one issued to Ms. Miers, carries with it two obligations: the obligation to appear, and the obligation to testify and/or produce documents. Even if a witness intends to assert privilege in response to a subpoena, that intention to assert privilege does not obviate the obligation to appear.

We are aware of absolutely no court decision that supports the notion that a former White House official has the option of refusing to even appear in response to a Congressional subpoena. To the contrary, the courts have made clear that no present or former government official – even the President – is above the law and may completely disregard a legal directive such as the Committee's subpoena. In fact, both present and former White House officials have testified before Congress numerous times, including both then-serving and former White House counsel. For example, former White House Counsel Beth Nolan explained to our Subcommittee that she testified before Congressional committees four times, three times while serving as White House counsel and once as former White House counsel. A Congressional Research Service study documents some 74 instances where serving White House advisers have testified before

Mr. George Manning
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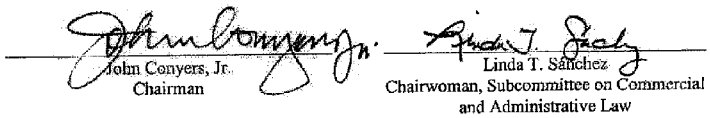
Congress since World War II.[1] Moreover, even the 1999 OLC opinion referred to in Mr. Fielding's July 10 letter refers only to current White House advisers and not to former advisers and acknowledges that the courts might not agree with its conclusion. Such Justice Department opinions are not law, state only the Executive Branch's view of the law, and have no legal force whatsoever. We note finally that another former White House adviser subpoenaed by the Senate Judiciary Committee in the U.S. Attorney matter, Sara Taylor, appeared today pursuant to Congressional subpoena and testified about many of the relevant facts while also declining to testify about other relevant facts based on the assertion of executive privilege.

A refusal to appear before the Subcommittee tomorrow could subject Ms. Miers to contempt proceedings, including but not limited to proceedings under 2 U.S.C. § 194 and under the inherent contempt authority of the House of Representatives.

We are prepared at the hearing tomorrow to consider and rule on any specific assertions of privilege in response to specific questions. We strongly urge you to reconsider, and to advise your client to appear before the Subcommittee tomorrow pursuant to her legal obligations. The Subcommittee will convene as scheduled and expects Ms. Miers to appear as required by her subpoena.

Sincerely,



John Conyers, Jr.
Chairman

Linda T. Sánchez
Chairwoman, Subcommittee on Commercial and Administrative Law

cc: The Honorable Lamar S. Smith
The Honorable Chris Cannon

[1] Harold C. Relyea & Todd B. Tatelman, Presidential Advisers' Testimony Before Congressional Committees: An Overview, CRS Report for Congress, RL 31351 (April 10, 2007)

Ms. SÁNCHEZ. A quorum being present, the question is on the motion to sustain the Chair's ruling.

All those in favor will signify by saying, "Aye."

Those opposed?

In the opinion of the Chair, the ayes have it.

Mr. CANNON. May I have a recorded vote on that, Madam Chair?

Ms. SÁNCHEZ. A roll-call vote is requested. As your name is called, please, all those in favor will signify by saying, "Aye," and all those opposed, "No."

The clerk will call the roll.

The CLERK. Mr. Conyers?

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers votes aye.

Mr. Johnson?

Mr. JOHNSON. Aye.

The CLERK. Mr. Johnson votes aye.

Ms. Lofgren?

Ms. LOFGREN. Aye.

The CLERK. Ms. Lofgren votes aye.

Mr. Delahunt?

Mr. DELAHUNT. Aye.

The CLERK. Mr. Delahunt votes aye.

Mr. Watt?

Mr. WATT. Aye.

The CLERK. Mr. Watt votes aye.

Mr. Cohen?

Mr. COHEN. Aye.

The CLERK. Mr. Cohen votes aye.

Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon votes no.

Mr. Jordan?

Mr. JORDAN. No.

The CLERK. Mr. Jordan votes no.

Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller votes no.

Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney votes no.

Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks votes no.

Ms. Sánchez?

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez votes aye.

Ms. SÁNCHEZ. The clerk will report the roll.

The CLERK. Madam Chair, seven Members voted aye, five Members voted nay.

Ms. SÁNCHEZ. A majority having voted in favor, the motion is agreed to.

Without objection, the record will remain open for a minimum of 5 legislative days for the submission of additional materials.

Thank you. This Subcommittee and full Committee will take under advisement what next steps are warranted. That concludes our hearing.

[Whereupon, at 11:24 a.m., the Subcommittee was adjourned.]

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