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NOVEMBER 19, 2008.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. Res. 707 and S. Res. 708]

The Committee on the Judiciary, reports favorably on original resolutions (S. Res. 707) authorizing the President of the Senate to certify the facts of the failure of Joshua Bolten, as the Custodian of Records at the White House, to appear before the Committee on the Judiciary and produce documents as required by Committee subpoena, and (S. Res. 708) authorizing the President of the Senate to certify the facts of the failure of Karl Rove to appear and testify before the Committee on the Judiciary and to produce documents as required by Committee subpoena, and recommends that the resolutions do pass.

CONTENTS

		Page
I.	Purpose and Background of Resolutions	2
II.	Hearings and Interviews	4
III.	Committee's Efforts To Reach Accommodation Were Futile	9
IV.	Non-compliance with Committee's Subpoenas	12
V.	Ruling on Executive Privilege and Immunity Claims	13
VI.	Resolutions of Contempt	20
VII.	The Privilege and Immunity Claims Are Not Legally Valid to Excuse Compliance	24

79–010

VIII. Continued Non-Compliance Despite District Court's Decision in House Judiciary Committee Lawsuit Dismissing the Administration's Immunity and Blanket Privilege Claims 39
IX. Department of Justice's Internal Investigation Confirmed Judiciary Committee's Findings Though Impeded by White House Refusal to Cooperate 42
X. Conclusion 48
XI. Minority Views of Senators Specter and Grassley 49
XII. Minority Views of Senators Kyl, Sessions, Brownback and Coburn 54

I. Purpose and Background of the Resolutions

Since the beginning of the 110th Congress, the Judiciary Committee has conducted an investigation into the unprecedented mass firings of Federal prosecutors by those in the administration of the President who appointed them.

The investigation began after news reports in late 2006 and early 2007 revealed that seven U.S. Attorneys had been fired on December 7, 2006: David C. Iglesias, District of New Mexico; Carol Lam, Southern District of California; John McKay, Western District of Washington; Daniel Bogden, District of Nevada; Paul K. Charlton, District of Arizona; Margaret Chiara, Western District of Michigan; and Kevin Ryan, Northern District of California. The Committee subsequently learned that H.E. "Bud" Cummins, III, Eastern District of Arkansas, was told to resign in June 2006, and that Todd Graves, Western District of Missouri, was asked to resign in January 2006. According to a joint investigation by the Department's Office of Inspector General (IG) and Office of Professional Responsibility (OPR), 28 U.S. Attorneys appeared on lists of those being considered for firing between the beginning of 2005 and the end of 2006.[1] The report verified news accounts that several dozen U.S. Attorneys were considered for firing.

In the course of this investigation, which led to the resignations of the Attorney General, the senior leadership of the Justice Department, their staff, and several high-ranking White House political officials, the Committee has uncovered grave threats to the independence of law enforcement from political manipulation. The evidence accumulated from the testimony of nearly 20 current and former Justice Department officials, as well as documents released by the Department, shows that the list for firings was compiled with participation from the highest political ranks in the White House, including former White House Deputy Chief of Staff Karl Rove. The evidence shows that senior officials were focused on the political impact of Federal prosecutions and whether Federal prosecutors were doing enough to bring partisan voter fraud and corruption cases. It is now apparent that the reasons given for these firings, including those reasons provided in sworn testimony by the Attorney General and Deputy Attorney General, were contrived as part of a cover-up.

The Committee's attempts to obtain information from the White House, first requested voluntarily and later legally compelled by subpoena, have been met with stonewalling. In the process, the White House has asserted blanket claims of executive privilege, and novel claims of absolute immunity, to block current and former

[1] See "An Investigation into the Removal of Nine U.S. Attorneys in 2006," U.S. Department of Justice Office of the Inspector General and U.S. Department of Justice Office of Professional Responsibility, September 29, 2008, chart at 18–19.

officials from testifying and producing documents in compliance with the Committee's subpoenas.

The constitutional powers of Congress and the responsibilities of this Committee to the Senate and the American people overcome unsubstantiated privilege claims by the White House. The Supreme Court has long recognized that Congress has "broad" power to investigate "the administration of existing laws" and to "expose corruption, inefficiency, waste" within the executive branch.[2] The evidence obtained by the Judiciary Committee's investigation, and the resulting reports issued by the Department of Justice's Inspector General and Office of Professional Responsibility, raises concerns about the violation of Federal laws, including possible obstruction of justice, laws that prohibit providing misleading or inaccurate testimony to Congress, and possible violations of laws, including the Hatch Act, that prohibit retaliation against Federal employees for improper political reasons. The Committee has a responsibility to conduct investigations and obtain information from the executive branch in order to consider legislation within its jurisdiction,[3] including legislation related to the appointment of U.S. Attorneys, and to protect the Committee's role in evaluating nominations pursuant to the Senate's constitutional responsibility to provide advice and consent.

The Supreme Court has long held that oversight is "inherent in the legislative process" and vital for "prob[ing] into departments of the Federal Government to expose corruption, inefficiency or waste."[4] The investigation demonstrated the relationship between the Committee's oversight and investigative powers, and its responsibilities to legislate and evaluate nominations. In fact, in connection to this investigation, the Judiciary Committee considered and reported the "Preserving United States Attorney Independence Act of 2007" (S. 214), a bill introduced by Senator Feinstein and which was signed into law on June 14, 2007, to close a loophole exploited by the Department of Justice and the White House to enable abuses to occur. The new law rescinded the Attorney General's power to appoint interim U.S. Attorneys to serve indefinitely without congressional approval.[5]

Not only does the Senate have the power to confirm a President's U.S. Attorney nominations, a matter under Senate rules within the jurisdiction of this Committee, but the appointment power is given to Congress by the Constitution. In Article II, the President's appointment power is limited by the power of Congress. In addition, constitutional provisions calling for appointments with the advice and consent of the Senate and for the President's limited power to make recess appointments, the Constitution provides: "But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the Heads of Departments."[6] In 2007, the Eastern District of Arkansas joined at least two other courts addressing the interim appointment of U.S. Attorneys—the First Circuit in United States

[2] See *Watkins* v. *United States,* 354 U.S. 178, 187 (1957).
[3] See, e.g., *McGrain* v. *Daugherty,* 273 U.S. 135, 174 (1927).
[4] *Watkins* v. *United States,* 354 U.S. 178, 187 (1957).
[5] See 28 U.S.C. 546 (1966), amended by Pub. L. No. 109–177, Title V, 502, 120 Stat. 546 (Mar. 9, 2006); amended by Pub. L. No. 110–34, 2, 121 Stat. 224 (June 14, 2007).
[6] U.S. Const. Art. II, 2, cl. 2.

v. Hilario,[7] and the Ninth Circuit in United States v. Gantt in concluding that U.S. Attorneys are "inferior officers."[8] Thus, Congress—and in particular this Committee—has a vested interest in obtaining information relating to the appointment and removal of U.S. Attorneys in order to fulfill its constitutional duty to provide for the appointment of inferior officers.

On November 29, 2007, Chairman Leahy ruled that the White House's claims of executive privilege and immunity are not legally valid to excuse current and former White House employees from appearing, testifying and producing documents related to this investigation. Accordingly, Chairman Leahy directed Karl Rove and White House Chief of Staff Joshua Bolten to comply immediately with the Committee's subpoenas by producing documents and testimony. They failed to do so, and on December 13, 2007, a bipartisan majority of the Committee voted to report favorably resolutions finding Mr. Rove and Mr. Bolten in contempt of Congress.

II. Hearings and Interviews

A. Senate Judiciary Committee Hearings

January 18, 2007

Hearing: Oversight of the U.S. Department of Justice.
Senate Judiciary Committee.
Witnesses:

- Alberto Gonzales, Attorney General, U.S. Department of Justice

February 6, 2007

Hearing: Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys.
Senate Judiciary Committee.
Witnesses:

- Mark Pryor, U.S. Senator, Arkansas
- Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice
- Mary Jo White, Partner, Debevoise & Plimpton, LLP, New York, NY
- Laurie L. Levenson, Professor of Law, Loyola Law School, Los Angeles, CA
- Stuart M. Gerson, Partner, Epstein Becker & Green, Washington, DC

March 6, 2007

Hearing: Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part II.
Senate Judiciary Committee.
Witnesses:

- H.E. "Bud" Cummins, III, Former U.S. Attorney for the Eastern District of Arkansas

[7] 218 F.3d 19 (1st Cir. 2000) (upholding the constitutionality of the pre-Patriot Act reauthorization law on interim appointments, including the role of the district court about which the administration earlier this year raised separation of powers concerns).
[8] See *United States* v. *Baker,* 504 F.Supp.2d 402, 412 (2007).

- David C. Iglesias, Former U.S. Attorney for the District of New Mexico
- Carol Lam, Former U.S. Attorney for the Southern District of California
- John McKay, Former U.S. Attorney for the Western District of Washington

March 29, 2007

Hearing: Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III.
Senate Judiciary Committee.
Witnesses:

- D. Kyle Sampson, former Chief of Staff to the Attorney General, U.S. Department of Justice

April 19, 2007

Hearing: Department of Justice Oversight.
Senate Judiciary Committee.
Witnesses:

- Alberto Gonzales, Attorney General, U.S. Department of Justice

May 15, 2007

Hearing: Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part IV.
Senate Judiciary Committee.
Witnesses:

- James B. Comey, former Deputy Attorney General, U.S. Department of Justice

June 5, 2005

Hearing: Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part V.
Senate Judiciary Committee.
Witnesses:

- Panel I
  - Bradley J. Schlozman, Associate Counsel to the Director, Executive Office for U.S. Attorneys, former Interim U.S. Attorney for the Western District of Missouri, former Principal Deputy Assistant Attorney General and Acting Assistant Attorney General for the Civil Rights Division, U.S. Department of Justice
- Panel II
  - Todd Graves, former U.S. Attorney for the Western District of Missouri

June 27, 2007

Hearing: Oversight of the Federal Death Penalty.
Senate Judiciary Committee, Subcommittee on the Constitution.
Witnesses:

- Panel I

- Barry Sabin, Deputy Assistant Attorney General, U.S. Department of Justice
- Panel II
  - David I. Bruck, Esq., Federal Death Penalty Resource Counsel, Lexington, VA
  - Paul K. Charlton, former U.S. Attorney for the District of Arizona
  - David B. Mulhausen, Ph.D., Senior Policy Analyst, Center for Data Analysis, The Heritage Foundation, Washington, DC
  - William G. Otis, former Chief of the Appellate Division, U.S. Attorney's Office, Eastern District of Virginia
  - Roberto J. Sánchez Ramos, Secretary of Justice, Commonwealth of Puerto Rico
  - Hilary O. Shelton, Director, Washington Bureau, National Association for the Advancement of Colored People

July 11, 2007

Hearing: Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part VI.

Senate Judiciary Committee.

Witnesses:

- Sara M. Taylor, former Deputy Assistant to the President and Director of Political Affairs, The White House

August 2, 2007

Hearing: Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part VII.

Senate Judiciary Committee.

Witnesses:

- J. Scott Jennings, former Deputy Director of Political Affairs, The White House

B. HOUSE JUDICIARY COMMITTEE HEARINGS

March 6, 2007

Hearing: H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys.

House Judiciary Committee, Commercial and Administrative Law Subcommittee.

Witnesses:

- Panel I
  - William E. Moschella, Principal Associate Deputy Attorney General, U.S. Department of Justice
- Panel II
  - Carol C. Lam, Former U.S. Attorney for the Southern District of California
  - David C. Iglesias, Former U.S. Attorney for the District of New Mexico
  - Daniel Bogden, Former U.S. Attorney for the District of Nevada
  - Paul K. Charlton, Former U.S. Attorney for the District of Arizona

- H. E. Cummins III, Former U.S. Attorney for the Eastern District of Arkansas
- John McKay, Former U.S. Attorney for the Western District of Washington

- Panel III
  - Darrell E. Issa, Member, U.S. House of Representatives
  - Asa Hutchinson, former Member, U.S. House of Representatives
  - John A. Smietanka, former U.S. Attorney for the Western District of Michigan
  - Altee W. Wampler III, President, National Association of Former U.S. Attorneys
  - George J. Terwilliger III, Partner, White and Case LLP
  - T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service

March 29, 2007

Hearing: Ensuring Executive Branch Accountability.

House Judiciary Committee, Subcommittee on Commercial and Administrative Law.

Witnesses:

- Noel J. Francisco, former Associate Counsel to President George W. Bush, Partner, Jones Day Washington, D.C.
- Beth Nolan, former White House Counsel to President Bill Clinton, Partner, Crowell & Moring Washington, D.C.
- John Podesta, former White House Chief of Staff to President Bill Clinton, President and Chief Executive Officer Center for American Progress, Washington, D.C.
- Frederick A.O. Schwarz, Jr., Senior Counsel, Brennan Center for Justice at NYU School of Law

May 3, 2007

Hearing: The Continuing Investigation into the U.S. Attorneys Controversy Witnesses.

House Judiciary Committee, Subcommittee on Commercial and Administrative Law.

Witnesses:

- James B. Comey, former Deputy Attorney General, U.S. Department of Justice

May 10, 2007

Hearing: Oversight Hearing on the United States Department of Justice.

House Judiciary Committee.

Witnesses:

- Alberto Gonzales, Attorney General, U.S. Department of Justice

May 23, 2007

Hearing: The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters.

House Judiciary Committee.

Witnesses:

- Monica Goodling, former Justice Department White House Liaison

June 21, 2007

Hearing: The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters.

House Judiciary Committee.

Witnesses:

- Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice

C. INTERVIEWS (CONDUCTED BY HOUSE AND SENATE JUDICIARY COMMITTEE STAFF UNLESS OTHERWISE NOTED)

March 30, 2007

Interview with Michael Elston, Chief of Staff, Office of the Deputy Attorney General [House only].

April 11, 2007

Interview with William Mercer, Acting Associate Attorney General, U.S. Department of Justice.

April 12, 2007

Interview with Michael Battle, former Executive Director, Executive Office for U.S. Attorneys.

April 15, 2007

Interview with D. Kyle Sampson, Former Chief of Staff to the Attorney General of the United States.

April 18, 2007

Interview with D. Kyle Sampson, Former Chief of Staff to the Attorney General of the United States.

April 24, 2007

Interview with William E. Moschella, Principal Associate Deputy Attorney General, U.S. Department of Justice.

April 27, 2007

Interview with Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice.

May 1, 2007

Interview with David Margolis, Associate Deputy Attorney General.

May 4, 2007

Interview with Matthew Friedrich, Chief of Staff and Principal Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice.

May 8, 2007

Interview with Larry Gomez, Acting U.S. Attorney for the District of New Mexico.

May 21, 2007

Interview with David Nowacki, Principal Deputy Director, Executive Office for U.S. Attorneys.

June 15, 2007

Interview with Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania, former Director of the Executive Office for U.S. Attorneys, U.S. Department of Justice.

July 10, 2007

Interview with D. Kyle Sampson, former Chief of Staff to the Attorney General of the United States.

September 14, 2007

Interview with Dana Simpson, attorney from Alabama [House only].

III. COMMITTEE'S EFFORTS TO REACH ACCOMMODATION WERE FUTILE

Before the issuance of the Committee's first subpoena to White House officials, the Committee sought, to no avail, the voluntary cooperation of the White House and its current and former employees. Instead, the President and the White House counsel conditioned any limited availability of information on a demand that whatever the White House were to provide initially would end the matter, and the Senate Judiciary Committee would agree to halt its investigation. They also demanded that any information provided be shared behind closed doors, not under oath and without a transcript. Despite mounting evidence of significant involvement by White House political officials, the White House did not produce a single document or allow even one White House employee or former employee involved in these matters to be interviewed voluntarily.

The administration has continued to rebuke the Committee's efforts to reach an accommodation since this initial, unacceptable "take it or leave it" offer. At each step, the Committee has sought an accommodation, but the White House has reiterated its initial offer. Chairman Leahy issued Committee-authorized subpoenas only after extensive efforts to reach a voluntary accommodation, and having concluded that further efforts to reach an accommodation would be futile.

Before issuing the subpoenas, the Committee sent nearly a dozen letters seeking voluntary cooperation from the White House and its current and former employees with the investigation:

• On March 13, 2007, Chairman Leahy and Senator Specter, the Committee's Ranking Member, sent a letter to White House Counsel Fred Fielding echoing a March 9, 2007, request from the House Judiciary Committee for documents and interviews with White House officials related to the U.S. Attorney investigation. Chairman Leahy and Senator Specter also sent letters to then White House Deputy Chief of Staff Karl Rove, then Deputy White House Counsel William Kelley, and former White House Counsel Harriet Miers seeking their voluntary cooperation with the Committee's investigation. On March 15, 2007, Chairman Leahy and Senator

Specter sent a similar letter to Special Assistant to the President and Deputy Director of Political Affairs J. Scott Jennings.

• On March 20, 2007, Mr. Fielding sent a letter to the Senate and House Judiciary Committees making a "take it or leave it" offer of off-the-record interviews with current and former White House employees, with no transcript, no oath, and no ability to follow up. Mr. Fielding offered to produce a small subset of the documents requested, but only as part of an agreement to the offer, which would prejudice any further investigative steps.

• On March 22, 2007, Chairman Leahy and nine Members of the Senate Judiciary Committee sent a letter to Mr. Fielding explaining that this "take it or leave it" offer was unacceptable because it would constrain the Committee's and the public's access to key information, and prejudge the outcome of the investigation. Republican Members of the Committee also publicly and privately recognized that such off-the-record meetings would be inadequate, and inhibit the Committee's exercise of its investigative, oversight and legislative functions. On the same day, the Committee authorized subpoenas for Mr. Rove, Ms. Miers, and Mr. Kelley.

• On March 28, 2007, having received no response from the White House to the March 22, 2007, letter, Chairman Leahy and House Judiciary Committee Chairman Conyers, in an effort to further the investigation, sent Mr. Fielding a letter seeking to narrow the dispute and gain access to documents the White House had previously offered to provide as part of its "take it or leave it" proposal.

• Still having received no response from Mr. Fielding to the previous two letters, Chairman Leahy sent Mr. Fielding another letter on April 5, 2007, asking for the "reviews by White House staff" that led the President to say on March 20, 2007, that there was no wrongdoing.

• On April 11, 2007, Chairman Leahy and Senator Specter sent a letter to then White House Director of Political Affairs Sara M. Taylor seeking her voluntary cooperation with the Committee's investigation.

• On April 12, 2007, in light of the Committee's request for White House emails related to the investigation, Chairman Leahy and Senator Specter sent a letter to Mr. Fielding requesting information about revelations that dozens of White House officials used non-governmental Republican National Committee email accounts for official government business. No White House emails have been turned over to the Committee.

• On April 12, 2007, and April 25, 2007, the Judiciary Committee authorized subpoenas for White House Chief of Staff Joshua Bolten as custodian of documents for the White House and Mr. Jennings and Ms. Taylor, respectively.

• Still having not received answers to the previous letters nearly two months after rejecting the White House's initial offer as unacceptable, Chairman Leahy sent Mr. Fielding a letter on May 16, 2007, recounting the previous requests for information and summarizing the evidence gathered by the investigating Committees of the Senate and House. This evidence showed that White House officials played a significant role in originating, developing, coordinating and implementing the plan for firing U.S. Attorneys, and the Justice Department's response to congressional inquiries about

it. This evidence also included an apparent effort to minimize admissions of the involvement by White House officials. The letter repeated the request for voluntary cooperation, but notified Mr. Fielding that the Chairman would have no choice but to issue subpoenas if it was not forthcoming.

• On June 7, 2007, Mr. Fielding sent a letter to the Senate and House Judiciary Committees disputing any wrongdoing and reiterating the same "take it or leave it" offer from March 20, 2007, for backroom interviews that the Committee rejected three months earlier. No documents accompanied the letter.

• After exhausting avenues of voluntary cooperation, on June 13, 2007, and July 26, 2007, Chairman Leahy issued subpoenas, authorized by the Committee in April 2007, for White House documents from Mr. Bolten and for documents and testimony from Mr. Rove. These subpoenas were met with non-compliance, eliciting blanket claims of executive privilege and immunity from the White House.

• On August 14, 2007, at the urging of Senator Specter, Chairman Leahy wrote to President Bush suggesting a meeting to work out differences with respect to the investigation before the Committee would be forced to consider citations for contempt of Congress by current and former White House officials. Mr. Fielding responded for the President on August 17, 2007, rejecting the offer.

This stonewalling is a dramatic break from the practices of every administration since World War II in responding to congressional oversight.[9] In that time, presidential advisors have testified before congressional committees 74 times, either voluntarily or compelled by subpoenas. During the Clinton administration, White House and administration advisors were routinely subpoenaed for documents or to appear before Congress. For example, in 1996 alone, the House Government Reform Committee issued at least 27 subpoenas to White House advisors. According to the Congressional Oversight Manual produced by the non-partisan Congressional Research Service, most disputes between Congress and the executive branch about access to documents and information are resolved through compromise.[10] The veil of secrecy this administration has insisted upon is unprecedented and damaging to the tradition of open government that has been a hallmark of this Republic.

Failure to provide information through accommodation despite the established public need for it bolsters the need to overcome claims of executive privilege. Executive privilege is overcome where the subpoenaed materials likely contain important information and where that information is not available elsewhere.[11] The evidence the Committee obtained in this investigation shows significant involvement by senior White House officials, but the White House has closed all avenues for obtaining materials necessary to answer critical questions about its involvement.[12]

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[9] See March 21, 2007, letter from Congressman Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, to Senator Patrick Leahy and Congressman John Conyers, Jr.

[10] Morton Rosenberg, Congressional Oversight Manual, CRS–39.

[11] In re Sealed Case, 121 F.3d at 755.

[12] The minority views filed by Senators Kyl, Sessions, Brownback and Coburn quote Chairman Leahy and other Democratic Senators out of context to suggest that the actions taken by the Committee in this investigation stand in contrast to past statements recognizing that "issuing a subpoena was a serious matter that should be undertaken only after substantial deliberation."

Continued

IV. Former and Current White House Officials Failed To Comply With the Senate Judiciary Committee's Subpoenas, Citing Blanket Executive Privilege and Immunity Claims

In response to Senate Judiciary Committee subpoenas for White House documents and for documents and testimony from current and former White House officials related to the mass firings of U.S. Attorneys, White House Counsel Fred Fielding has conveyed President Bush's blanket claim of executive privilege over all information from the White House related to the Committee's investigation. In addition to its privilege claims, the White House has asserted the novel claim that Karl Rove, subpoenaed by this Committee for testimony and documents, is immune as an "immediate Presidential Advisor" from appearing at all.[13]

The effects of the White House's assertions of privilege and immunity have been to withhold critical information related to the Committee's investigation. The Committee has demonstrated that it needs the subpoenaed materials in order to perform its constitutional legislative, investigative, and oversight functions and to explore the veracity of administration responses to requests for information from the Committee.

On June 13, 2007, Chairman Leahy issued a subpoena authorized April 12, 2007, to Mr. Bolten, the White House custodian of records, for documents related to the Committee's investigation. The return date for the documents from Mr. Bolten was June 28, 2007.

On June 28, 2007, Mr. Fielding sent a letter to the Senate and House Judiciary Committees making a blanket claim of executive privilege on behalf of President Bush, refusing to turn over any documents compelled by subpoenas.[14]

To the contrary, as demonstrated in exhaustive detail in this report, this Committee undertook extensive efforts to reach an accommodation with the administration before authorizing subpoenas, before issuing subpoenas, before issuing any rulings, and before voting on contempt resolutions. Judge Bates of the District Court for the District of Columbia recounted the extent of the efforts taken by both the House and Senate Judiciary Committees to reach an accommodation with the administration in rejecting the administration's claims of absolute immunity and blanket unsubstantiated privilege. Judge Bates acknowledged that these efforts had been to no avail in light of the administration's continued reliance on its initial "take it or leave it" proposal for off-the-record, backroom interviews with no transcript, no oath, and no ability to follow up, which would deny Congress the ability to fulfill its legislative and oversight responsibilities.

The Bush Administration's approach is a sharp break from the approach of past administrations, such as the Clinton Administration, in which 47 presidential advisors testified before Congress. Indeed, the Committee's deliberation in continuing to seek an accommodation with the administration even after voting to adopt the contempt resolutions has led Senators Specter and Grassley to file minority views to question whether the matter is now "somewhere between moot and meaningless" because so much time has passed. Although the administration has continued to stonewall the investigation, three reports from the Department of Justice's Inspector General and Office of Professional Responsibility have confirmed the Committee's findings of serious wrongdoing, a federal court has rejected the administration's immunity and privilege claims, and the Attorney General has referred the matter to a Special Prosecutor for further investigation to determine whether crimes occurred.

[13] Letter from Fred Fielding, White House counsel, to Chairman Leahy and Senator Specter (August 1, 2007).

[14] Mr. Fielding's letter also responded to a subpoena issued June 13 to former White House employee Sara Taylor for documents and testimony. Mr. Fielding's letter asserted that the testimony of Ms. Taylor would be subject to a claim of executive privilege. That same day, Mr. Fielding informed Ms. Taylor's attorney, W. Neil Eggleston, that the President claimed executive privilege over all responsive documents. Mr. Eggleston by letter informed the Committee that Ms. Taylor was not producing the compelled documents, but rather turning responsive documents over to the White House. Ms. Taylor was directed by Mr. Fielding not to testify, and when she appeared before the Senate Judiciary Committee on July 11, 2007, she selectively invoked Mr. Fielding's letter to answer some, but not to answer many other, questions regarding the firings.

In response to the White House's blanket privilege claims, on June 29, 2007, the Chairmen of the Senate and House Judiciary Committees sent Mr. Fielding a letter asking the White House to provide the Committees with the specific factual and legal bases for its privilege claims regarding each document withheld and a privilege log. They asked the White House to provide this information so that it could substantiate its claim. A serious assertion of privilege would include an effort to demonstrate to the Committees which documents, and which parts of those documents, are covered by any privilege that is asserted to apply and why. The White House declined this opportunity in a July 9, 2007, letter to the Committee Chairmen. No factual basis for the blanket claims and no specificity with respect to those claims of privilege have been provided.

On July 26, 2007, Chairman Leahy issued a subpoena to Mr. Rove for documents and testimony related to the Committee's investigation. This subpoena had been authorized by the Committee on March 22, 2007. It had a return date of August 2, 2007. Mr. Fielding sent a letter August 1, 2007, to Chairman Leahy and Senator Specter informing the Committee that the President would invoke the blanket claim of executive privilege to direct Mr. Rove not to produce responsive documents or testify before the Committee about the firings.[15] In addition, this letter asserted that Mr. Rove was "immune from compelled congressional testimony" as an "immediate presidential advisor" and would not even appear in response to the Committee's subpoena.[16]

Before ruling on the White House's executive privilege and immunity claims, Chairman Leahy wrote to President Bush on August 14, 2007, at the urging of Senator Specter, suggesting a meeting to work out differences with respect to the investigation before the Committee. Mr. Fielding responded for the President on August 17, 2007, and rejected the request for a meeting.

Executive privilege is not a broad and sweeping authority the President can hide behind because he does not want to cooperate with congressional oversight because White House actions are embarrassing or worse. It should not prevent Congress from examining White House documents vitally important to a legitimate investigation. While courts have recognized a qualified executive privilege, that privilege, even when properly invoked, is not absolute and must be balanced against the Committee's compelling need for the information in order for Congress to perform its constitutional functions.

V. Ruling on Executive Privilege and Immunity Claims

Having been unable to reach accommodation with the White House, on November 29, 2007, Chairman Leahy ruled on the privilege and immunity claims. He held them not legally valid and di-

[15] Mr. Fielding's August 1, 2007, letter also informed the Committee that the President would invoke the blanket claim of executive privilege in response to a July 26, 2007, subpoena of Scott Jennings. On August 2, 2007, Mr. Fielding sent a letter to Mr. Jennings informing him that he was "directed" not to produce documents or testify before Congress regarding the U.S. Attorney firings due to the President's blanket privilege claim. When Mr. Jennings appeared before the Senate Judiciary Committee on August 2, 2007, he selectively invoked Mr. Fielding's letter not to answer most questions from members of the Committee.

[16] Letter from Fred Fielding, White House Counsel, to Chairman Leahy and Senator Specter (August 1, 2007).

rected Mr. Rove and Mr. Bolten to comply with the Senate subpoenas. His ruling is reprinted below:

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

Ruling on the White House's Claims of Executive Privilege and Immunity Made in Response to Senate Judiciary Committee Subpoenas

Chairman Patrick Leahy
Senate Judiciary Committee

Since the beginning of this Congress, the Senate Judiciary Committee has conducted an investigation into the unprecedented mass firings of federal prosecutors by those in the Administration of the President who appointed them. In the course of this investigation, which has led to the resignations of the Attorney General, the senior leadership of the Justice Department, their staff, and several high-ranking White House political officials, the Committee has uncovered grave threats to the independence of law enforcement from political manipulation. The evidence accumulated from the testimony of nearly 20 current and former Justice Department officials and documents released by the Department shows that the list for firings was compiled based on input from the highest political ranks in the White House, including Karl Rove. The evidence shows that senior officials were apparently focused on the political impact of federal prosecutions and whether federal prosecutors were doing enough to bring partisan voter fraud and corruption cases. It is now apparent that the reasons given for these firings were contrived as part of a cover up.

The Committee's attempts to obtain information from the White House, first requested voluntarily and later legally compelled by subpoenas, have been met with stonewalling. In the process, the White House has asserted blanket claims of executive privilege and novel claims of absolute immunity to block current and former officials from testifying and producing documents in compliance with the Committee's subpoenas. Today, I am ruling on those claims.

I. White House Invoked Blanket Privilege Claims to Avoid Complying with Subpoenas

On June 13 and July 26, I issued Judiciary Committee subpoenas that had been authorized months earlier for White House documents and for documents and testimony from current and former White House officials related to the firings. In response, White House counsel Fred Fielding conveyed President Bush's blanket claim of executive privilege over all information from the White House related to the Committee's investigation. Based on this claim of executive privilege, White House Chief of Staff Joshua Bolten and other current and former White House officials have refused to comply with subpoenas to provide documents and information. In addition, Mr. Fielding has written not only to current White House employees subpoenaed by the Committee and directed them not to testify about the firings, but has reached out to instruct former White House political director Sara M. Taylor not to testify to the best of her knowledge.

Finally, the White House has asserted the novel claim that Karl Rove, subpoenaed by this Committee for testimony and documents, is immune as an "immediate Presidential Advisor" from appearing at all or testifying.

That Mr. Fielding asserts executive privilege on behalf of the President is surprising in light of the significant and uncontroverted evidence that the President had no involvement in these firings. To date, the President has not taken responsibility for the firings and his own statements regarding the firings refer to others making the decisions. The Attorney General's former chief of staff, the former political director at the White House and the Attorney General himself have testified under oath that they did not talk to the President about these firings. Courts analyzing executive privilege claims have made clear that the purpose of the privilege is to protect the President's ability to receive candid advice. The President's lack of involvement in these firings—by his own account and that of many others—calls into question any claim of executive privilege.

The effects of the White House's assertions of privilege and immunity are unmistakable—they are to withhold critical evidence related to the Committee's investigation that the Committee has demonstrated it needs in order to perform its legislative and oversight functions and to explore the veracity of testimony to the Committee.

Selectively citing letters from Mr. Fielding, former employee Ms. Taylor and her former deputy, J. Scott Jennings, refused to answer most of the Committee's questions related to the firings. They produced no documents, despite their obligations to do so pursuant to the Committee's subpoenas. In response to the subpoena to Mr. Rove, the Committee received only a letter from Mr. Fielding. Mr. Rove did not appear to testify and produce documents or even to assert executive privilege in response to questions.

The White House's other blanket assertion is that there was no wrongdoing in the firings. We have asked for the basis for this assertion. None has been provided. In light of the evidence gathered by the Committee showing the significant involvement of White House political officials in improper politicization of law enforcement, the White House is not entitled to withhold key evidence. If the White House has information that led the President and others to discount the evidence of wrongdoing the investigating Committees have gathered so far, then it should be produced. Otherwise, we must conclude that they do not have it and it does not exist.

II. White House Rejected Voluntary Cooperation

I reluctantly moved to issue these subpoenas only after exhausting every avenue seeking voluntary cooperation. Before issuing the subpoenas, I sent nearly a dozen letters seeking voluntary cooperation with the Committee's investigation to the White House and its current and former employees. Despite mounting evidence of significant involvement by White House political officials, the White House did not produced a single document or allow even one White House employee or former employee involved in these matters to be interviewed voluntarily.

Indeed, the White House's only response to our many attempts to work out an accommodation has been to restate an unacceptable "take it or leave it" offer of limited document availability and off-the-record, backroom interviews with no transcript, no oath, and no ability to follow up. The Committee rejected that as unacceptable when it was offered in March and, despite all of our efforts, the White House has been unwilling to work with us on a voluntary basis. When I wrote to the President in August following the suggestion of Senator Specter, the Committee's Ranking Member, to ask the President to sit down with us and work out an accommodation, my offer was flatly rejected. The White House also flatly rejected an additional attempt earlier this month by the House Judiciary Committee to reach an accommodation.

III. White House Failed to Support Privilege Claims

After the White House counsel made a blanket privilege assertion in response to this Committee's subpoenas and subpoenas issued by House Judiciary Chairman Conyers, we gave the White House the opportunity to provide the factual and legal basis for its blanket privilege assertion. A serious assertion of privilege would include an effort to demonstrate to the Committees which documents, and which parts of those documents, are covered by any privilege that is asserted to apply and why. But the White House has ignored these opportunities. In light of the evidence pointing to significant involvement by White House political officials, which had been communicated to the White House multiple times, the White House's refusal to provide a listing of those documents on which it asserts privilege and a specific factual and legal basis for the assertion of executive privilege claims renders its privilege assertions wholly unsupported and invalid.

The complete lack of particularity of the White House claims, including the lack of a privilege log or any specific factual basis for the privilege claims, makes the scope of the claims improper. That is so especially here where there is no indication of presidential involvement. The White House's privilege claim extends to all communications with third parties and the Department of Justice from any White House employee irrespective of the purpose of the communication and despite Mr. Fielding having offered to provide documents showing third party communications if the Committee would agree to terminate its investigation. The extension of this privilege claim to the knowledge of former employees is even more attenuated.

Executive privilege, even when properly asserted, "is qualified, not absolute"[1] and "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege."[2]

The White House has fallen well short of providing adequate support for its claims.

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[1] *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).
[2] *United States v. Nixon*, 418 U.S. 683, 706 (1974).

IV. The Committee Has Demonstrated Compelling Congressional Need That Outweighs the Overbroad, Unsubstantiated Executive Privilege Claims

Claims of executive privilege "can be overcome by an adequate showing of need."[3] In contrast to the White House's improperly asserted and unparticularized privilege claims, invoked despite the President's lack of involvement in these firings, the Committee's need for this information has been well-established. Evidence gathered by the investigating Committees of the Senate and House shows that White House political officials played a significant role in originating, developing, coordinating and implementing these unprecedented firings and the Justice Department's response to congressional inquiries about it.

The evidence we have found supports a conclusion that officials from the highest political ranks at the White House, including Mr. Rove, manipulated the Justice Department into its own political arm to pursue a partisan political agenda. We have found evidence of the involvement of White House political officials in pressuring prosecutors to bring partisan cases and seeking retribution against those who refuse to bend to their political will. An example is New Mexico U.S. Attorney David Iglesias, who was fired a few weeks after Karl Rove complained to the Attorney General about the lack of purported "voter fraud" enforcement cases in Mr. Iglesias' jurisdiction.

We have found that at least one Department official, the White House liaison Monica Goodling, who attended political briefings provided by White House political officials, admitted while testifying in the House under a grant of immunity to screening career employees for political loyalty and to wielding undue political influence over key law enforcement decisions and policies. We have found that officials at the White House and the Justice Department were determined to use the Attorney General's new authority enacted as part of the Patriot Act reauthorization to put in place "interim" U.S. Attorneys indefinitely, doing an end-run around the Senate's constitutional and statutory role in the confirmation of U.S. Attorneys.

Along the way, this subversion of the justice system has included lying, misleading, stonewalling and ignoring the Congress in our attempts to determine what happened. It is obvious that the reasons given for these firings were contrived as part of a cover up and that the stonewalling by the White House is part and parcel of that same effort. During his sworn testimony, the Attorney General himself contrasted these politically-motivated firings with the replacement of other United States Attorneys for "legitimate cause."

Another demonstration of this Administration's partisan intervention in federal law enforcement is its threat to block the Justice Department from pursuing congressional contempt citations. This Administration has announced its intentions to interfere with our system of justice by preventing a United States Attorney from fulfilling his or her sworn, constitutional duty faithfully to execute the laws and proceed pursuant to section 194 of title 2 of the United States Code.

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[3] *In re Sealed Case* at 745.

The constitutional powers of Congress and the responsibilities of this Committee to the Senate and the American people overrule the White House's unsupported privilege claims. The Supreme Court has long recognized that Congress has "broad" power to investigate "the administration of existing laws" and to "expose corruption, inefficiency, waste" within the executive branch.[4] The evidence obtained raises concerns about the violation of federal laws, including possible obstruction of justice, laws prohibiting misleading or inaccurate testimony to Congress, and possible violations of laws like the Hatch Act prohibiting retaliation against federal employees for improper political reasons. The Committee has the responsibility to conduct investigations and obtain executive branch information in order to consider legislation within our jurisdiction,[5] including legislation related to the appointment of U.S. Attorneys, and to protect our role in evaluating nominations pursuant to the Senate's constitutional responsibility to provide advice and consent. Indeed, it was in light of this jurisdiction, the confirmation power vested in the Senate, and the jurisdiction of this Committee over the review of U.S. Attorney nominations, that Senator Specter, the Committee's Ranking Member, observed early on that we have "primary" responsibility to investigate this matter.

The White House's privilege claim is particularly inappropriate in light of the evidence suggesting possible wrongdoing by government officials. Not only has the Supreme Court recognized that Congress' "broad investigative power" is necessary to determine whether there was wrongdoing and address it, but previous administrations have recognized that executive privilege should not be invoked to prevent investigations into wrongdoing.

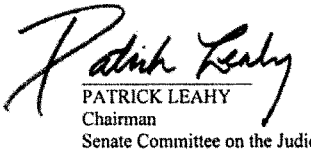
V. No Support for Immunity Claim

Also without support is the White House claim that Mr. Rove is immune from the obligation to appear in response to a Senate subpoena. There is no proper basis for Mr. Rove's refusal to appear, and it flies in the face of legal and historical precedent. Since World War II, 74 presidential advisors, in positions of proximity to the President similar to Mr. Rove, have testified before Congress, many of those compelled by subpoena. Even the President has not been immune from compliance with subpoenas. In support of its novel immunity argument, the White House relies on a July 10 memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General in the Office of Legal Counsel, that amounts to a selective and incomplete collection of untested executive branch memoranda, opinions, presidential letters and speeches—in short, assertions of executive power by the executive branch. Indeed, the White House does not and cannot cite a single court decision in support of its contention.

VI. Conclusion: White House Officials Directed to Comply with Subpoenas

I have given the White House's claims of executive privilege and immunity careful consideration. I hereby rule that those claims are not legally valid to excuse current and former White House employees from appearing, testifying and producing documents related to this investigation. Accordingly, I direct Mr. Bolten, Mr. Rove, Ms. Taylor and Mr. Jennings to comply immediately with the Committees' subpoenas by producing documents and testifying.

Issued this 29th day of November, 2007.



PATRICK LEAHY
Chairman
Senate Committee on the Judiciary

VI. Resolutions Finding Joshua Bolten and Karl Rove in Contempt of Congress for Failure To Comply With the Senate Subpoenas

Despite Chairman Leahy's ruling, Mr. Rove and Mr. Bolten continued in noncompliance with the subpoenas. Mr. Bolten was scheduled to appear and provide documents to the Committee by June 28, 2007, and Mr. Rove was summoned to testify before the Judiciary Committee on August 2, 2007. Both failed to appear. On December 13, 2007, the Judiciary Committee found Mr. Rove and Mr. Bolten to be in contempt of Congress for failing to comply with the subpoenas issued in connection with the Committee's investigation into the mass firings of U.S. Attorneys. The bipartisan vote to report the contempt resolutions came two weeks after Chairman Leahy ruled that the President's claims of executive privilege were overbroad and not legally valid to excuse Mr. Rove and Mr. Bolten from providing Congress with subpoenaed documents and testimony.

A. FORM OF THE RESOLUTIONS

The resolutions of contempt, certifying the noncompliance of Mr. Rove and Mr. Bolten are reprinted below:

RESOLUTION

Authorizing the President of the Senate to certify the facts of the failure of Joshua Bolten, as the Custodian of Records at the White House, to appear before the Committee on the Judiciary and produce documents as required by Committee subpoena.

WHEREAS, since the beginning of this Congress, the Senate Judiciary Committee has conducted an investigation into the removal of United States Attorneys;

WHEREAS, the Committee's requests for information related to its investigation, including documents and testimony from the White House and White House personnel, were denied;

WHEREAS, the White House has not offered any accommodation or compromise to provide the information requested that is acceptable to the Committee;

WHEREAS, on April 12, 2007, pursuant to its authority under Rule 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary authorized issuance to the Custodian of Records at the White House, a subpoena which commands the Custodian of Records to provide the Committee with all documents in the possession, control, or custody of the White House related to the Committee's investigation;

WHEREAS, on June 13, 2007, the Chairman issued a subpoena pursuant to the April 12, 2007, authorization to White House Chief of Staff Joshua Bolten as the White House Custodian of Records, for documents related to the Committee's investigation, with a return date of June 28, 2007;

WHEREAS, on June 28, 2007, in response to subpoenas for documents issued by the Senate and House Judiciary

Committees, White House Counsel Fred Fielding conveyed the President's claim of executive privilege over all information in the custody and control of the White House related to the Committee's investigation;

WHEREAS, based on this claim of executive privilege, Mr. Bolten refused to appear and produce documents to the Committee in compliance with the subpoena;

WHEREAS, on June 29, 2007, the Chairmen of the House and Senate Judiciary Committees provided the White House with an opportunity to substantiate its privilege claims by providing the Committees with the specific factual and legal bases for its privilege claims regarding each document withheld and a privilege log to demonstrate to the Committees which documents, and which parts of those documents, are covered by any privilege that is asserted to apply and why;

WHEREAS, the White House declined this opportunity in a July 9, 2007, letter to the Committee Chairmen from Mr. Fielding, while reiterating the privilege claim;

WHEREAS, on August 17, 2007, Mr. Fielding rejected the Chairman's request for a meeting with the President to work out an accommodation for the information sought by the Committee;

WHEREAS, on November 29, 2007, the Chairman ruled that the White House's claims of executive privilege and immunity are not legally valid to excuse current and former White House employees from appearing, testifying and producing documents related to this investigation and directed Mr. Bolten, along with other current and former White House employees, to comply immediately with the Committee's subpoenas by producing documents and testifying;

WHEREAS, Mr. Bolten has not complied with the Committee's subpoenas or made any offer to cure his previous noncompliance;

WHEREAS, the Committee's investigation is pursuant to the constitutional legislative, oversight and investigative powers of Congress and the responsibilities of this Committee to the Senate and the American people; including the power to: (1) investigate the administration of existing laws, and obtain executive branch information in order to consider new legislation, within the Committee's jurisdiction, including legislation related to the appointment of U.S. Attorneys; (2) expose any corruption, inefficiency, and waste within the executive branch; (3) protect the Committee's role in evaluating nominations pursuant to the Senate's constitutional responsibility to provide advice and consent; and (4) examine whether inaccurate, incomplete, or misleading testimony or other information was provided to the Committee;

BE IT RESOLVED, that the President of the Senate certify the facts in connection with the failure of Joshua Bolten, as the Custodian of Records at the White House, though duly summoned, to appear and to produce documents lawfully subpoenaed to be produced before the Com-

mittee, under the seal of the United States Senate, to the United States Attorney for the District of Columbia, to the end that Joshua Bolten may be proceeded against in the manner and form provided by law.

RESOLUTION

Authorizing the President of the Senate to certify the facts of the failure of Karl Rove to appear and testify before the Committee on the Judiciary and to produce documents as required by Committee subpoena.

WHEREAS, since the beginning of this Congress, the Senate Judiciary Committee has conducted an investigation into the removal of United States Attorneys;

WHEREAS, the Committee's requests for information related to its investigation, including documents and testimony from the White House and White House personnel, were denied;

WHEREAS, the White House has not offered any accommodation or compromise to provide the requested information that is acceptable to the Committee;

WHEREAS, on March 22, 2007, pursuant to its authority under Rule 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary authorized issuance to Karl Rove, Deputy Chief of Staff to the President, subpoenas in connection with the Committee's investigation;

WHEREAS, on June 28, 2007, in response to subpoenas for documents issued by the Senate and House Judiciary Committees, White House Counsel Fred Fielding conveyed the President's claim of executive privilege over all information in the custody and control of the White House related to the Committee's investigation;

WHEREAS, on June 29, 2007, the Chairmen of the House and Senate Judiciary Committees provided the White House with an opportunity to substantiate its privilege claims by providing the Committees with the specific factual and legal bases for its privilege claims regarding each document withheld and a privilege log to demonstrate to the Committees which documents, and which parts of those documents, are covered by any privilege that is asserted to apply and why;

WHEREAS, the White House declined this opportunity in a July 9, 2007, letter to the Committee Chairmen from Mr. Fielding, while reiterating the blanket privilege claims;

WHEREAS, on July 26, 2007, the Chairman issued a subpoena authorized March 22 to Mr. Rove for documents and testimony related to the Committee's investigation, with a return date of August 2;

WHEREAS, the Chairman noticed an August 2, 2007, Judiciary Committee hearing under its Rules at which Mr. Rove was subpoenaed to testify;

WHEREAS, Mr. Fielding, in an August 1, 2007, letter to the Chairman and Ranking Member, informed the Committee that the President would invoke a claim of execu-

tive privilege and a claim of immunity from congressional testimony for Mr. Rove, and directed Mr. Rove not to produce responsive documents or testify before the Committee about the firings, and that Mr. Rove would not appear in response to the Committee's subpoena;

WHEREAS, based on these claims of executive privilege and absolute immunity, Mr. Rove refused to appear or to produce documents or to testify at the Committee's August 2, 2007, hearing in compliance with the subpoena;

WHEREAS, on August 17, 2007, Mr. Fielding rejected the Chairman's request for a meeting with the President to work out an accommodation for the information sought by the Committee;

WHEREAS, on November 29, 2007, the Chairman ruled that the White House's claims of executive privilege and immunity are not legally valid to excuse current and former White House employees from appearing, testifying and producing documents related to this investigation and directed Mr. Rove, along with other current and former White House employees, to comply immediately with the Committee's subpoenas by producing documents and testifying;

WHEREAS, Mr. Rove has not complied with the Committee's subpoenas or made any offer to cure his previous noncompliance;

WHEREAS, the Committee's investigation is pursuant to the constitutional legislative, oversight and investigative powers of Congress and the responsibilities of this Committee to the Senate and the American people; including the power to: (1) Investigate the administration of existing laws, and obtain executive branch information in order to consider new legislation, within the Committee's jurisdiction, including legislation related to the appointment of U.S. Attorneys; (2) expose any corruption, inefficiency, and waste within the executive branch; (3) protect the Committee's role in evaluating nominations pursuant to the Senate's constitutional responsibility to provide advice and consent; and (4) examine whether inaccurate, incomplete, or misleading testimony or other information was provided to the Committee;

BE IT RESOLVED, that the President of the Senate certify the facts in connection with the failure of Karl Rove, though duly summoned, to appear and testify before the Judiciary Committee and to produce documents lawfully subpoenaed to be produced before the Committee, under the seal of the United States Senate, to the United States Attorney for the District of Columbia, to the end that Karl Rove may be proceeded against in the manner and form provided by law.

B. VOTE ON THE RESOLUTIONS

The Senate Judiciary Committee considered the resolutions on December 13, 2007. After debate, the Committee agreed to report the resolutions favorably to the Senate by the following vote:

YEAS (12)	NAYS (7)
Biden (Del.)	Brownback (Kan.)
Cardin (Md.)	Coburn (Okla.)
Durbin (Ill.)	Cornyn (Texas)
Feingold (Wis.)	Graham (S.C.)
Feinstein (Calif.)	Hatch (Utah)
Grassley (Iowa)	Kyl (Ariz.)
Kennedy (Mass.)	Sessions (Ala.)
Kohl (Wis.)	
Leahy (Vt.)	
Schumer (N.Y.)	
Specter (Pa.)	
Whitehouse (R.I.)	

VII. The Privilege and Immunity Claims Are Not Legally Valid To Excuse Compliance

A. The President's Lack of Involvement in the Firings Undermines Privilege Claims

Mr. Fielding's executive privilege assertion on behalf of the President is surprising in light of the lack of evidence that the President was involved in these firings. To date, the President has not taken responsibility for the firings, and his own statements regarding the firings deflect responsibility to others for the decisions that were made. Attorney General Alberto Gonzales's former chief of staff, the former political director at the White House and Attorney General Gonzales himself testified under oath that they did not talk to the President about these firings.

On March 14, 2007, addressing the growing controversy related to the firings, President Bush stated that the Justice Department made the decisions in the firings:

> I do have confidence in Attorney General Gonzales. I talked to him this morning, and we talked about his need to go up to Capitol Hill and *make it very clear to members in both political parties that the Justice Department made the decisions it made,* make it clear about the facts, and he is right, mistakes were made.[17]

President Bush echoed this statement in subsequent statements on March 20, 2007, and March 31, 2007, continuing to point to the need for Attorney General Gonzales to resolve the scandal by telling the truth.[18] He did not take responsibility for the firings, nor did he express at any point that he had been advised about them.

Indeed, the sworn testimony of White House and Department of Justice officials indicate that the President was not involved. Kyle Sampson, former chief of staff to the Attorney General who "aggregated" the lists of those U.S. Attorneys to be fired, testified that the President was not present at a single meeting to discuss the decision to remove the U.S. Attorneys, and no presidential decision

[17] President George W. Bush, Joint Media Availability with President Calderon of Mexico, Merida, Mexico, March 14, 2007 (emphasis added).

[18] See President George W. Bush, Press Conference Addressing the Resignations of U.S. Attorneys, March 20, 2007; President George W. Bush, Remarks with President Luiz Ignacio Lula De Silva of Brazil, Camp David, MD, March 31, 2007.

document endorsing the replacement plan existed.[19] Former Deputy Attorney General Paul McNulty, on whose recommendations and advice Attorney General Gonzales said he relied, testified that he was "not aware of the President being consulted" in regards to the U.S. Attorney firings.[20] Ms. Taylor, former White House political director, testified that to her knowledge the President was not involved with any U.S. Attorney removal decisions.[21] And in a statement on March 13, the Attorney General stated that he took responsibility for the firings,[22] later testifying to the same effect before the Committee.

Courts analyzing executive privilege claims have made clear that the purpose of the privilege is to protect the President's ability to receive candid advice. According to the leading case on executive privilege from the D.C. Circuit, the presidential communications privilege applies to communications "intimately connected to his presidential decision-making."[23] Where, as here, the President by all accounts, including his own, was not involved, there are serious questions whether information sought by the Committee could be withheld based on a claim of executive privilege.

The court decisions reviewing executive privilege claims do not support such a broad scope for executive privilege claims beyond communications directly involving the President. Senate Select Committee on Presidential Campaign Activities v. Nixon case dealt solely with tapes of presidential conversations.[24] Nixon v. United States[25] and Nixon v. Administrator of General Services,[26] the leading Supreme Court cases on the issue of executive privilege, consider similarly limited assertions of privilege.[27]

The administration seeks to have it both ways by claiming that the President was not involved in the removal decisions, but simultaneously that executive privilege, premised on the need to secure candid advice for the President, should apply. If the White House wishes to assert executive privilege, it should describe the involvement the President had in the decision making process. It has not done so and the evidence is that the President was not involved.

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[19] Interview with D. Kyle Sampson, Former Chief of Staff to the Attorney General, Department of Justice (April 15, 2007).

[20] Testimony of Paul McNulty, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part II, Senate Committee on the Judiciary, 110th Congress at 76 (February 6, 2007).

[21] Testimony of Sara M. Taylor, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part VI, Senate Committee on the Judiciary, 110th Congress at 105–106 (July 11, 2007).

[22] Attorney General Alberto Gonzales, Press Conference on the Firing of U.S. Attorneys (March 13, 2007).

[23] In re Sealed Case, 121 F.3d at 753.

[24] *Senate Select Committee* v. *Nixon,* 498 F.2d 725 (D.C. Cir. 1974) (holding that tapes of Presidential conversations that had already been released to another committee were protected by executive privilege).

[25] *Nixon* v. *United States,* 418 U.S. 683 (1974).

[26] *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977).

[27] In re Sealed Case (Espy), 121 F.3d 729, 752 (D.C. Cir. 1997) (the D.C. Circuit case which recently defined the scope of executive privilege involved a grand jury subpoena and expressly excluded congressional subpoenas from this extension of the privilege claim, recognizing the different balance that would govern: "Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, . . . and we take no position on how the institutional needs of Congress and the President should be balanced." Even in that case, the scope of privilege was limited to aides within "operational proximity" of the President who were "members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate" but not "staff outside the White House in executive branch agencies").

Accordingly, there is no justification for claiming executive privilege.

B. THE WHITE HOUSE'S ASSERTION OF EXECUTIVE PRIVILEGE IS UNSUBSTANTIATED

The President has not met his burden of properly claiming executive privilege, including a particularized showing of why he is entitled to the privilege from disclosing the information subpoenaed by the Committee. "As with any privilege the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure."[28] The White House's generalized assertion of blanket privilege fails to meet the President's burden, especially where, as here, the Committee has set forth its need for the materials and evidence showing White House involvement.[29]

In Center on Corporate Responsibility v. Shultz, the D.C. District Court held that the invocation of executive privilege by a White House counsel 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."[30] In Senate Select Committee on Presidential Campaign Activities v. Nixon, the claim was asserted in a letter to the Committee from the President.[31] More recently, when the D.C. Circuit determined that an assertion of executive privilege by White House Counsel Abner Mikva was an acceptable proxy for an assertion by the President, it did so because Mr. Mikva in a sworn affidavit asserted that the President personally invoked the privilege.[32] Mr. Fielding's letters do not meet this standard.

In addition, Mr. Fielding's claim on the President's behalf fails to make "a specific designation and description of the documents claimed to be privileged" as required by the courts.[33]

After the White House counsel made a blanket privilege assertion on behalf of the President in response to this Committee's subpoenas and subpoenas issued by the House Judiciary Committee, the Committees offered the White House the opportunity to provide the factual and legal basis for its blanket privilege assertion. A serious assertion of privilege would include an effort to demonstrate to the Committees which documents, and which parts of those documents, are covered by any privilege that is asserted and why. The White House ignored these opportunities. The White House's refusal to provide a listing of those documents on which it asserts privilege and a specific factual and legal basis for the assertion of

[28] *Smith* v. *F.T.C.,* 403 F. Supp. 1000, 1016 (D. Del. 1975). See also, *Black* v. *Sheraton Corp.,* 371 F. Supp. 97 (D.D.C. 1974) ("An improperly asserted claim of privilege is no claim of privilege").

[29] In re: Sealed Case (Espy) at 745 ("If a court believes that an adequate showing of need has been demonstrated, it should proceed then to review the documents in camera to excise nonrelevant material. Further, the President should be given the opportunity to raise more particularized claims of privilege . . .").

[30] 368 F. Supp. 863, 872–73 (D.D.C. 1973). See also *U.S.* v. *Reynolds,* 345 U.S. 1, 7–8 (1953) ("There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer").

[31] *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 498 F.2d, 725, 726–729 (D.C. Cir. 1974).

[32] In re Sealed Case (Espy) at 744, note 16 ("We need not decide whether the privilege must be invoked by the President personally, since the record indicates that President Clinton has done so here; in his affidavit former White House Counsel Abner J. Mikva stated "the President . . . has specifically directed me to invoke formally the applicable privileges over those documents").

[33] Smith at 1016 (quoting Black at 101).

executive privilege undermines the validity of any privilege assertion.

Executive privilege, even where properly asserted, "is qualified, not absolute"[34] and "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege."[35] The White House has fallen well short of providing adequate support for its claims. In reviewing executive privilege claims, courts have required that the President make "particularized showings in justification of his claims of privilege"[36] and have found that that a privilege log is necessary "in order that a court be able to make a knowledgeable decision as to whether any document or portion thereof actually contains advisory or deliberative materials." The unilateral assertion of privilege by a President must be subject to review by the Committee and courts. The White House's refusal to provide the factual basis for its claims renders them unfounded.

The complete lack of particularity of the White House claims, including the lack of a privilege log or any specific factual basis for the privilege claims is especially troubling where, as here, there appears not to be any involvement by the President. In presenting only a claim predicated on the generalized need for candid dialogue between the President and his aides, the President has failed to meet the burden of making "a demonstration of 'precise and certain reasons for preserving' the confidentiality of the governmental communications."[37] There are not even demonstrated communications with the President. Courts have cited with approval the general practice of providing a sworn affidavit raising the necessary facts underlying the claim.[38] Courts have rejected executive privilege claims, where, as here, they are broad and inadequately substantiated. In one case, the D.C. District Court held that "to recognize such a broad claim in which the Defendant has given no precise or compelling reasons to shield these documents from outside scrutiny, would make a farce of the whole procedure."[39] In another, the Court found "serious deficiencies" in an agency's privilege claim even where the agency provided detailed information about each specific document subject to the claim because "little or no information is provided as to the actual content of various documents."[40]

As discussed more fully in the following pages, in a civil suit stemming from the House Judiciary Committee's parallel investigation, the District Court for the District of Columbia undercut the White House's blanket claims of privilege without substantiation.[41] In his July 31, 2008, opinion, Judge John D. Bates wrote that "clear precedent and persuasive policy reasons confirm that the Executive cannot be the judge of its own privilege"[42] and that "both

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[34] In re Sealed Case (Espy), 121 F.3d at 745.
[35] *United States* v. *Nixon,* 418 U.S. 683, 706 (1974).
[36] Senate Select Committee at 729.
[37] Smith at 1016 (quoting Sheraton at 101).
[38] Smith at 1016 ("a close reading of cases where claims of executive privilege were raised indicates that the necessary facts have generally been required to be raised by affidavit").
[39] *Black* v. *Sheraton Corp.,* 371 F.Supp. 97, 101 (D.D.C. 1974).
[40] Smith at 1017.
[41] *Committee on the Judiciary, U.S. House of Representatives* v. *Miers,* 558 F.Supp.2d 53 (D.D.C., 2008), order stayed by *Committee on Judiciary of U.S. House of Representatives* v. *Miers,* 542 F.3d 909 (D.C.Cir. 2008).
[42] Id. at 106.

the Court and the parties will need some way to evaluate the privilege assertions going forward."[43] Judge Bates' opinion validates the Committee's requests for over a year for the White House to provide the specific legal and factual basis for its claims of privilege so that the Committee can probe the basis for those claims and their validity rather than rely on the say-so of the President's lawyers.

The White House's assertion of privilege over information related to the dismissal and replacement of U.S. Attorneys, and the response to congressional and media inquiries about them, extends to documents and testimony including internal White House communications, communications between the White House and the Department of Justice, and even communications between officials at the White House and third-party individuals outside the executive branch.[44] The White House's privilege claim is irrespective of the purpose of the communications. Were it successful, this effort to extend the scope of the privilege taken in conjunction with the White House's failure to make the particularized showing needed to support its claim would amount to an unprecedented and unchecked extension of executive privilege to include any information.

C. CONGRESS' NEED FOR THE INFORMATION OUTWEIGHS ANY PRIVILEGE CLAIM

Presidential communications privilege is not absolute,[45] and determining whether it prevails depends on "a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."[46] According to the Supreme Court in Nixon v. United States, "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises."[47] The White House's privilege assertion ignores the legitimate constitutional responsibilities of Congress in this matter. The constitutional legislative, investigative and oversight functions of Congress must be balanced against, and in this instance outweigh, the claim of executive privilege.

The constitutional functions of Congress include its legislative functions, including the review and passage of laws regarding the appointment of U.S. Attorneys and the filling of vacancies in those offices; its oversight functions and examination of the truthfulness of congressional testimony; the Senate's role in confirming presidential nominations; and the need to investigate possible corruption. The need to investigate possible corruption, maladministration and the failure to execute faithfully the laws weighs heavily in this balance. Here, the compelling needs of Congress outweigh the White House's generalized privilege assertion.

The constitutional powers of Congress and the responsibilities of this Committee to the Senate and the American people overcome the White House's unsubstantiated privilege claims. The Supreme Court has long recognized that Congress has "broad" power to in-

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[43] Id. at 107.

[44] Letter from Paul D. Clement, Solicitor General and Acting Attorney General, to President Bush (June 27, 2007).

[45] *United States* v. *Nixon*, 418 U.S. 683, 706–707 (1974) (holding that the executive was required to produce tapes of his oval office conversations in response to a grand jury subpoena).

[46] *Nixon* v. *Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973).

[47] *United States* v. *Nixon* at 706.

vestigate "the administration of existing laws" and to "expose corruption, inefficiency, [and] waste" within the executive branch.[48] The Committee has the responsibility to conduct investigations and obtain executive branch information in order to consider legislation within its jurisdiction,[49] including legislation related to the appointment of U.S. Attorneys, and to protect its role in evaluating nominations pursuant to the Senate's constitutional responsibility to provide advice and consent. Indeed, it was in light of this jurisdiction, the confirmation power vested in the Senate, and the jurisdiction of this Committee over the review of U.S. Attorney nominations, that Senator Specter, the Committee's Ranking Member, observed early on that the Committee has "primary" responsibility to investigate this matter.

This investigation offers a clear example of the relationship between the Committee's compelling oversight and investigative interests and the need for the Committee to obtain information in order to legislate. Since this investigation began and the Committee began uncovering abuses in the appointment of interim U.S. Attorneys, Congress has already legislated once to rescind the Attorney General's power to appoint interim U.S. Attorneys who could serve indefinitely without the Congressional approval.[50]

The Committee has met the standard provided by the D.C. Circuit for establishing that its need for the materials overcomes the privilege claim. According to the Espy court, "[a] party seeking to overcome a claim of presidential privilege must demonstrate: first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere."[51]

The Committee has pursued this matter diligently. Based on evidence, information, testimony and interviews, the Committee believes that White House officials are involved. Still, the White House refuses to provide a single witness or document. The documents and testimony that have been subpoenaed will provide critical evidence.

D. EVIDENCE OF INVOLVEMENT OF WHITE HOUSE OFFICIALS IN THE FIRINGS DEMONSTRATES COMMITTEE'S NEED FOR THE INFORMATION

In contrast to the White House's improperly asserted and unparticularized privilege claims, the Committee's need for this information, including the specific information of White House involvement and possible misconduct, has been well-established. Evidence gathered by the investigating Committees of the Senate and House shows that White House officials played a significant role in originating, developing, coordinating and implementing these un-

[48] See *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).

[49] See, e.g., *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927).

[50] See 28 U.S.C. 546 (1966), amended by Pub. L. No. 109–177, Title V, § 502, 120 Stat. 546 (Mar. 9, 2006); amended by Pub. L. No. 110–34, § 2, 121 Stat. 224 (June 14, 2007).

[51] In re: Sealed Case (Espy) at 754 (The Acting Attorney General's letter to the President cites the standard from an older D.C. Circuit case, *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, that has been superseded by Espy—that a Congressional Committee must establish that the materials it seeks are "demonstrably critical to the fulfillment of the Committee's functions." Senate Select Comm. at 731. There is no question the Committee's need for this information meets either standard. Here, unlike in Senate Select, the documents and testimony sought by the Committee contain information that remains under White House control and critical to the investigation).

precedented firings and the Justice Department's response to congressional inquiries about it.

The accumulated evidence shows that the list for firings was compiled based on input from the highest political ranks in the White House, including Mr. Rove, Ms. Taylor, and Mr. Jennings. The evidence shows that senior officials were apparently focused on the political impact of Federal prosecutions and whether Federal prosecutors were doing enough to bring partisan voter fraud[52] and corruption cases. It is obvious that the reasons given for these firings were contrived as part of a cover up and that the stonewalling by the White House is part and parcel of that same effort. Even Attorney General Gonzales, in his sworn testimony in July 2007, contrasted these politically motivated firings with the replacement of other United States Attorneys for "legitimate cause."[53]

The evidence that U.S. Attorneys were fired for political purposes points to Mr. Rove and his political operations in the White House. Evidence shows that Mr. Rove and then-White House Counsel Alberto Gonzales were involved from the beginning in plans to remove U.S. Attorneys. According to documents obtained from the Department and Mr. Sampson's testimony, Mr. Sampson discussed the plan with then-White House Counsel Gonzales not long after President Bush's re-election in 2004. A January 9, 2005, e-mail released by the Department shows that Mr. Rove initiated inquires with respect to "how we planned to proceed regarding U.S. Attorneys, whether we were going to allow all to stay, request resignations from all and accept only some of them, or selectively replace them, etc."[54] In his response to queries from David Leitch, a White House official, Mr. Sampson expressly deferred to the political judgment of Mr. Rove as to whether to proceed with plans for the replacement of U.S. Attorneys, writing,"[I]f Karl thinks there would be political will to do it, then so do I."[55]

Mr. Sampson, who has testified that he "aggregated" the list of U.S. Attorneys to be fired, was apparently in frequent contact with White House officials about multiple versions of proposed lists of possible U.S. Attorneys for dismissal and potential replacements over the course of nearly two years.[56]

Mr. Rove's own words suggest that placing "loyal Bushies" in key battleground states for the next election played a significant role in these firings. In April 2006, Mr. Rove gave a speech to the Republican National Lawyers' Association where he listed 11 states

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[52] The minority views filed by Senators Kyl, Sessions, Brownback and Coburn repeat partisan talking points from the last election equating voter registration fraud with in-person voter fraud. Only the latter threatens to affect the outcome of an election. As both this Committee and the Senate Rules Committee have demonstrated in numerous hearings, the myth of in-person voter fraud is just that. In their recent amicus brief to the United States Supreme Court a number of present and former Secretaries of State from Georgia, Maryland, Missouri, Ohio and Vermont noted that "in Federal elections between 1996 and the present, in which more than twenty-four million votes were cast" not a single case of voter impersonation fraud occurred at the polls. The Federal Judge who reviewed and dismissed a Justice Department suit against Missouri concluded: "It is . . . telling that the United States has not shown that any Missouri resident was denied his or her right to vote . . . [n]or has the United States shown that any voter fraud has occurred."

[53] Testimony of Alberto Gonzales, Oversight of the U.S. Department of Justice, Senate Committee on the Judiciary, 110th Congress at 53 (July 24, 2007).

[54] OAG 180.

[55] Id.

[56] Interview with D. Kyle Sampson, Former Chief of Staff to the Attorney General, Department of Justice at 111–119 (April 15, 2007).

he saw as pivotal battlegrounds for the 2008 election: Pennsylvania, Michigan, Ohio, Florida, Colorado, Arkansas, Wisconsin, Minnesota, Nevada, Iowa, New Mexico.[57] Since 2005, U.S. Attorneys in nine of these states have been considered for removal and nine have been replaced.[58] Four of the U.S. Attorneys who were fired as part of the mass firing were from these states.

The Committee has learned that Mr. Rove raised concerns with Attorney General Gonzales about prosecutors not aggressively pursuing purported voter fraud cases in several of the districts he discussed in that speech and that prior to the 2006 mid-term election he sent the Attorney General's chief of staff a packet of information containing a 30-page report concerning voting in Wisconsin in 2004.[59] Mr. Rove also passed on to Mr. Sampson the complaints of Wisconsin Republican officials about the U.S. Attorney for the Eastern District of Wisconsin regarding his failure to pursue voter fraud cases.[60] That U.S. Attorney's name was added to the list Mr. Sampson was developing for firing in early 2005, two weeks after Mr. Rove reviewed activity about vote fraud in his district.[61] That U.S. Attorney's name did not appear on subsequent lists and he kept his job after he brought 14 voter fraud cases arising from the 2004 election and prosecuted Wisconsin civil servant Georgia Thompson in a public corruption case connected to Democratic Governor Jim Doyle.[62] The Justice Department won only five of these 14 cases[63] and the Georgia Thompson case was later thrown out on appeal by the Seventh Circuit for evidence that was "beyond thin" immediately after oral argument, which is highly unusual.[64] This evidence points to Mr. Rove's role and the role of those in his office in removing or trying to remove prosecutors not considered sufficiently loyal to Republican electoral prospects. Such manipulation shows corruption of Federal law enforcement for partisan political purposes.

We also know, through press accounts and testimony, that after the 2006 midterm election, Mr. Rove discussed the performance of New Mexico U.S. Attorney David Iglesias with Senator Domenici, who himself had called Mr. Iglesias before the election to ask whether he was bringing indictments against a Democratic official in the lead up to the election.[65] We have learned that Mr. Jennings set up a meeting between the Department's White House liaison, Monica Goodling, and New Mexico Republican officials in June 2006 to talk about the U.S. Attorney "situation" in New Mexico, de-

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[57] Speech by Karl Rove to Republican National Lawyers Association, April 7, 2006; See also Greg Gordon, New U.S. Attorneys Seem to Have Partisan Records, McClatchy Newspapers, March 23, 2007.

[58] An Evolving List, Washington Post, May 17, 2007.

[59] Interview with Matthew Friedrich, Chief of Staff and Principal Deputy Assistant Attorney General, Criminal Division, Department of Justice at 27–31 (May 4, 2007); OAG 820–852

[60] Interview with D. Kyle Sampson, Former Chief of Staff to the Attorney General, Department of Justice at 168–175 (April 15, 2007).

[61] An Evolving List.

[62] Eric Lipton and Ian Urbina, In 5-Year Effort, Scant Evidence of Voter Fraud, New York Times, April 12, 2007; Gina Barton, Stacy Forster and Steven Walters, State Official Indicted in Travel Contract Case, Milwaukee Journal-Sentinel, January 24, 2007.

[63] Lipton and Urbina, 5-Year Effort, Scant Evidence of Voter Fraud.

[64] *U.S.* v. *Thompson,* 484 F.3d 877, 878–879 (7th. Cir. 2007); Steven Walters and John Diedrich, Ex-State Official Freed, April 5, 2007.

[65] Mike Gallagher, Domenici Sought Iglesias Ouster, Albuquerque Journal, April 15, 2007; Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part II, Senate Committee on the Judiciary, 110th Congress at 36–37 (March 6, 2007).

scribing it as "sensitive."[66] Matthew Friedrich, counselor to the Attorney General, also met with these officials and testified that they were concerned about Mr. Iglesias' failure to bring a particular vote fraud case against ACORN, a non-profit organization that works to register voters.[67] Mr. Friedrich also testified that when he later met with these officials, they told him they had communicated with Mr. Rove and Senator Domenici about trying to have Mr. Iglesias removed.[68]

Mr. Iglesias was subsequently fired a few weeks after Mr. Rove complained to the Attorney General about the lack of purported "voter fraud" enforcement cases in his jurisdiction.[69] His name had not been on any previous lists of U.S. Attorneys being considered for firing that were "aggregated" by Mr. Sampson.[70] According to Allen Weh, chairman of New Mexico's Republican party, when he asked Mr. Rove during a holiday party in 2006 "is anything ever going to happen to that guy?"—referring to Mr. Iglesias—Mr. Rove responded, "He's gone."[71]

Evidence suggests that other fired U.S. Attorneys had drawn the ire of political operatives in the White House. John McKay, former U.S. Attorney for the Western District of Washington, testified that when he met with Ms. Miers and her deputy Mr. Kelley to interview for a Federal judgeship, he was asked to explain "criticism that I mishandled the 2004 governor's election" after which Republicans were upset with him for not intervening in that closely contested election.[72]

There is evidence that suggests that White House officials may have been involved in the firing of Carol Lam, former U.S. Attorney for the Southern District of California. She prosecuted Republican Congressman Duke Cunningham, which led to his conviction and the convictions of CIA official Kyle "Dusty" Foggo and Brent Wilkes, a defense contractor with links to Republican members of Congress. One day after she notified Department officials in Washington, D.C., that she was executing search warrants against Mr. Foggo and Mr. Wilkes,[73] Kyle Sampson sent an email to Deputy White House Counsel William Kelley saying that they should discuss, "[t]he real problem we have right now that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her 4-year term expires."[74]

According to documents and testimony, Ms. Taylor and Mr. Jennings were involved in the discussions and planning that led to the removal of Bud Cummins and bypassing the Senate confirmation process to install Tim Griffin, another former aide to Mr. Rove, as U.S. Attorney in the Eastern District of Arkansas. They were both

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[66] OAG 114, 572; Interview with Matthew Friedrich at 31–40.

[67] Id. at 34–35.

[68] Id. at 38–39.

[69] Testimony of Kyle Sampson, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III, Senate Committee on the Judiciary, 110th Congress at 130–134 (March 29, 2007).

[70] Id. at 130–131.

[71] See Margaret Talev & Marisa Taylor, Rove Was Asked to Fire U.S. Attorney, McClatchy Newspapers, March 10, 2007.

[72] Answers to Post-Hearing Questions from John McKay, H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys, Subcomm. on Commercial and Admin. Law, House Committee on the Judiciary, 110th Congress at 275 (March 6, 2007).

[73] Dan Eggen, Prosecutor's Firing Was Urged During Probe, Washington Post, March 9, 2007; Testimony of Kyle Sampson, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III at 39–40.

[74] OAG 22.

part of a group that discussed using the Attorney General's expanded authority under the Patriot Act reauthorization to avoid the opposition of the Arkansas Senators by appointing Mr. Griffin indefinitely.[75] Mr. Sampson testified that Ms. Taylor was upset when, a month after telling Senator Pryor he was committed finding a U.S. Attorney who could be confirmed by the Senate, the Attorney General finally "rejected" this use of his appointment authority.[76]

In addition, documents and testimony show that Ms. Taylor was the White House official who approved the plan for firing multiple U.S. Attorneys on December 7, 2006, on behalf of the White House political office.[77] Mr. Jennings also had knowledge of this plan and both he and Ms. Taylor were involved in subsequent discussions regarding congressional testimony of Department officials and the administration's response to the growing scandal surrounding the firings.[78]

Documents and testimony also show that Mr. Rove, Mr. Jennings and Ms. Taylor had a role in shaping the administration's response to congressional inquiries into these dismissals, which led to inaccurate and misleading testimony to Congress and misleading statements to the public. According to the testimony of Department officials, Mr. Rove and other White House officials attended a meeting at the White House on March 5, 2007—the day before Principal Associate Deputy Attorney General William Moschella testified before the House Judiciary Committee—to "go over the Administration's position on all aspects of the US atty issue."[79]

The administration's response included an attempt to cover up the role that White House officials played in the firings. According to documents and the testimony of Mr. Sampson, Attorney General Gonzales was upset after the February 6, 2006, testimony of Deputy Attorney General Paul McNulty because Mr. McNulty's testimony put the White House involvement in the firings in the public domain.[80] The administration's February 23, 2007, response to a letter from Senators Reid, Schumer, Durbin and Murray regarding the firings stated, "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin."[81] Earlier emails indicate that the appointment of Mr. Griffin was important to Mr. Rove.[82] The White House apparently signed off on this letter. Many parts of this letter were later retracted.[83] Reports indicate that among the emails withheld from the investigating Com-

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[75] Interview with D. Kyle Sampson, Former Chief of Staff to the Attorney General, Department of Justice at 54 (April 15, 2007).

[76] Id. at 93.

[77] OAG 45; Testimony of Kyle Sampson, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III at 32–33.

[78] Testimony of Kyle Sampson, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III at 37–39.

[79] Interview with William Moschella, Principal Associate Deputy Attorney General, Department of Justice at 99–102 (April 24, 2007); DAG 0840.

[80] Testimony of Kyle Sampson, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III at 159–162; OAG 297.

[81] Letter from Richard A. Hertling, Acting Assistant Attorney General, to Senator Charles Schumer (February 23, 2007).

[82] OAG 127.

[83] Letter from Richard A. Hertling, Acting Assistant Attorney General, Department of Justice to Senator Patrick Leahy and Senator Charles Schumer (March 28, 2007).

mittees are emails indicating that White House officials were consulted about that misleading letter.[84]

The extensive involvement of White House officials in the matters under investigation has been established by the selective documents and emails released by the Justice Department and by the testimony of Department officials. What the White House stonewalling is preventing is conclusive evidence of who made the decisions to fire these Federal prosecutors. The Committee's investigation of the firings, including critical information about the reasons and motivations for them, and the veracity of information provided to Congress about them, remains incomplete without the materials subpoenaed by this Committee.

E. EXECUTIVE PRIVILEGE NOT PROPER TO COVER UP WRONGDOING

The White House's privilege claim is particularly inappropriate in light of the evidence suggesting possible wrongdoing by government officials. Not only has the Supreme Court recognized that Congress' "broad investigative power" is necessary to determine whether there was wrongdoing and address it,[85] but previous administrations have recognized that executive privilege should not be invoked to prevent investigations into wrongdoing. During the Reagan administration, President Reagan himself declared, "[w]e will never invoke executive privilege to cover up wrongdoing,"[86] and the Justice Department's Office of Legal Counsel stated, "the privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers."[87] The Clinton administration followed a similar policy, stating that in relation to communications "relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either, in judicial proceedings or in congressional investigations and hearings."[88]

The Committee has found evidence of possible wrongdoing. The evidence supports a conclusion that officials from the highest political ranks at the White House, including Mr. Rove, manipulated the Justice Department, turning the Department into a political arm of the White House to pursue a partisan political agenda. The Committee has found evidence of the involvement of White House officials in pressuring prosecutors to bring partisan cases and seeking retribution against those who refuse to adhere to the political will of the administration. One example is New Mexico U.S. Attorney David Iglesias, who was fired a few weeks after Karl Rove complained to the Attorney General about the lack of purported "voter fraud" enforcement cases in Mr. Iglesias' jurisdiction. Department official Monica Goodling admitted while testifying before the House

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[84] Evan Perez, More Justice Emails Raise Stakes for Aide, Washington Post, March 29, 2007.

[85] See *Nixon* v. *Adm'r of Gen. Srvs.,* 433 U.S. 425, 453 (1977) (court found there to be a "substantial public interest" in preserving President Nixon's records so that Congress could investigate the events that led to President Nixon's resignation "in order to gauge the necessity for remedial legislation").

[86] Public Papers of the Presidents (1983) at 239, cited in L. Fischer, The Politics of Executive Privilege at 51 (2004).

[87] Congressional Subpoenas of Department of Justice Investigative Files, 8 U.S. Op. Off. Legal Counsel 252 at 41 (1984).

[88] Lloyd N. Cutler, Special Counsel to the President, Memorandum for all Executive Department and Agency Counsels, Congressional Requests for Departments and Agencies for Documents Protected by Executive Privilege at 1, Sept. 28, 1994, available in Frederick M. Kaiser et al., Congressional Oversight Manual, CRS Report for Congress, RL 30240 at App. C, May 1, 2007.

Judiciary Committee under a grant of immunity from prosecution to improperly screening career employees for political loyalty and wielding undue political influence over key law enforcement decisions and policies.[89] The Committee has found that officials at the White House and the Justice Department were determined to use the Attorney General's new authority enacted as part of the Patriot Act reauthorization, since rescinded, to put in place "interim" U.S. Attorneys indefinitely, doing an end-run around the Senate's constitutional and statutory role in the confirmation of U.S. Attorneys.[90]

Along the way, this subversion of the justice system has included lying, misleading, stonewalling and ignoring the Congress in our attempts to find out precisely what happened. The reasons given for these firings were contrived as part of a cover up and the stonewalling by the White House is part and parcel of that same effort. During his sworn testimony, Attorney General Gonzales, who has since resigned, contrasted these politically motivated firings with the replacement of other United States Attorneys for "legitimate cause."

As discussed more fully below, a joint investigation by the Department's Office of Inspector General (OIG) and Office of Professional Responsibility (OPR) concluded that the firings were unprecedented and that partisan political considerations played a role in the firings.[91] The report also concluded that the firings were not the result of "a few bad apples" run amok as suggested by some in the administration, but rather that Attorney General Gonzales and Deputy Attorney General McNulty bore primary responsibility for the deeply flawed process that led to the firings because they "abdicated their responsibility to adequately oversee the process and to ensure that the reasons for removal of each U.S. Attorney were supportable and not improper." In addition, the internal investigation found that they and other high-level Department officials were responsible for making untruthful statements about the removals and their role in the process. Finally, even though it was an executive branch investigation, the OIG/OPR investigation, like the Committee's investigation, was impeded by the Bush administration's refusal to cooperate and provide documents or witnesses despite evidence pointing to the significant involvement of high-level White House officials.

Since the beginning of this investigation, numerous Department and administration officials heavily involved in these firings have resigned, including the Attorney General and his chief of staff, the Deputy Attorney General and his chief of staff, the Acting Associate Attorney General, the Department's White House liaison, the Director of the Executive Office of U.S. Attorneys, the White House Political Director, the White House Counsel, the Deputy White House Counsel, and the White House Deputy Chief of Staff.

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[89] Testimony of Monica Goodling, The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters (Part I), House Committee on the Judiciary, 110th Congress at 36 (May 23, 2007).

[90] Testimony of Kyle Sampson, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III at 137; OAG 127.

[91] "An Investigation into the Removal of Nine U.S. Attorneys in 2006," the Department of Justice's Office of the Inspector General and the Department of Justice's Office of Professional Responsibility (September 29, 2008).

Monica Goodling, the Department's White House liaison, who only testified before the House Judiciary Committee after invoking her Fifth Amendment privilege against self-incrimination and receiving immunity, admitted to "crossing the line" with the illegal political vetting of possible hires for career positions at the Justice Department.[92] The allegations of improper hiring for career positions throughout the Department have been corroborated and confirmed as widespread by two OIG/OPR reports stemming from referrals by the Senate and House Judiciary Committees. An OIG/OPR report issued June 24, 2008, found improper and illegal political hiring for career positions in the Department's Honors Program and Summer Law Intern Program and a report issued July 28, 2008, found improper and illegal use of political considerations in hiring for career positions throughout the Department, including hiring for career prosecutor positions in U.S. Attorneys offices, for detailee positions in main Justice, and for immigration judge positions.

Bradley Schlozman, former Acting Assistant Attorney General for the Civil Rights Division of the Department of Justice and former Interim United States Attorney for the Western District of Missouri, has also acknowledged raising the political leanings of candidates who were being considered for career positions at the Justice Department.[93] A forthcoming report is expected to detail the findings of the OIG/OPR investigation into the allegations raised regarding Mr. Schlozman and the use of political considerations for hiring and personnel decisions in the Civil Rights Division.

The President's claim of executive privilege cannot be used to shield Congress from investigating possible wrongdoing by officials at the Department and the White House. Such wrongdoing was rampant.

F. THE WHITE HOUSE'S CLAIMS THAT KARL ROVE IS IMMUNE FROM TESTIMONY ARE CONTRADICTED BY LEGAL AND HISTORICAL PRECEDENT

In an August 1, 2007, letter, White House Counsel Fred Fielding advanced the novel argument that "based upon the advice of the Department of Justice, the President also has requested that I advise and inform you that Mr. Rove, as an immediate presidential advisor, is immune from compelled congressional testimony about matters that arose during his tenure and that relate to his official duties in that capacity." The White House raised similar arguments in response to a House Judiciary Committee subpoena issued to former White House Counsel Harriet Miers.

There is no proper basis for Mr. Rove to refuse to appear pursuant to the Committee's subpoena. Since World War II, 74 presidential advisors, in positions of proximity to the President similar to Mr. Rove, have testified before Congress, many of those compelled by subpoena.[94] Since 1975, in each of the 10 times cabinet-

[92] Testimony of Monica Goodling, The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters (Part I) at 36.

[93] Answers to Post-Hearing Questions from Bradley Schlozman, Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part V, Senate Committee on the Judiciary, 110th Congress (June 5, 2007).

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

level or senior executive officials have been cited by a congressional committee for contempt for failure to produce subpoenaed documents, the officials turned over the documents and "there was substantial or full compliance with the document demands."[95] The White House's newly-minted claim of "immunity" for White House employees is undermined by appearances by other current and former White House advisors, Ms. Taylor and Mr. Jennings, in response to this Committee's subpoenas related to this investigation. Even President Nixon backed away from making the extreme legal argument asserted by this White House. The White House Counsel, John Dean, and other advisors appeared and testified before Congress during its investigation of the Watergate scandal.

In support of this blanket assertion of immunity, the administration does not set forth a single court precedent. Rather, it relies on an August 1, 2007, letter from White House Counsel Fred Fielding and attached July 10, 2007, memorandum from Stephen G. Bradbury, this administration's principal Deputy Assistant Attorney General in the Office of Legal Counsel (OLC), that amounts to a selective and incomplete collection of untested executive branch memoranda, opinions, presidential letters and speeches—in short, assertions of executive power by the executive branch.[96] Indeed, the White House does not and cannot cite a single court case in support of its claims.

In a civil suit stemming from the House Judiciary Committee's parallel investigation, the District Court for the District of Columbia rejected the administration's claim of immunity for presidential advisors.[97] In his July 31, 2008, opinion, Judge Bates found that the "Executive's current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law." In addition, Judge Bates explained why the administration's blanket immunity claims were an unjustified encroachment on the constitutional powers of Congress. He wrote: "[I]f the Executive's absolute immunity argument were to prevail, Congress could be left with no recourse to obtain information that is plainly *not* subject to any colorable claim of executive privilege." The result, which the court concluded was "unacceptable," would be that the "Executive's proposed absolute immunity would thus deprive Congress of even non-privileged information."[98]

Although the administration has appealed Judge Bates' decision to the D.C. Circuit, the D.C. Circuit has specifically rejected the argument that OLC opinions like those cited by the White House in support of its novel claims have value as legal precedent outside of the executive branch itself. In Public Citizen v. Burke,[99] the government sought to enforce an OLC opinion that obliged the Archivist of the United States to "acquiesce in any claim of executive privilege asserted by the former president."[100] The opinion nominally interpreted regulations issued under the Presidential Record-

[95] Morton Rosenberg, Congressional Oversight Manual, CRS–37, note 21 and accompanying text.

[96] Steven G. Bradbury, Re: Immunity of Former Counsel to the President from Compelled Testimony at 1, July 10, 2007 (quoting Assertion of Executive Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 4 (1999) (hereinafter Bradbury)).

[97] See *Committee on the Judiciary* v. *Miers*, 558 F.Supp.2d 53.

[98] Id. at 106.

[99] 843 F.2d 1473, (Cir. Ct. D.C. 1988).

[100] Id. at 1474.

ings and Materials Act of 1974.[101] The court rejected the administration's argument, holding that deference to executive branch documents occurred only where an agency was interpreting a statute that it was bound to enforce and that, "[t]he federal Judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution."[102] Accordingly, the court rejected the OLC opinion because it "is at variance with congressional purpose."[103]

In fact, Federal court decisions contradict the White House's immunity assertion, and establish the scope of executive privilege and the need for balance among the three branches of the government. These decisions establish that no government official, including the President, is immune from compliance with a subpoena. Mr. Bradbury's memo states, "This immunity is absolute and may not be overborne by competing congressional interests."[104] This broad claim was struck down in the earliest days of the Republic. When the privilege was first recognized during the trial of Aaron Burr in 1807, Chief Justice Marshall specifically stated "[t]hat the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted."[105] The Supreme Court yet again ratified this principle 190 years later when it held that even a sitting president may be subpoenaed by a court and required to participate in a civil lawsuit.[106]

Moreover, Federal courts examining privilege claims have never endorsed the type of blanket immunity claim set forth by the White House in response to congressional or court subpoenas. For example, in Senate Select Committee on Presidential Campaign Activities v. Nixon, a case involving an executive privilege claim against compulsion by a congressional subpoena, the court set forth, as it has in every other instance of an executive privilege claim, a balancing test of the interests involved. The court held that applying the privilege "depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."[107] This balancing test presupposes that the President, not to mention his aides, must be able to be compelled by congressional committees to appear.

The White House contends its novel claim of immunity for presidential aides arises from separation of powers principles that render the President immune from Congressional subpoena. These claims ignore that the branches of government, while separate, act as a check on each other. Courts have long recognized that Congress has a broad, constitutionally grounded oversight power that encompasses both investigations into the administration of the government and the power to compel production of information where necessary. Mr. Bradbury's memo relies heavily on statements by President Truman in its argument and ignores that his broad

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[101] Note following 44 U.S.C. § 2111 (1982).

[102] See Burke, 843 F.2d at 1478, ("[T]he government's administrative opinion is not, in any meaningful sense, an interpretation of the statute. The OLC memorandum is driven entirely by its constitutional reasoning").

[103] 843 F.2d at 1480.

[104] Bradbury at 1.

[105] *United States* v. *Burr*, 25 F.Cas. 187, 191 (1807).

[106] *Clinton* v. *Jones*, 520 U.S. 681, 703–706 (1997).

[107] *Senate Select Committee* v. *Nixon*, 498 F.2d 725, 729 (D.C. Cir., 1974).

claims of presidential authority were rebuffed by the Supreme Court in the Youngstown Sheet & Tube Co. v. Sawyer.[108]

Another president, Woodrow Wilson, observed:

> Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. . . . The informing functions of Congress should be preferred even to its legislative function.[109]

Unlike President Truman, President Wilson has been favorably quoted on this point by the Supreme Court,[110] and has had his fundamental point—that the Congress has a constitutional oversight power and duty—upheld by numerous courts on numerous occasions. "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad."[111] The Court in McGrain v. Daugherty went further: "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[112] Not only is the power of inquiry essential to the function of Congress, the power of inquiry cannot exist without a means to compel testimony and production of documents.

The Supreme Court ruled in Nixon v. Fitzgerald: "It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States."[113] The Court has also stated that "[e]ven when a branch does not arrogate power to itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."[114] The White House provides no answer to the Supreme Court precedence demonstrating that Congress has the power to compel testimony and production of documents from government officials in the course of its investigations.

VIII. Continued Non-Compliance Despite the District Court's Decision in House Judiciary Committee Lawsuit Dismissing the Administration's Immunity and Blanket Privilege Claims

As part of its parallel investigation into the hiring and firing of U.S. Attorneys, the House Judiciary Committee, on behalf of the House of Representatives, has pursued a civil suit seeking an order that former White House Counsel Harriet Miers comply with a subpoena to appear and testify regarding the U.S. Attorney firings and that White House Chief of Staff Joshua Bolten produce a privilege log in response to the House Judiciary Committee subpoena. That

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[108] 343 U.S. 579 (1952).

[109] Woodrow Wilson, Congressional Government 195, 198 (Meridian Books 1956) (1885) (hereafter Wilson).

[110] See, e.g., *Hutchinson* v. *Proxmire*, 443 U.S. 111, 132 (1975) ("Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served") (quoting Wilson at 303).

[111] *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).

[112] *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927); See also Id. at 175 ("some means of compulsion are essential to obtain what is needed").

[113] *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753–754 (1981).

[114] *Loving* v. *United States*, 517 U.S. 748, 757 (1996).

suit, challenging the administration's claims of absolute immunity for presidential advisors and blanket claims of executive privilege, involves issues similar to those at issue in the administration's non-compliance with this Committee's subpoenas. The sole decision on the merits in that suit, issued by Judge Bates of the District Court for the District of Columbia on July 31, 2008, reached the same conclusion as Chairman Leahy's November 29, 2007 order, that the White House's executive privilege and immunity claims were not legally valid to excuse compliance with the Committee's subpoenas.

On July 25, 2007, after the failure of the administration to cooperate voluntarily or under compulsion by subpoena with the House Judiciary Committee's investigation into the U.S. Attorney firings, the House Judiciary Committee adopted a resolution of contempt against former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten. After continued non-compliance with the subpoenas, on February 14, 2008, the House voted 223–32 to hold Ms. Miers and Mr. Bolten in contempt, passing resolutions to pursue both criminal contempt charges and a civil action in Federal court for declaratory and injunctive relief to obtain compliance with the subpoenas.

On February 28, 2008, Speaker of the House Nancy Pelosi certified the contempt report to District of Columbia U.S. Attorney Jeffrey A. Taylor, directing him pursuant to 2 U.S.C. §§ 192 and 194 to present contempt charges against Mr. Bolten and Ms. Miers to a grand jury. On February 29, 2008, Attorney General Mukasey informed Speaker Pelosi that the Department refused to bring the contempt charges before a grand jury or take any action to prosecute Mr. Bolten or Ms. Miers. Accordingly, the House Judiciary Committee filed a civil action in the District Court for the District of Columbia for declaratory and injunctive relief to enforce the subpoenas.

On July 31, 2008, Judge Bates rejected the administration's claim that senior White House officials are not required to comply with congressional subpoenas. As in Chairman Leahy's November 29, 2007, order finding the administration's novel "immunity" claims without any legal or historical precedence, Judge Bates' decision found: "Executive's current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law." In addition, Judge Bates explained why the administration's blanket immunity claims were an unjustified encroachment on the constitutional powers of Congress. He wrote: "[I]f the Executive's absolute immunity argument were to prevail, Congress could be left with no recourse to obtain information that is plainly *not* subject to any colorable claim of executive privilege." The result, which the court concluded was "unacceptable," would be that the "Executive's proposed absolute immunity would thus deprive Congress of even non-privileged information."

Judge Bates' decision also undercut the White House's blanket claims of privilege without substantiation. In the court's opinion, Judge Bates wrote that "clear precedent and persuasive policy reasons confirm that the Executive cannot be the judge of its own privilege" and that "both the Court and the parties will need some way to evaluate the privilege assertions going forward." Judge

Bates' opinion validates the Committee's requests for over a year for the White House to provide the specific legal and factual basis for its privilege so that the Committee can probe the basis for those claims and their validity rather than rely on the say-so of the President's lawyers.

Judge Bates' opinion also recounted the efforts taken by both the House and Senate Judiciary Committees to reach an accommodation with the administration which have been to no avail in light of the administration's continued reliance on its initial "take it or leave it" proposal for off-the-record, backroom interviews with no transcript, no oath, and no ability to follow up, which would deny Congress the ability to fulfill its legislative and oversight responsibilities.

On July 31, 2008, after Judge Bates issued his opinion, Chairman Leahy sent letters to Mr. Rove's attorney, Robert Luskin, and White House Counsel Fred Fielding, instructing them to advise the Committee by August 7 when Mr. Rove and Mr. Bolten would appear to provide documents and testimony related to the mass firing of U.S. Attorneys. Chairman Leahy also sent a letter to Attorney General Michael Mukasey asking when the Department would withdraw memoranda and opinions justifying the White House's non-compliance with the subpoenas, including the memos purporting to justify the claim of immunity from testifying.

On August 7, 2008, Mr. Bolten and Ms. Miers requested a stay of Judge Bates' decision pending an appeal and White House Counsel Fred Fielding responded to Chairman Leahy that, despite the court's order, the White House would await the outcome of an appeal and a request to stay the decision before "entertaining any requests for Mr. Bolten's compliance with the Senate Judiciary Committee subpoena."

Chairman Leahy responded to Mr. Fielding's letter on August 14, 2008, again seeking compliance with the Committee's subpoenas, stating that the White House's "continued reliance on unprecedented 'immunity' claims places the administration starkly at odds with Congress, the Federal court, and the rule of law." In addition, Chairman Leahy pointed out that the administration has made no proposals since the initial unacceptable offer in March 2007 and taken no steps toward compliance with the Judiciary Committee's subpoenas or with the court's order.

On October 6, 2008, the Court of Appeals for the D.C. Circuit granted the administration's motion for a stay of Judge Bates' decision and refused to expedite the appeal. Accordingly, Judge Bates' July 31, 2008, decision rejecting the administration's position remains the only one on the merits. On October 16, 2008, Chairman Leahy received the Department's belated response to his July 31, 2008, letter to Attorney General Michael Mukasey asking whether he would be withdrawing the Department's memorandum supporting the now-rejected immunity claim. The Department responded that, in light of the D.C. Circuit's stay of the district court decision, the Office of Legal Counsel memorandum on immunity remains "authoritative."

The effects of the White House's assertions of privilege and immunity have been unmistakable—amounting to the withholding of critical evidence related to the congressional investigation. All along, the administration has contended that their blanket claim of

privilege and immunity cannot be tested but must be accepted by the Congress as the last word. The administration maintains that position despite a resounding rejection by Judge Bates.

IX. Department of Justice's Internal Investigation Confirmed Judiciary Committee's Findings Though Impeded by White House Refusal to Cooperate

On September 29, 2008, the Department of Justice's Office of the Inspector General (OIG) and the Office of Professional Responsibility (OPR) released a 358 page report on "An Investigation into the Removal of Nine U.S. Attorneys in 2006." This report stems from a joint internal investigation into the U.S. Attorney firings begun in March 2007. Glenn A. Fine, the Department's Inspector General, and H. Marshall Jarrett, counsel for OPR, informed the Judiciary Committee of the joint investigation in a March 26, 2007, letter to Chairman Leahy and Ranking Member Specter. They stated that they intended to investigate issues related to the removals of the U.S. Attorneys, including "whether the removal of any of the United States Attorneys was intended to interfere with or was in retaliation for pursuing or failing to pursue prosecutions or investigations" and "the accuracy of statements made by various Department officials to Congress about the removal of the United States Attorneys." The Senate and House committees investigating the firings clarified that investigation would be conducted in accordance with OIG practices, including independence from the Attorney General and making public any findings from the investigation.

Subsequent referrals to OIG/OPR of related matters of politicization of hiring and firing at the Department stemming from the congressional investigation became part of the joint internal investigation. As a result, in addition to the September 29, 2008, report summarized here regarding the removal of nine U.S. Attorneys in 2006, OIG/OPR issued reports on June 24, 2008, relating to political hiring for career positions in the Department's Honors Program and Summer Law Intern Program and on July 28, 2008, relating to the use of political considerations in hiring for career positions throughout the Department, including hiring for career prosecutor positions in U.S. Attorneys offices, for detailee positions in main Justice, and for immigration judge positions. A separate report is expected detailing the findings of the OIG/OPR investigation into the use of political considerations for hiring and personnel decisions in the Civil Rights Division.

The findings of September 29, 2008, report into the removal of U.S. Attorneys echoed the findings of the Committee's investigation that the firings were unprecedented and that partisan political considerations played a role in the firings. The report also concluded that the firings were not the result of "a few bad apples" run amok as suggested by some in the administration, but rather that Attorney General Gonzales and Deputy Attorney General McNulty bore primary responsibility for the deeply flawed process that led to the firings because they "abdicated their responsibility to adequately oversee the process and to ensure that the reasons for removal of each U.S. Attorney were supportable and not improper." In addition, the internal investigation found that they and other high-level Department officials were responsible for making untruthful statements about the removals and their role in the process. Finally,

even though it was an executive branch investigation, the OIG/OPR investigation, like the Committee's investigation, was impeded by the Bush administration's refusal to cooperate and provide documents or witnesses despite evidence pointing to the significant involvement of high-level White House officials like Karl Rove and former White House Counsel Harriet Miers.

The investigation described in the September 29, 2008, report focused on four areas. First, OIG/OPR investigated possible reasons the U.S. Attorneys were removed including whether for partisan political purposes, to influence an investigation or prosecution, or for retaliation purposes. Second, the investigation examined the process by which the U.S. Attorneys were selected for removal and identified the persons involved in those decisions. Third, OIG/OPR investigated whether Attorney General Gonzales or other Department officials made misleading statements regarding the U.S. Attorneys' removal or attempted to influence other witnesses' testimony. Finally, OIG/OPR investigated whether the Department intended to bypass the Senate confirmation process by replacing the dismissed attorneys with interim U.S. Attorneys for an indefinite period.

The OIG/OPR report found that 28 U.S. Attorneys were considered for removal on at least one of eight lists compiled between March 2005, and the firings of seven U.S. Attorneys in December 2006. Of the nine U.S. Attorneys that were the subject of the investigation, OIG/OPR concluded that the removal of at least seven involved impropriety as to the reasons for the removal or inconsistencies in the reasons given for removal. The following is a brief summary of the findings regarding those seven:

A. TODD GRAVES

Todd Graves, former U.S. Attorney for the Western District of Missouri, was asked to resign on January 24, 2006. He announced his resignation on March 10, 2006 and left office March 24, 2006. Until May 2007, Department witnesses represented to Congress that seven U.S. Attorneys, plus Bud Cummins, were the only U.S. Attorneys removed as part of the process Kyle Sampson initiated in 2005 to identify and remove "underperforming" U.S. Attorneys. No witness mentioned Todd Graves of the Western District of Missouri. On May 9, 2007, Graves publically stated he was told to resign in January 2006 and his removal subsequently was included in the OIG/OPR investigation.

The only explanation offered by Department officials for Mr. Graves's removal, a vague recollection that an internal Department investigation may have been the basis for his removal, was found by OIG/OPR to have no basis. Rather, Mr. Graves appeared to have been removed because of complaints to the White House Counsel's Office by Senator Bond's staff regarding his decision not to respond to a demand from Senator Bond's staff member to get involved in a personnel decision in Representative Sam Graves's congressional office. The investigation into Mr. Graves's removal was hindered by the failure of Mr. Sampson and Ms. Goodling to recall the reasons for Mr. Graves's removal, by Ms. Goodling's refused to cooperate with the investigations, by the refusal of former White House Counsel Harriet Miers and other White House officials to cooperate

with the investigations, and by the absence of any documents memorializing the justifications for Mr. Graves's removal.

The report concludes that the Department's handling of Mr. Graves' removal was inappropriate because: The Department failed to fulfill its responsibility to protect its independence and the independence of Federal prosecutors by ensuring that otherwise effective U.S. Attorneys are not removed for improper political reasons. Nobody in the Department accepted responsibility for the decision to remove Mr. Graves, and nobody consulted with the Attorney General about the decision to tell a U.S. Attorney to resign.

B. H.E. "BUD" CUMMINS

H.E. "Bud" Cummins, the former U.S. Attorney for the Eastern District of Arkansas, was asked to resign in June 2006. He was replaced by Timothy Griffin in December 2006. The replacement of Mr. Cummins by Mr. Griffin gave rise to allegations that the firing was improper and that the Department was attempting to bypass the Senate confirmation process by appointing Griffin the interim U.S. Attorney for an indefinite term.

The Department initially stated that Mr. Cummins was included on its initial list of "weak U.S. Attorneys" because he was mediocre and an underperformer. In fact, Mr. Cummins was considered to be one of the top five U.S. Attorneys in the country. The two Department evaluations of Mr. Cummins' office were positive about his management of the office and his adherence to Department priorities. The investigation found that Mr. Cummins was not removed for performance reasons. His performance was never evaluated and no Department leader had suggested Mr. Cummins' performance was lacking. Rather, the evidence showed the main reason for Mr. Cummins' removal and timing of the removal was to provide a position for the former White House employee, Mr. Griffin.

The investigation also found that following Mr. Cummins' resignation and the announcement of Mr. Griffin as his replacement, senior Department leaders made a series of conflicting and misleading statements about Mr. Cummins' removal. The OIG/OPR investigation into the removal of Mr. Cummins was hindered by the refusal of former White House employees to cooperate with the investigations even though they had relevant information.

C. DAVID IGLESIAS

David Iglesias, former U.S. Attorney for the District of New Mexico was asked to resign on December 7, 2006. The Department stated Mr. Iglesias was removed because he was underperforming, was an absentee landlord who was "physically away a fair amount of time," and the Department received a complaint by Senator Domenici that he doesn't "move cases."

The OIG/OPR investigation into Mr. Iglesias's removal was hampered and is not complete because key witnesses declined to cooperate with their investigation. Specifically, former White House officials Harriet Miers and Karl Rove and Senator Domenici and his Chief of Staff refused requests for interviews as part of the investigation. Further, the White House would not provide the investigation with any internal documents and emails relating to the removal of Mr. Iglesias.

The investigation found that the Department's allegation that Mr. Iglesias was an absentee manager who had delegated too much authority to his first assistant was an "after-the-fact" justification for Mr. Iglesias's termination and not a reason he was placed on the removal list. Rather, the evidence shows that Kyle Sampson placed Mr. Iglesias on a list for removal due to complaints to the Department of Justice and the White House by Republican members of the Congress and party activists from New Mexico about Mr. Iglesias's handling of voter fraud and public corruption cases in the state. Once Mr. Iglesias was on the list, no senior Department leaders questioned his inclusion or asked that he be taken off the list. Thus, Mr. Iglesias was fired because of complaints by political officials, who had a political interest in the outcome of the voter fraud and corruption cases. The report found that these actions were an abdication of senior Department leaders' responsibilities, independence and integrity.

Based on inability of investigators to compel the cooperation of key witnesses and obtain White House documents, several unanswered questions regarding Mr. Iglesias's removal remain. Accordingly, OIG/OPR recommended that the Attorney General appoint a special counsel to investigate why Mr. Iglesias, and the other U.S. Attorneys, were removed, whether Mr. Sampson or other Department officials made false statements to Congress or to Department investigators about the reasons for the removal of Mr. Iglesias or the other U.S. Attorneys, and whether Federal criminal statutes were violated with regard to the removal of Iglesias. The report states that interviews with witnesses who refused to cooperate with the investigation, such as Mr. Rove, Ms. Goodling and Ms. Miers and a review of White House documents would provide more evidence to whether Mr. Sampson or others made false statements.

D. DANIEL BOGDEN

Daniel Bogden, former U.S. Attorney for Nevada, was told to resign on December 7, 2006, announced his resignation on January 17, 2007, and left office on February 28, 2007. The Department stated Mr. Bogden was removed because he "lacked energy and leadership, and was good on guns but not good on obscenity cases." The Department also proffered that he was removed for using a provision of the Patriot Act to obtain evidence in a criminal case.

The OIG/OPR investigation found no support for the allegation that Mr. Bodgen was told to resign due to the Patriot Act incident. The investigation determined that the primary reason that Mr. Bogden was placed on the removal list was because of complaints to the Department by Brend Ward, the head of the Obscenity Prosecution Task Force, about Mr. Bogden's decision not to assign a Nevada prosecutor to a Task Force case. It appears, however, that no Department official other than Mr. Sampson knew that justification for Mr. Bodgen's listing and were instead led to believe that his inclusion on the list for removal was because he was a "mediocre" U.S. Attorney and the Department could "do better." Attorney General Gonzales and Deputy Attorney General McNulty were apparently never informed of the real reason for Mr. Bodgen's removal.

The investigation concluded that Mr. Bogden's removal was "troubling" because neither Sampson nor any other Department of-

ficial involved in the removal process asked for Mr. Bogden's explanation about Mr. Ward's complaint, no Department official ever raised concerns or objectively assessed Mr. Bodgen's performance to determine whether he was in fact "mediocre" prior to his removal, Deputy Attorney General McNulty's qualms about Mr. Bogden's removal appear to have been quashed by his marital status or family status, and Attorney General Gonzales and Deputy Attorney General McNulty stated they did not know why Mr. Bogden was removed.

E. PAUL CHARLTON

Paul Charlton, the former U.S. Attorney for the District of Arizona, was instructed to resign December 7, 2006, announced his resignation on December 18, 2006, and left office January 30, 2007. The Department provided the following reasons for his removal: (1) Mr. Charlton advocated for additional resources for his office directly with Senator Kyl; (2) Mr. Charlton instituted a policy for tape recording interrogations; (3) Mr. Charlton did not timely file a notice that the Department would seek the death penalty in a particular case; and (4) Mr. Charlton refused to prosecute obscenity cases.

The OIG/OPR investigation called into question the propriety of what it found to be the two primary reasons for Mr. Charlton's removal. Regarding the first of these reasons, Mr. Charlton's implementation of a pilot program for tape recording interrogations, Deputy Attorney General McNulty testified that while he did find Mr. Charlton's actions insubordinate, he would not have removed Mr. Charlton based on an attempt to implement the policy. The second reason for Mr. Charlton's removal, the one described in the report as "the most significant factor" in his removal, was Mr. Charlton's efforts to re-evaluate the Department's decision to seek the death penalty in a specific case. The report concluded that these efforts were not insubordination or inappropriate, but warranted given the magnitude of the Department's decision.

F. JOHN MCKAY

John McKay, former U.S. Attorney for the Western District of Washington, was asked to resign on December 7, 2006, announced his resignation on December 14, 2006, and left office January 26, 2007. The Department proffered that Mr. McKay was removed because he was "enthusiastic but temperamental," made promises about information sharing that the Department could not support, was "overly aggressive in seeking resources" to investigate the murder of an Assistant U.S. Attorney, his district's sentencing statistics were out of line and was resistant to Department leadership. According to media reports, Mr. McKay was removed because he failed to investigate voter fraud claims following the 2004 Washington State governor's race.

Although the OIG/OPR report concludes that the evidence suggests the primary reason for Mr. McKay's removal was his conflict with Deputy Attorney General McNulty over an information sharing program, the investigation could not make a conclusive determination as to the reasons for Mr. McKay's removal. Based on the evidence, OIG/OPR could not determine whether or not complaints

of Mr. McKay's handling of the voter fraud cases caused him to be removed.

G. CAROL LAM

Carol Lam, former U.S. Attorney for the Southern District of California was asked to resign on December 7, 2006. The Department stated that Lam was removed because of her district's prosecution of firearm and immigration cases. During the OIG/OPR investigation, an additional justification emerged that Ms. Lam was removed because of her office's investigation of Congressman Randy "Duke" Cunningham and Central Intelligence Agency (CIA) official Kyle "Dusty" Foggo.

The investigation concluded that the Department's actions surrounding Ms. Lam's removal provide a "clear example of the disorganized removal process and lack of oversight over that process." In particular, OIG/OPR found it inappropriate that the Department never discussed with Ms. Lam her office's statistics in gun and immigration cases prior to her removal and did not provide her with an explanation as to why she was removed.

Overall, the OIG/OPR report concluded that the process used to remove the nine U.S. Attorneys in 2006 was unsystematic and arbitrary with little oversight from the Attorney General, the Deputy Attorney General or other senior Department officials. The U.S. Attorneys did not have an opportunity to address the concerns about their performance prior to their removal and Department statements explaining why they were removed were inconsistent, misleading and inaccurate. The report concluded that Attorney General Gonzales and Deputy Attorney General McNulty are primarily responsible for the Department's actions because they failed to adequately oversee the process and ensure the reasons for removal were proper. Other Department officials are responsible for making untruthful statements about the removals and their role in the process.

While the investigation was able to verify some of the facts surrounding the removals, there are still gaps in the investigation due to key witnesses refusing to be interviewed, including former White House Deputy Chief of Staff Karl Rove, former White House Counsel Harriet Miers, and former Deputy White House Counsel William Kelley, as well as former Department of Justice White House liaison Monica Goodling, Senator Domenici and his Chief of Staff. The White House also refused to allow access to internal documents related to the removals.

Finally, the report concluded that further investigation is needed regarding the removal of David Iglesias and the allegations that he was removed to influence prosecutions of voter fraud and public corruption. The report recommended that the Attorney General appoint a special counsel to determine whether a criminal offense was committed in connection with Iglesias's removal or testimony related to his removal as well as the testimony of other witnesses related to the U.S. Attorney removals, including former Attorney General Gonzales.

Following the release of this report, Attorney General Mukasey appointed Acting U.S. Attorney Nora Dannehy of Connecticut as the special prosecutor in the investigation.

X. CONCLUSION

The Committee reports these resolutions and the facts in support thereof finding White House Chief of Staff Joshua Bolten and former White House Deputy Chief of Staff Karl Rove in contempt of Congress because of their continuing non-compliance with the Committee's subpoenas.

The Committee has conducted this investigation into the firing of U.S. Attorneys and politicization of hiring and firing at the Department of Justice and now refers these contempt resolutions pursuant its constitutional legislative, oversight and investigative powers and in order to fulfill its responsibilities to the Senate and the American people.

The investigation was met initially by misleading and inaccurate statements from Department officials regarding the reasons for the firings, then by stonewalling by the White House despite evidence of significant involvement by political officials at the White House, and ultimately by the resignations of numerous Department and White House officials, including the Attorney General. The conduct of these officials has been the subject of an internal investigation at the Department that has now confirmed the Committee's findings of serious wrongdoing and led to a referral of the matter to a Special Prosecutor for further investigation to determine whether crimes occurred.

The Department of Justice engaged in the unprecedented firing of U.S. Attorneys for political reasons and that the White House's partisan interests in the prosecution of voter fraud and public corruption played a role. Attorney General Gonzales and the other former top officials at the Department abdicated their responsibility to ensure the independence of law enforcement. The Committee has pursued this matter on a bi-partisan basis because the injection of political bias into the determination of which cases should be prosecuted is corrosive to the very foundations of our system of justice.

In light of the evidence showing that White House officials played a significant role in originating, developing, coordinating and implementing these unprecedented firings and the response to Congressional inquiries about it, the investigation will not be complete without information available only from the White House and from current and former White House officials. The White House's unsubstantiated blanket claims of privilege and novel claims of immunity do not trump the Committee's well-established need for the information it has sought about the firings and do not excuse current and former White House officials from complying with the Committee's subpoenas.

XI. MINORITY AND DISSENTING VIEWS OF SENATORS SPECTER AND GRASSLEY

The Senate Judiciary Committee's investigation into the U.S. Attorney removals was conducted in a largely bipartisan fashion. For months during 2007, Members from both sides of the aisle pressed difficult questions in a series of hearings and through letters, and staff from Democrat and Republican offices participated in numerous transcribed interviews of officials from the highest ranks of the Department of Justice. We have supported Congressional oversight throughout our nearly three-decades of shared tenure in the Senate. Accordingly, we joined with the Majority in supporting various Committee subpoenas, as well as the revised contempt resolutions approved by the Committee last December.

Although we supported the Committee's efforts in the U.S. Attorney removal investigation, including the contempt resolutions voted upon last year, we cannot join the Majority in this Report. We both voted in favor of the contempt resolutions regarding Messrs. Bolten and Rove after staff and Member consultation produced resolution text that: (1) had bipartisan support; (2) identified every fact and element necessary to charge contempt of Congress under 2 U.S.C. § 194; (3) was consistent with Committee precedent; (4) contained no surplussage that could arguably jeopardize or undermine the enforceability of the Committee's action; and (5) was fair to the due process rights of the prospective contempt defendants. However, so much time has passed that the matter is now somewhere between moot and meaningless. Had there been any intention to pursue Senate action, these procedural steps would have been taken soon after the resolutions of contempt were approved. The filing of this report—fourteen months after Attorney General Gonzales resigned, eleven months after the contempt resolutions were approved and a mere two months before a new administration takes office—will likely prove superfluous.

The Majority's Report also strays from the neutral language of the contempt resolutions we supported. We believe the Report should have stayed within the facts voted upon by the Committee last year. Additionally, we would have preferred a more measured approach to the Report's factual and legal conclusions to ensure both objectivity and enforceability. As the Majority's Report currently stands, we cannot support it. Accordingly, we file these supplemental and dissenting views.

A. THE FACTS CONTAINED IN THE REPORT VARY FROM THOSE CONSIDERED AND VOTED UPON BY THE COMMITTEE

We are concerned by the many factual and legal assertions in the Report that are not reflected in the Committee's findings in the Resolutions. This variance is not insignificant and could cause problems for the enforceability of the Committee's Resolutions.

Both Resolutions call on "the President of the Senate to certify the facts of the failure" of the witnesses to appear as required. This approach appears to comply with 2 U.S.C. § 194, which refers to a report of "the fact of such failure or failures" to comply with a subpoena and to the President of the Senate's certification of "the statement of facts." With different facts stated in the Report and the Resolutions, the question arises: Which facts are to be certified? Is the President of the Senate called upon to certify the narrow set of facts stated in the Resolutions or the much broader and colorfully written facts stated in the Majority's Report? If multiple bases of fact are possible, ambiguity could result at multiple stages downstream in the process—for the President of the Senate when he certifies the facts, for the U.S. Attorney when he presents the case, and for the defendants if they are put in criminal jeopardy.

The due process concerns for the prospective defendants are not insignificant. As the Supreme Court in *Russell* v. *United States,* 369 U.S. 749 (1962),wrote in response to a flawed Congressional referral of contempt: "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise and conjecture." *Id.* at 766. If such a ruling were to be repeated in this matter, it would not just be a boon to those who failed to honor the Committee's subpoenas. It would also be a blow to the oversight authority of the legislative branch relative to the executive.

B. THE MAJORITY'S REPORT INCLUDES FACTS AND FINDINGS THAT ARE UNNECESSARY AND COUNTERPRODUCTIVE TO SUBPOENA ENFORCEMENT

We are concerned the Majority's Report contains facts and findings that are unnecessary—and even counterproductive—to enforcement of the Resolutions. For example, the Majority's Report reaches evidentiary conclusions in what is essentially a discovery exercise. The Majority's Report describes findings of "grave threats to the independence of law enforcement," "lying," "significant involvement of White House political officials in improper politicization," "stonewalling," and a contrived "cover up;" yet the Report itself is an effort to support the enforcement of Committee subpoenas via the statutory contempt mechanism.

If a court looks to the Majority's Report and finds that the Committee is already reaching conclusions in its investigation, it will justifiably ask why any further testimony or documents are needed. We are especially concerned with the Majority's Report in this regard because one of the touchstones of executive privilege review is the party's need for the subpoenaed information. Indeed, it is a threshold question for any party who seeks to overcome a claim of executive privilege. *See In re Sealed Case,* 121 F.3d 729, 746 (1997) (explaining that courts "must specifically consider the need of the party seeking privileged evidence" when evaluating either a presidential communications privilege or deliberative process privilege case).

C. THE MAJORITY'S REPORT SHOULD HAVE STRUCK A MORE MEASURED TONE ON PRIVILEGE

Battles between the branches on executive privilege are an all too common occurrence. As shown in the Gorsuch case, federal courts are loathe to wade into such battles if they are perceived as irreconcilable bickering among the political branches. See *United States* v. *House of Representatives*, 556 F. Sup. 150 (D.D.C. 1983) ("Compromise and cooperation, rather than confrontation, should be the aim of the parties."). We are concerned the Majority's Report is too strident and one-sided in its rejection of the Administration's executive privilege claims.

For example, the Majority's Report describes the Administration's assertion of privilege as "novel" and "a dramatic break from the practices of every administration since World War II in responding to congressional oversight." Although the Administration's position might be viewed as controversial and in some respects at odds with the Committee's constitutional oversight responsibility, it is far from novel for an Administration to claim that officials are immune from appearing before Congress due to their senior roles and proximity to the President. Claims of executive immunity are not novel. Indeed, well-documented claims of this type have been made by both Democrat and Republican administrations for at least forty years.

During the Senate Judiciary Committee's investigation into alleged improprieties of then-Supreme Court Justice Abe Fortas, Johnson Administration Associate Special Counsel to the President, W. DeVier Pierson, wrote the following to Chairman Eastland when he declined to appear: "It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government." Among the precedents to which Pierson may be been referring were the two occasions when Truman adviser John Steelman returned House subpoenas with a letter stating, "the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee."

In February 1971, then Assistant Attorney General William Rehnquist authored a memorandum detailing the history and basis for such claims of immunity, which cited the two above examples. Following his historic and legal analysis, Rehnquist wrote, "[t]he 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." Rehnquist OLC Memo Titled "Power of Congressional Committee to Compel Appearance or Testimony of 'White House Staff'" (Feb. 5, 1971). Like the assertion of privilege made to the Judiciary Committee, Rehnquist made distinctions between senior and lower level White House staff.

The distinction between immunity for senior Presidential advisers and lower level staff was further developed in a February 8, 1979 memorandum by Carter-Administration White House counsel Robert Lipshutz. Although Lipshutz conceded that advisers with statutory obligations would be required to testify, he broadly asserted that advisers without such duties are immune from testifying before Congress:

> The role of the White House aide is that of 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. . . .
>
> 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.

Lipshutz Memo Titled "Congressional Testimony by Members of the White House Staff" (Feb. 8, 1979). Notwithstanding our own disagreement with the Administration's broad executive privilege claims before the Committee, it is nevertheless incorrect to label the claim of immunity "novel" or contrary to all modern precedent.

In addition to our concerns about dismissing the Administration's immunity claim as "novel," we are also concerned with some apparent omissions in the Report. For example, the Report fails to discuss, define, or even mention the potential application of the deliberative process privilege. The deliberative process privilege, which is much broader, but also weaker, than the presidential communications privilege, requires no involvement by the President. *See In re Sealed Case,* 121 F.3d 729, 737 (D.C. Cir. 1997) (requiring only that the material at issue be predecisional and comprising part of a deliberative process by which government decisions and policies are formulated). The Report's silence on this issue creates an opportunity for unfavorable precedent.

D. WE SHOULD PRESERVE THE SENATE'S OVERSIGHT AUTHORITY, BUT BE EVER VIGILANT AGAINST THE POTENTIAL FOR CREATING BAD PRECEDENT

We remain committed to defending the Committee's oversight authority and responsibility. That is why we supported the revised Resolutions considered by the Committee last December. Nevertheless, our strong support of the Senate's institutional role in administration oversight cautions us to be concerned about actions that could undermine or limit the Senate's subpoena power in the future. We are mindful that Congress's record before the courts on contempt has been mixed. See *Watkins* v. *United States,* 354 U.S. 178 (1957); *Russell* v. *United States,* 369 U.S. 749 (1962); *Wilson* v. *United States,* 369 F.2d 198 (D.C. Cir. 1966). An adverse ruling by a federal court—whether against the contempt power or in favor of executive privilege—could weaken the Senate's oversight authority in future matters and encourage a future administration to fight subpoenas in a matter of greater urgency or importance. We

are concerned the variance between the facts in the Resolutions and the Report could lead to an adverse outcome and be a blow to the Committee's—indeed, the Congress'—ability to conduct oversight in the future.

ARLEN SPECTER.
CHUCK GRASSLEY.

XII. MINORITY VIEWS OF SENATORS KYL, SESSIONS, BROWNBACK AND COBURN

We generally agree with the Minority Views of Senators Specter and Grassley. Three aspects of the Majority Report, however, merit additional comment: the first is the Majority's utterly unfounded accusation that the Justice Department's public-corruption prosecution decisions were influenced by politics. The second is the Majority's attack on the notion of executive privilege—a position that is very much at odds with the position that members of the Majority have adopted in the past. And finally, we are simply dumbfounded by the Majority's earth-is-flat insistence that no such thing as vote fraud ever occurs in this country, and thus no investigation or prosecution of such matters is ever appropriate—an insistence that is completely at odds with what the American people just witnessed during the recent elections.

FALSE ACCUSATIONS LEVELED AGAINST THE JUSTICE DEPARTMENT

The Majority's Report concludes its analysis with the assertion that "[t]he evidence shows that senior officials were apparently focused on the political impact of federal prosecutions and whether federal prosecutors were doing enough to bring partisan voter fraud and corruption cases." [1]

This is a falsehood—one that the Majority does not even attempt to buttress with any citations to the relevant record. The Majority Report does not cite one shred of evidence to support this conclusion because there is no such evidence. Indeed, all of that record—the numerous interviews conducted by the staff of this committee—supports the very opposite conclusion: that the professional and dedicated attorneys at the U.S. Justice Department fulfilled their duty to investigate and prosecute public corruption, and that partisan bias played no role in these investigative and prosecutorial decisions.

The Majority's thesis—that public-corruption prosecutions were driven by politics—was repeatedly refuted by witness after witness during this committee's investigations. For example, Deputy Attorney General Paul J. McNulty, in his April 27, 2007, interview, while describing the "nonpolitical, career investigators, assistant United States attorneys and U.S. attorneys" who make the decision to bring these cases, stated that "if any one of these professionals thought that a case were being undermined or harmed by the removal of a U.S. attorney, they would scream to high heaven, as they should." [2] David Margolis, the highest ranking career official at the Department of Justice, when asked whether he had heard from anyone in a position of power that the requests for resigna-

[1] Majority Report at 2.
[2] Former Deputy Attorney General Paul McNulty 04/27/2007 Tr. at 188–190.

tions were dispatched with an eye toward "influence[ing] a political corruption case," said, "[a]bsolutely not, and they would get my sharp stick in the eye if they suggested that."[3] When asked whether he had heard anyone complain about Carol Lam's public integrity prosecution of Duke Cunningham and her investigation of Dusty Foggo and Brent Wilkes, Mr. Margolis responded, "No. Absolutely not. We're very proud of that prosecution of Representative Cunningham and the investigation of Foggo. We're very proud of that."[4]

Similarly, when asked whether he was ever present when anyone discussed seeking a U.S. Attorney's resignation because of a political prosecution, the former Director of the Executive Office of U.S. Attorneys, Michael Battle, testified "No. Never aware of that."[5] Significantly, up until his resignation from the Department of Justice in January of 2006, Mr. Battle had dedicated his entire career—over twenty years—to public service.[6] Other witnesses were equally dismissive of the innuendo and baseless accusations in the media on which the Majority Report relies. Mr. McNulty's former Chief of Staff, Michael Elston testified as follows:

> The notion that the media has that the dismissal of the United States Attorney in any way, shape or form affects a pending investigation or case is silly. I have been through the transition of a United States Attorney in the district—Northern District of Illinois. And I was an Assistant United States Attorney, and I had pending investigations and pending cases at the time. And it affected my cases in the following way: I changed the name of the United States Attorney on my letterhead and pleadings.[7]

Mr. Elston's credibility on the Cunningham and associated prosecutions is further bolstered by the fact that he assisted in executing subpoenas simultaneously in Virginia and California when the investigation turned to Brent Wilkes:

> There was a coordinated effort to search the California and Virginia offices of that business as well as Mr. Wilkes' home on the same day, and I was the Assistant United States Attorney assigned to obtaining a search warrant. And I did do that. A search warrant is a matter of public record and sets out what an incredible case the Cunningham case was and how very blatant the bribery was, and it goes on and on and on in detail.[8]

As a former Federal prosecutor heavily invested in the case, Mr. Elston went on to testify, "I would have been outraged had anyone suggested to me that there was a problem with that case that merited anything, whether it was a request for resignation or anything else, because I had probably among the leadership of the Depart-

[3] Associate Deputy Attorney General David Margolis 05/01/07 Tr. at 206.
[4] Id. at 211.
[5] Former Director of the Executive Office of U.S. Attorneys Michael Battle 04/10/07 Tr. at 114.
[6] Id. at 112.
[7] Former Deputy Attorney General Chief of Staff Michael Elston 03/30/07 Tr. at 123–124.
[8] Id.

ment the most intimate knowledge of that case and how good that case was of anybody else."[9]

These are the facts of record. Yet they are markedly absent from the Majority's Report.

Sadly, much more was at stake in this investigation than the employment of nine U.S. Attorneys—namely, the confidence of the American people in the most revered law enforcement institution in the world. It is, therefore, deeply ironic that in pressing its case that the Justice Department has been overly politicized, the Majority chooses to politicize its very investigation, and completely ignores the voluminous evidence that rebuts its pre-determined conclusion.

WE'VE COME A LONG WAY

During this Congress, the Majority has been rather promiscuous in its issuance of subpoenas to the executive branch. It was not always thus. In the past, members of this same Majority appeared to recognize that issuing a subpoena was a serious matter that should be undertaken only after substantial deliberation. Some examples of past expressions the Majority's now-abandoned modesty in this regard are as follows:

Senator Leahy (Press Release September 23, 1999):

"I do not believe we should be issuing subpoenas to the Justice Department unless that step is absolutely necessary."

> Executive privilege is used by the President and the executive branch to shield presidential communications, advice, and national security information from disclosure in judicial proceedings, congressional investigations and other arenas. While the proper scope of executive privilege is the subject of much debate, at a minimum, it covers presidential communications, and may also protect the decision-making, or deliberative process, of the executive branch in general . . . Thus, this resolution, which avoids the issuance of a subpoena should the Justice Department continue to cooperate with the Committee in producing non-privileged documents, is a good result.

Senator Leahy (Press Release June 8, 2000):

> [At the last business meeting,] "I held over consideration of [a] subpoena . . . since, in my view, it had been precipitously added to the agenda at the last minute and needed further consideration . . . [T]he White House has made clear that it will provide the email communications that are relevant to the Committee's oversight inquiries without the need for a subpoena. . . . It is truly remarkable that the majority of this Committee chooses first to communicate—now routinely at each executive business meeting—with the Executive Branch and its agencies by way of subpoena. Issuing subpoenas may make for a good show of partisan force by the majority but certainly continues the erosion of civil discourse that has marked this Congress.

[9] Id. at 124.

The following quotes are from the floor of the Senate in Whitewater debate. (Congressional Record: December 20, 1995):

Senator Sarbanes:

> It always should be borne in mind that when the executive and legislative branches fail to resolve a dispute between them and instead submit their disagreements to the courts for resolution, significant power is then placed in the judicial branch to write rules that will govern the relationship between the elected branches . . . [W]e have a chance here to work this out . . . and there is no need to go to court running the risk, I would suggest to some Senators, of an adverse precedent.
>
> We need to avoid a needless constitutional confrontation by pursuing a negotiated resolution to this dispute. Congressional attempts to inquire into privileged executive branch communications are rare and with good reason. In fact, the courts on occasion have refused to determine the dispute and have encouraged the two branches to settle the differences without further judicial involvement. In other words, when it comes to the court, it says you ought to settle it between yourselves and not involve the court in trying to address this matter. The U.S. Court of Appeals for the District of Columbia has long held that Presidential communications are presumptively privileged.

Senator Dodd:

> Our role, fundamentally, is legislative. We conduct investigations, of course, but that is primarily to help develop legislation. And it seems to me that, where you have a White House that is cooperating, you ought to avoid a confrontation with the executive branch. After all, it is not clear what the third branch of government, the judiciary, will do. In similar cases, the courts have thrown the matter right back to us and have said, "Look, you people sort this out your own way. We are not going to make the decision for you." So we may end up, after months of squabbling, in no better position than we are in today.

Senator Boxer:

Supporting reaching a compromise with the Clinton Administration:

> We can avoid a costly subpoena battle. We can avoid, frankly, losing in the courts, which would harm the U.S. Senate out into the future, and we can get the information . . . We [should] not go on political witch hunts and deny people their rights. . . . That is bad for this institution. It is bad for this investigation. It is bad for the precedence of the United States. Frankly, I think it is bad for individual Senators.
>
> The bottom line is, do you want to get the [information] or do you want to play politics? That is the way I see it. I hope we decide we want to get the [information], we want to do it in a way that keeps this committee working

> in a bipartisan fashion because, frankly, if we do not stick together on this, on the procedures, I think the American people are going to think this is all politics and all the hard work that we do to put light on this subject will simply not be respected.

Senator Bumpers:

> [This] is not a constitutional crisis . . . But it just seems to me that in the interest of comity, in the interest of taking advantage of an offer by the President to say here [is the information] . . . I daresay there is not a Member of the U.S. Senate that would have made a more generous offer under the same conditions than the President of the United States has made in this case.

Senator Pryor:

> I think it is very, very necessary for the American public at this time to have the knowledge that this administration in no way is trying to keep the [sought information from the] U.S. Senate. . . . The White House has repeatedly said: 'We want you to have [this information]. We think you should have [this information]. We will give you [this information].' I do not think that should be the business of the Senate at this particular time, to start eroding and emasculating the particular right that we revere in the common law and have for so many years, and that is the right of privilege created between lawyer and client.

VOTE EARLY AND VOTE OFTEN

As Justice Thurgood Marshall noted in the U.S. Supreme Court's decision in Anderson v. U.S., 417 U.S. 211, "[e]very voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes."

Perhaps the most Orwellian aspect of the Majority report is its repeated insistence that there is no vote fraud in this country that is ever worth investigating. At one point, the Majority even places scare quotes around the term, lest anyone receive the impression that the Majority believes that voter fraud could ever be a real problem. Yet during the federal elections just concluded, the American public saw numerous examples of serious attempts to commit voter fraud in this country.

Most of these incidents involved the Association of Community Organizations for Reform Now (ACORN), a group that actively promotes voter registration in many cities across the nation. ACORN tends to target areas where it believes that it can register Democratic voters, such as parks, public-assistance agencies, and liquor stores,[10] and generally hires part-time workers who are paid for each registered name to canvas these areas.

[10] The Emerging Democratic Majority, http://www.powerlineblog.com/archives/2008/08/021168.php? (Aug. 5, 2008, 7:30 EST).

ACORN's history is littered with claims and convictions of fraud.[11] In this election cycle, many different groups, from journalists to the GOP, strongly criticized the integrity of the organization's registration methods. As early as September, state officials reported fraudulent voter registrations submitted by ACORN, and as of October 6th, the *New York Times* reported that about 400,000 ACORN filings had been rejected by authorities as duplicates, incomplete, or fraudulent.[12] After comparing their voter registration rolls, Georgia, Florida, and Ohio found 112,000 duplicate voters registered in two states, and authorities have rejected ACORN applications attempting to register such "voters" as Mickey Mouse and the Dallas Cowboys' offensive line.[13]

In Connecticut, a Republican registrar complained to state officials that ACORN systematically filed ineligible registrations, including one for a 7-year-old resident.[14]

Indiana's election officials refused to accept 5,000 ACORN applications after each of the first 2,100 were found to be fraudulent.[15] And in Michigan, clerks reported "a sizeable number of duplicate and fraudulent applications" and the Michigan Secretary of State's office said the problem appears to be "widespread."[16]

Kansas City election officials discovered at least 380 fraudulent registrations that ACORN submitted[17] and 15,000 applications have been questioned.[18] St. Louis officials attempted to contact 5,000 voters that ACORN registered, but it could not reach even 40 applicants.[19]

In Las Vegas, the county registrar said that problems cropped up almost immediately after ACORN took root there.[20] Concerns included voter registration fraud and questionable staff members, such as supervisors who are convicted felons and employees convicted of identity theft.[21] These problems led to a raid of ACORN's Las Vegas office because of a suspected voter fraud scheme.[22]

The FBI opened an "investigation into 1,400 potentially fraudulent voter registrations" filed in Albuquerque, New Mexico.[23] In the state's urban areas, ACORN and others registered almost 80,000

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[11] Evan Perez, GOP Renews Complaints Over Voter Registrations, Wall St. J., Oct. 9, 2008, available at http://online.wsj.com/article/SB122351568128417691.html.; John Fund, A Smelly Acorn, Wall St. J., Oct. 10, 2008, available at http://online.wsj.com/article/SB122360917725822225.html [hereinafter Fund, A Smelly Acorn]; Editorial, Obama and Acorn, Wall St. J., Oct. 14, 2008, available at http://online.wsj.com/article/SB122394051071230749.html [hereinafter Editorial, Obama and Acorn].

[12] When in Trouble, Cheat, http://www.powerlineblog.com/archives/2008/09/021523.php? (Sept. 15, 2008 20:39 EST).

[13] Voter Fraud: It's Easy!, http://www.powerlineblog.com/archives/2008/11/021989.php? (Nov. 4, 2008, 14:58 EST).

[14] Obama Campaign Taking No Chances, http://www.powerlineblog.com/archives/2008/10/021723.php? (Oct. 8, 2008, 17:48 EST).

[15] Acorn: the Fraud Continues, http://www.powerlineblog.com/archives/2008/10/021768.php? (Oct. 13, 2008, 19:55 EST).

[16] When in Trouble, Cheat, http://www.powerlineblog.com/archives/2008/09/021523.php? (Sept. 15, 2008 20:39 EST).

[17] Obama Campaign Taking No Chances, http://www.powerlineblog.com/archives/2008/10/021723.php? (Oct. 8, 2008, 17:48 EST).

[18] "Is Acorn Stealing the Election?", http://www.powerlineblog.com/archives/2008/10/021729.php? (Oct. 9, 2008, 14:11 EST).

[19] "Is Acorn Stealing the Election?", http://www.powerlineblog.com/archives/2008/10/021729.php? (Oct. 9, 2008, 14:11 EST).

[20] Fund, A Smelly Acorn, supra note 21.

[21] Fund, A Smelly Acorn, supra note 21.

[22] Fund, A Smelly Acorn, supra note 21.

[23] Evan Perez, GOP Renews Complaints Over Voter Registrations, Wall St. J., Oct. 9, 2008, available at http://online.wsj.com/article/SB122351568128417691.html.

voters.[24] Some of those were illegal applications that actually resulted in illegal votes according to New Mexico politicians.[25] A search of public records verified that illegal votes, made possible by fraudulent ACORN registrations, were cast during the Democrat's primary.[26] ACORN admits to firing 80 New Mexico employees since December 2007.[27]

In Ohio, Republicans sought verification of thousands of voter registrations after ACORN admitted that it could not verify that its applications were not fraudulent.[28] When the Secretary of State refused to verify the registrations, the challenge went up to the Supreme Court which denied Republicans' claim by holding that the Federal Vote Act did not include a private right to sue for enforcement of voter registration verification.[29] One man stated that he was paid $1 or given a cigarette each time he filled out an application to vote even though he told workers he was already registered.[30] At the end of 18 months, he had registered 72 times.[31]

Philadelphia election officials turned at least 1,500 ACORN applications over to the U.S. Attorney and found 6,500 more that were suspect.[32] The Deputy Commissioner complained that ACORN hires "people desperate for money . . . who only get paid if they get signatures."[33]

In Wisconsin, a convicted felon illegally registered to vote and illegally registered others as an employee of ACORN.[34] This employee was one of 49 under "suspicion of election fraud."[35] In Virginia, a voter registration group fired three employees who falsified almost 100 forms.[36]

In light of this recent history, the Majority's insistence that no vote fraud occurs in this country that is ever worthy of investigation is simply bizarre.

CONCLUSION

The firing of 9 U.S. attorneys earlier in this Administration is a dead horse that has already been beaten too many times to count. The Majority's factually inaccurate, tendentious, and misleading report on this matter, though unworthy of the committee, is in some

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[24] Evan Perez, GOP Renews Complaints Over Voter Registrations, Wall St. J., Oct. 9, 2008, available at http://online.wsj.com/article/SB122351568128417691.html.

[25] Joe the Plumber: Changing this Year's Race?, http://www.powerlineblog.com/archives/2008/10/021794.php? (Oct. 16, 2008, 20:18 EST).

[26] Joe the Plumber: Changing this Year's Race?, http://www.powerlineblog.com/archives/2008/10/021794.php? (Oct. 16, 2008, 20:18 EST).

[27] Evan Perez, GOP Renews Complaints Over Voter Registrations, Wall St. J., Oct. 9, 2008, available at http://online.wsj.com/article/SB122351568128417691.html.

[28] Amy Merric, Court Ruling Stokes Voter-Fraud Fight, Wall St. J., Oct. 18, 2008, available at http://online.wsj.com/article.SB122428556700546435.html.

[29] Jess Bravin, Supreme Court is United in Siding with Ohio Election Official, Wall St. J., Oct. 17, 2008, available at http://online.wsj.com/article.SB122425922129244747.html.

[30] Acorn's Criminal Enterprise, Continued, http://www.powerlineblog.com/archives/2008/10/021736.php? (Oct. 10, 2008, 9:05 EST).

[31] Acorn's Criminal Enterprise, Continued, http://www.powerlineblog.com/archives/2008/10/021736.php? (Oct. 10, 2008, 9:05 EST).

[32] Acorn Does Philadelphia, http://www.powerlineblog.com/archives/2008/10/021783.php? (Oct. 15, 2008, 9:56 EST).

[33] Acorn Does Philadelphia, http://www.powerlineblog.com/archives/2008/10/021783.php? (Oct. 15, 2008, 9:56 EST).

[34] Obama Campaign Taking No Chances, http://www.powerlineblog.com/archives/2008/10/021723.php? (Oct. 8, 2008, 17:48 EST).

[35] Obama Campaign Taking No Chances, http://www.powerlineblog.com/archives/2008/10/021723.php? (Oct. 8, 2008, 17:48 EST).

[36] Evan Perez, GOP Renews Complaints Over Voter Registrations, Wall St. J., Oct. 9, 2008, available at http://online.wsj.com/article/SB122351568128417691.html.

ways a fitting coda to the politicized witch hunts that have constituted the 110th Congress's investigation of this matter.

JON KYL.
JEFF SESSIONS.
SAM BROWNBACK.
TOM A. COBURN.

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