ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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August 12, 1999

The Honorable Dan Burton
Chairman
Committee on Government Reform
House of Representatives
Washington, DC 20515

Dear Chairman Burton:

I am writing to convey my thoughts about your treatment of Mark Middleton, a former White House aide, during the Committee's August 5, 1999, hearing. Our Constitution gives every American citizen a privilege against self-incrimination. Yet regrettably, your conduct at the hearing -- and the conduct of certain other members -- appeared to be intended to punish Mr. Middleton for exercising his Fifth Amendment rights.

The Fifth Amendment gives witnesses not only a right to refuse to answer incriminating questions. It also prevents government officials from harassing or humiliating witnesses by publicly forcing them to invoke their Fifth Amendment privilege over and over again. Unfortunately, this is exactly the spectacle that was staged at the hearing.

Although you knew in advance that Mr. Middleton would refuse to answer questions, you proceeded to call him as a witness, required him to sit before the Committee for over an hour with television cameras and other media present, and forced him to assert his Fifth Amendment right 38 separate times. You called his invocation of his constitutional right "more than unseemly" and drew unfair inferences from his assertion of privilege, such as remarking "Mr. Middleton, if you haven't done anything wrong, why not speak up today." One member even asked Mr. Middleton to admit that he was a "bag man" for foreign individuals.

You may not like Mr. Middleton. You may even believe that he has violated U.S. laws. But he is an American citizen, and your powers as Chairman do not give you the right to violate his fundamental constitutional rights.

Judicial Requirements

The Fifth Amendment privilege against self-incrimination is one of our most fundamental constitutional rights. As the Supreme Court has recognized, the privilege "registers an important

advance in the development of our liberty -- one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1955). It "reflects a complex of our fundamental values and aspirations, and . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

The courts have long recognized that the protections of the Fifth Amendment would be meaningless if prosecutors could require criminal defendants to repeatedly assert their privilege in the face of incriminating questions. Thus, the courts recognize that "a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury." *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970). This conduct is prohibited because the Constitution requires that "guilt may not be inferred from the exercise of the Fifth Amendment privilege." *Id.* In fact, the courts have held that "an interrogating official himself gravely abuses the privilege against self-incrimination when . . . he nevertheless insists on asking the incriminating question with a view to eliciting a claim of privilege against the witness." *United States v. Tucker*, 267 F.2d 212, 215 (3d Cir. 1959).

For this reason, it is considered prosecutorial misconduct when the government calls witnesses in a "conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege." *United States v. Namet*, 373 U.S. 179, 186 (1963). As recently as last month, a federal appeals court affirmed this rule once again, writing that "[m]isconduct may yet arise if the prosecution continues to question a witness once her consistent refusal (legitimate or otherwise) to testify has become apparent." *United States v. Torrez-Ortega*, 1999 Westlaw 4460008 (10th Cir. 1999).

Congressional Requirements

These requirements apply to Congress. This point was conclusively established during the McCarthy hearings, when the Supreme Court held that the House Committee on Un-American Activities could not force a witness to answer questions about whether certain people had been members of the Communist Party in the past. As the Supreme Court stated, "the Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves." *Watkins v. United States*, 354 U.S. 178, 188 (1957).

The American Bar Association guidelines directly address the circumstances that we confronted during the Middleton hearing. These guidelines, adopted in 1988, expressly state:

Witnesses in Congressional proceedings shall have the privileges in connection with their

> appearance which are recognized by the courts of the United States in Administrative and Judicial Proceedings, including the fifth amendment privilege against self-incrimination. ... A witness shall not be compelled to exercise his or her fifth amendment privilege against self-incrimination in a public proceeding where the witness has provided notice to the committee.

The District of Columbia Bar Association's Legal Ethics Committee has also ruled that congressional attorneys should respect the Fifth Amendment privilege in the same ways required of federal prosecutors. Opinion No. 31 (Mar. 29, 1997). The Legal Ethics Committee addressed the question that arose during the Middleton hearing as follows:

> We have been asked to advise whether it is proper for a congressional committee whose chairman, staff and several members are attorneys to require a witness who is a "target" of a pending grand jury investigation to appear at televised hearings to be questioned when the committee has been notified in advance that the witness will exercise his constitutional privilege not to answer any questions. ...
>
> The courts have held that summoning a witness in such circumstances constitutes prosecutorial misconduct. ... We see no reason in principle why this standard should not govern the conduct of an attorney acting for a congressional committee. ...
>
> [I]t appears clear that the conduct described in the inquiry is improper. ... [I]n our view, the conduct described herein appears to conflict with at least the spirit of one Disciplinary Rule and the language of several Ethical Considerations.

A copies of these ethics opinions are enclosed as exhibits A and B.

The Treatment of Mr. Middleton

Unfortunately, your conduct during the Middleton hearing violated these clear legal requirements. In the words of the *Tucker* court, your conduct "gravely abuse[d] the privilege against self-incrimination" by "insist[ing] on asking the incriminating question with a view to eliciting a claim of privilege against the witness." 267 F.2d at 215.

There is no defense of ignorance possible here. You knew before the hearing started that Mr. Middleton would assert his Fifth Amendment privilege. Mr. Middleton's attorney wrote you two days before the hearing to inform you of Mr. Middleton's intentions, stating: "We ... wish to advise you that Mr. Middleton will continue to assert his Fifth Amendment privilege at the Committee's hearing scheduled for August 5." Letter from Robert D. Luskin to Chairman Burton (August 3, 1999). This letter also advised you of the controlling legal precedent that forbids repeatedly questioning witnesses who have asserted their constitutional privilege.

You nevertheless called Mr. Middleton to appear at a public hearing -- with television cameras, press photographers, and other media present -- and forced him to repeatedly invoke his Fifth Amendment privilege. On his second invocation of the privilege, Mr. Middleton clearly stated that he "will continue to do so with respect to any further questions." Nevertheless, you and other Republican members of the Committee continued to question him. In total, he was compelled to assert his privilege a total of 38 times. A copy of the transcript of the hearing is enclosed as exhibit C.

The questions that you and other members asked Mr. Middleton were deliberately designed to humiliate and incriminate him. For example, Mr. Barr asked Mr. Middleton the following question, knowing he would assert his privilege and be unable to answer: "This is kind of ludicrous, Mr. Middleton. Are you a bag man for Ng Lap Seng or any other foreign individual?"

Not only was Mr. Middleton forced to repeatedly reassert his privilege, you tried to use his invocation of the privilege to imply that Mr. Middleton was guilty of particular crimes. You stated, "Mr. Middleton, if you haven't done anything wrong, why not speak up today and say so?" and "If you're being unfairly maligned, then I hope you'll defend yourself." You also called his assertion of his constitutional right "more than unseemly."

These actions obviously violated Mr. Middleton's rights. If you were a prosecutor, they would amount to prosecutorial misconduct -- a "conscious and flagrant attempt to build [a] case out of inferences arising from the use of the testimonial privilege." *Namet*, 373 U.S. at 186. As a Committee Chairman sworn to uphold the Constitution, they are simply inexcusable.

Congressional Precedent

I protested your actions during the Committee hearing, pointing out that they violated judicial and bar association opinions and were without precedent. As I said at the hearing, "our Committee has now ... establish[ed] procedures that are unheard of in the history of the Congress."

You took issue with my remarks and claimed that there was precedent for your treatment of Mr. Middleton. In particular, you cited hearings held by Rep. Tom Lantos and Rep. John Dingell as precedent for your conduct. You said:

> First of all, it is not unprecedented for extended questioning when someone asserts their Fifth Amendment privilege before a Committee. ... If this is a low, then it was established by the Democrats when they were in charge because Mr. Lantos did and so did Mr. Dingell. And I'll be glad to give you that information for the record.

I have examined the record established by Mr. Lantos and Mr. Dingell and have enclosed copies of the relevant portions as exhibits D and E. There is simply no similarity with what you did last week.

In the 101st Congress, Rep. Lantos chaired the Employment and Housing Subcommittee of the Committee on Government Operations, one of the predecessors to our Committee. In 1989, the Subcommittee investigated the work of the Department of Housing and Urban Development during the eight years that it was headed by Samuel R. Pierce, Jr. On May 25, 1989, unaccompanied by counsel, Secretary Pierce testified extensively about his stewardship of HUD, but in the following months, certain aspects of his testimony were contradicted by others.

The Subcommittee then called Mr. Pierce to reappear, which he finally did on September 26. House Committee on Government Operations, Employment and Housing Subcommittee, *Hearings on Abuses, Favoritism and Mismanagement in HUD Programs (Part 4)*, 101st Cong., 23 (Sept. 26, 1989). At this hearing, the committee room was closed to television, radio, and photographic coverage, pursuant to the witness's request and House rules. *Id.* (Unfortunately, this right was unavailable to Mr. Middleton due to a change in House rules adopted last Congress.)

Rep. Lantos afforded Mr. Pierce an opportunity to make an opening statement. During his statement, Mr. Pierce announced for the first time that he would be invoking his Fifth Amendment privilege, largely because his counsel had had insufficient time to review materials from HUD related to Mr. Pierce's testimony. Mr. Pierce also stated that he hoped he would be able to testify in the near future. *Id.* at 42-43.

After Mr. Pierce's statement, Rep. Lantos asked him eight narrow questions. After Mr. Pierce invoked the Fifth Amendment as to each, Mr. Lantos determined that it would be improper to continue questioning Mr. Pierce. Mr. Lantos stated: "It would be the request of the Chair to all his colleagues not to propound any further questions to the witness, since it is obvious that the witness is determined, which is his full right and privilege, to invoke his Fifth Amendment prerogative." *Id.* at 51.

Mr. Lantos also stated: "I feel very deeply, as several of my colleagues have also indicated, that the Bill of Rights is one of our most precious possessions; that it is a shield that is there for protection of the innocent; and no inference is to be made whatsoever with respect to your invoking the Fifth Amendment." *Id.* at 56.

Because Mr. Pierce stated in his opening statement that he hoped to be able to testify in the future after reviewing the relevant materials with his lawyer, the Subcommittee recalled Mr. Pierce on October 27. This hearing was also closed to radio, television, and photographers. At this hearing, Mr. Lantos asked Mr. Pierce two questions. After Mr. Pierce asserted the Fifth

Amendment privilege to both questions, and Mr. Lantos determined that Mr. Pierce intended to assert the privilege as to all other questions, Mr. Lantos ceased questioning Mr. Pierce. *Id.* at 705-06. Mr. Lantos also twice restated his view that "the Fifth Amendment privilege is a shield to the innocent and no inference whatsoever should be drawn from a witness taking the Fifth Amendment." *Id.* at 696, 704.

I hope this review of Mr. Lantos's conduct is instructive. It certainly makes clear that you have no basis for citing his actions as a precedent for your treatment of Mr. Middleton.

If anything, Mr. Dingell's conduct as Chairman of the Committee on Energy and Commerce provides an even starker contrast to your actions. In the 100th Congress, Mr. Dingell held a hearing at which he called Michael R. Milken, the "junk bond" trader from Drexel Burnham Lambert. House Committee on Energy and Commerce, *Hearings on Securities Market Oversight and Drexel Burnham Lambert*, 100th Cong. (April 17, 1988). At this hearing, Mr. Dingell asked Mr. Milken only two questions, and he asserted his Fifth Amendment privilege to each. *Id.* at 15-16. Mr. Dingell then determined that Mr. Milken would invoke the privilege as to all other questions. *Id.* at 16. Mr. Dingell then excused Mr. Milken from further questioning, stating:

> Mr. Milken, the committee at this time will excuse you from further testimony. ... Your assertion of your rights under the Constitution is the assertion of an absolute right. It is one which is held in the highest esteem and respect by this committee.

Id. at 16.

The Treatment of Robert Luskin

I must also object to the treatment of Robert Luskin, Mr. Middleton's attorney. At the hearing, you repeatedly refused to allow Mr. Luskin to address the Committee, ruling that only a sworn witness may address the Committee. In fact, you did not even permit him to respond to technical legal questions about the Fifth Amendment that had nothing to do with the factual issues under investigation. While I recognize that you have the power to silence Mr. Luskin, you have no right to unfairly impugn his character, as Mr. Luskin alleges occurred. In an August 6 letter to you, Mr. Luskin states that your chief counsel distributed to the press table copies of articles describing an acrimonious fee dispute between Mr. Luskin and his firm and the Department of Justice in a completely unrelated criminal case. According to Mr. Luskin, when he questioned your chief counsel about her conduct, he was informed that "because the articles were in the 'public domain,' the issue -- and my personal and professional reputation -- was, therefore, 'fair game.'"

I do not know if Mr. Luskin's allegations are accurate. To date, I have not seen any

response from you to Mr. Luskin. If what he says is true, however, you certainly owe him an apology. There is simply no justification for these sorts of smear tactics.

Conclusion

In the last Congress, our Committee repeatedly abused many of Congress' investigative powers, including the subpoena power, the deposition power, the immunity power, and the power of contempt. These unfortunate incidents are thoroughly documented in volume four of the Committee's interim report on the campaign finance investigation, which contains the views of the minority members of the Committee. Last week's hearing adds a new -- and especially grave -- abuse to this embarrassing litany.

Our investigation has become far better known for its abuses than for its results. Regrettably, your conduct last week will only cast us further into disrepute.

Sincerely,

Henry A. Waxman
Ranking Minority Member

cc: Members of the Committee on Government Reform