IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES, *Plaintiff*, v. HARRIET MIERS, *et al.* *Defendants*.	Case No. 1:08-cv-00409 (JDB)

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7 and 56.1, and based on the entire record, the Memorandum of Points and Authorities filed herewith, and the accompanying declaration and exhibits, Plaintiff Committee on the Judiciary of the U. S. House of Representatives ("Judiciary Committee"), by and through counsel, hereby respectfully moves the Court for entry of an Order granting summary judgment to Plaintiff on Counts I and II of its Complaint. On these two counts, there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law.

Accordingly, as to Count I, Plaintiff Judiciary Committee prays that this Court (a) declare that Harriet Miers's refusal to appear before the Judiciary Committee's Subcommittee on Commercial and Administrative Law (collectively, with Judiciary Committee, "Committee") in response to the subpoena issued to her was without legal justification and violated her legal obligations; (b) declare that Ms. Miers may assert executive privilege in response to Committee questions only in the presence of the Committee and only in response to particular questions,

where appropriate and if properly authorized to do so; (c) declare that Ms. Miers must testify before the Committee about all subjects not covered by privilege; and (d) enjoin Ms. Miers to appear and testify forthwith before the Committee in compliance with the subpoena served upon her and the rulings of this Court.

As to Count II, Plaintiff Judiciary Committee prays that this Court (a) declare that the failures of Ms. Miers and Joshua Bolten to produce privilege logs identifying all documents withheld on grounds of executive privilege or any other basis in response to the duly issued and served congressional subpoenas were without legal justification and violated their legal obligations; and (b) enter an injunction directing Ms. Miers and Mr. Bolten forthwith to provide the Committee with privilege logs identifying by author, recipient, date, and subject matter all documents withheld on grounds of executive privilege or any other legal basis; and (c) enjoin the Defendants forthwith to produce to the Committee all nonprivileged documents responsive to the subpoenas.

A proposed order is submitted herewith.

Respectfully submitted,

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Dated: April 10, 2008

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

International Cases

Constitutional Provisions

Statutes and Rules

Legislative Materials

Other Authorities

INTRODUCTION

Not since the days of Watergate have the Congress and the federal courts been confronted with such an expansive view of executive privilege as the one asserted by the current presidential administration ("Administration") and the individual Defendants in this case. At the heart of this case is an investigation undertaken by the Plaintiff Committee on the Judiciary of the U.S. House of Representatives ("Judiciary Committee") and its Subcommittee on Commercial and Administrative Law (collectively, "Committee") into whether partisan political considerations at the Department of Justice ("Department") and the White House undermined the fair and impartial administration of the federal criminal justice system and led to the unprecedented forced resignations in mid-Administration of nine United States Attorneys ("Investigation"). During the course of the Investigation, Harriet Miers, a private citizen and former Counsel to the President, asserted that a President's mere request that she not even appear to testify before, and produce documents to, the Committee is enough to bestow absolute immunity upon her from a validly issued congressional subpoena. Similarly, Joshua Bolten contended that, as White House Chief of Staff, he is "absolutely immune" from congressional process and thus is not required to comply in any manner with a Committee subpoena for documents. These extraordinary and wholly unsupportable claims flout established law and suggest a return to the long-since discredited executive mantra of "when the President does it, that means that it is not illegal."[1]

The Supreme Court and this Circuit, of course, have repeatedly made clear that no person "is above the law's commands." *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (en banc) (per curiam). It is now well understood and widely accepted, for example, that there exists no general "unqualified presidential privilege of immunity from judicial process," *United States v.*

[1] *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. Times, May 20, 1977, at A16.

Nixon, 418 U.S. 683, 707 (1974); that the qualified executive privilege can be overcome by a showing of need not only in criminal process, but also in private civil litigation, *Dellums v. Powell*, 561 F.2d 242, 245-46 (D.C. Cir. 1977) ("*Dellums I*"); that even the President is not immune from civil process and a demand to appear for a deposition, *Clinton v. Jones*, 520 U.S. 681, 709-10 (1997); and that the Executive Branch is not the final arbiter of whether or not executive privilege applies, *Sirica*, 487 F.2d at 713-14.

Based on the uncontroverted material facts of this case and applicable law, the Judiciary Committee moves at this time for partial summary judgment on Counts I and II of the Complaint. In particular, the Committee now seeks (1) a declaration that Ms. Miers and Mr. Bolten must comply with – and are not immune from – their duly authorized, issued and served congressional subpoenas; (2) an injunction directing Ms. Miers to appear before the Committee, be sworn, respond to questions and invoke executive privilege, if appropriate and properly authorized to do so, in response to *specific* questions; (3) an injunction directing Ms. Miers and Mr. Bolten to produce privilege logs, identifying with specificity which documents are being withheld and on what precise legal grounds; and (4) an injunction directing Ms. Miers and Mr. Bolten to produce promptly to the Committee all nonprivileged documents responsive to their subpoenas.

SUMMARY OF ARGUMENT

Partial summary judgment is appropriate at this time because this Court has jurisdiction, and because the Committee is entitled to a judgment as a matter of law on Counts I and II. With respect to jurisdiction, this case and controversy arises under the Constitution and laws of the United States and is ripe for adjudication. The Congress, whose subpoena authority emanates from the Constitution and is deeply rooted in English law, cannot fulfill its legislative and

oversight functions if its subpoenas, particularly those for information that is critically important to such functions, can be countermanded by personal and presidential fiat. To fulfill its role as "the grand inquest of the state,"[2] the Congress must have access to testimony and documents relevant to its Investigation. For "the administration of the Department of Justice – whether its functions were being properly discharged or were being neglected or misdirected, . . . [i]s one on which legislation could be had and would be materially aided by the information which [the Congress's] investigation [i]s calculated to elicit." *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

As a result of Defendants' unlawful failure to comply with their subpoenas, and on the heels of the Department's adamant refusal to carry out its statutory obligation to present to a grand jury the contempt of Congress citations issued against Ms. Miers and Mr. Bolten, the Committee has standing to bring this action. The Committee has been concretely injured because it has been deprived of information critical to the completion of its Investigation and because, if the actions of the contumacious witnesses stand, the Committee will not be able to function as the Constitution requires and as our Nation's citizens expect. The Committee's "informational injury" is likely to be redressed by the declaratory and injunctive relief it seeks, as such relief will enable the Committee to inform itself fully prior to rendering meaningful conclusions and proposing necessary corrective legislation. It is for these reasons that the full

[2] 1 The Works of James Wilson 415 (R. McCloskey ed. 1967). Similarly, in speaking about the House of Commons, former British Secretary of State and then-Member of Parliament William Pitt asserted: "We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every step of publick Management, either Abroad or at Home, in order to see that nothing has been done amiss." Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 Colum. L. Rev. 865, 886 (1975) (quoting 13 R. Chandler, History & Proceedings of the House of Commons 172 (1743)); *see also Howard v. Gossett*, (1845) 10 Eng. Rep. 359, 379-80 (Q.B.) (asserting that the House of Commons "are general inquisitors of the realm" who "may inquire into every thing which it concerns the public weal for them to know").

U.S. House of Representatives ("House") has specifically authorized the Committee to seek and obtain appropriate declaratory and injunctive judicial relief.

The parties are unquestionably at a constitutional impasse. The Counsel to the President, on behalf of both Ms. Miers and Mr. Bolten, has made absolutely clear that the Administration will not compromise and has expressly acknowledged the impasse. The Administration will not permit *any* testimony by Ms. Miers on the record and under oath and will not produce a *single* document or even a routine itemization of the documents withheld. While the Committee has repeatedly attempted to reach an acceptable accommodation with the White House, the Administration has made only one take-or-leave it offer that it well understands the Committee cannot accept. The Administration offered to produce clearly unprivileged documents, and unsworn, untranscribed answers on limited topics in return for a guarantee that the Committee would not thereafter seek sworn, transcribed testimony on these or any other topics, regardless of what was learned during the initial interviews, and would relinquish its right to seek any other documents. Had the Committee accepted such a one-sided proposal, it would have violated the American people's trust to oversee the effective operation of their duly elected government.

It should be clear that were the Court to decline to rule on the merits of this suit, it would tacitly sanction, and make unreviewable, the Administration's unilateral claims of executive power. As former Attorney General and Supreme Court Justice Robert Jackson warned, a "presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

It may be suggested that the Congress could seek to enforce its will through its inherent power of Contempt of Congress. But even if the House were to exercise its inherent contempt

authority and arrest the Defendants, try them in the House and imprison them, Defendants would undoubtedly petition this Court for writs of habeas corpus, once again placing the legality of their actions squarely before this Court. Thus, rather than divert congressional resources from other pressing affairs, engage in unseemly actions and escalate tensions between the political branches only to face the same, if not more complex, issues in short order, the Court should entertain the Committee's suit. This is why the Department's Office of Legal Counsel ("OLC") has repeatedly asserted, in opinions signed by former Assistant Attorneys General Theodore B. Olson and Charles J. Cooper, that the appropriate method to resolve such disputes is through a civil action initiated by the Congress.

With respect to the merits of Count I, the law of this Circuit makes clear that no citizen is "immune" from a congressional subpoena.

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their *unremitting obligation* to respond to subpoenas, to respect the dignity of Congress and its committees and to testify fully with respect to matters within the province of proper investigation.

Watkins v. United States, 354 U.S. 178, 187-88 (1957) (emphasis added). Ms. Miers's status as a former aide does not absolve her of this responsibility. She is being sued in her *personal* capacity based on contumacious conduct that occurred while she was a *private* citizen. The President has no power, by statute or under the Constitution, to direct Ms. Miers to disobey or disregard a congressional subpoena. Accordingly, Ms. Miers had no right to rely on a wholly unauthorized direction from the White House to ignore her legal obligation to the Committee. There is simply no manner in which the Congress can fulfill its obligation under the Constitution to legislate and perform oversight if the individuals it subpoenas – those who supply the

Congress with essential information – may unilaterally claim exemption from congressional process.

With respect to the merits of Count II, Defendants' unilateral and unsupported assertion that they do not have to produce privilege logs is akin to Ms. Miers's erroneous assertion of "absolute immunity." Instead, the law is clear that, in the context of a congressional investigation, any person claiming a qualified privilege with respect to documents withheld must produce a detailed account of those documents and the basis for their withholding. Such action is required to facilitate Congress's duty – and, if necessary, the court's – to assess independently claims of privilege.

Federal courts have insisted that when a member of the Executive Branch claims privilege – including executive privilege, which is qualified and may be overcome by need – he or she must provide a privilege log with sufficient detail to enable the Court to assess whether the claim is valid. Cognizant of this judicial requirement and the need for the branches to assess independently the validity of any claim of privilege, prior Administrations have routinely provided privilege logs to Congress when asserting executive privilege. Such logs are a critical first step in evaluating whether Congress's needs outweigh the executive's need for confidentiality of the documents itemized on the log. This is why it has long been held that, even in the context of suits for information brought against the Executive Branch by private citizens under the Freedom of Information Act ("FOIA"), or in other private civil suits, that the Executive Branch is required to provide a privilege log to justify any claims of executive privilege.

In conjunction with entering judgment for the Committee on Counts I and II, the Court should also instruct Ms. Miers and Mr. Bolten forthwith to produce all responsive documents as

to which no reasonable claim of executive privilege can be asserted (including, for example, communications between the White House and third parties, such as the Department, state political operatives and Members of Congress). Once Ms. Miers has appeared and, if appropriate, asserted executive privilege in response to specific questions, and after both Defendants have submitted privilege logs to the Committee, the Committee will make further determinations on Defendants' assertions of privilege, and if necessary, the Committee will file dispositive motions on the issues of whether the information withheld is privileged at all or, if covered by executive privilege, whether the privilege is outweighed by the Committee's needs.

STATEMENT OF THE CASE[3]

As a result of widespread allegations that the sudden and unprecedented forced resignations of a number of United States Attorneys ("U.S. Attorneys") in late 2006 were the result of improper and unlawful partisan political considerations potentially undermining politically sensitive criminal investigations, the Committee in early 2007 commenced an oversight investigation to determine the validity of such allegations and whether corrective legislation was required. *See* H.R. Rep. No. 110-423, at 15, 55-60 (2007), *available at* http://judiciary.house.gov/Media/PDFS/ContemptReport071105.pdf ("Report"), Exhibit 1.[4] The circumstances of the forced resignations were quite suspicious: the U.S. Attorneys were given no reasons for the requests that they resign promptly; few were given any advance warning or made aware of any performance deficiency they could have attempted to correct; and most had

[3] All of the citations to the record for the material statements contained in this Statement of the Case and the Memorandum generally are set forth in the accompanying Plaintiff Judiciary Committee's Statement of Material Facts As to Which There Is No Genuine Issue ("Statement").

[4] The Report consists of the Judiciary Committee's official report together with the "Additional Views" submitted by Judiciary Committee Chairman John Conyers, Jr. and Subcommittee on Commercial and Administrative Law Chair Linda Sánchez, *see id.* at 11-77, and the "Minority Views," *see id.* at 99-155.

received sterling reviews from the office at the Department tasked with evaluating their performance. *See id.* at 44.

Among the nine U.S. Attorneys asked to resign were: (1) Carol Lam of the Southern District of California, who successfully prosecuted Congressman Randy "Duke" Cunningham, a prominent member of the President's political party, and who was continuing to investigate Mr. Cunningham's associates, including a high-ranking political appointee in the Central Intelligence Agency ("CIA"); (2) John McKay of the Western District of Washington, who despite repeated calls by members of the President's political party for prosecutions of alleged "voter fraud" against their opponents during the hotly contested 2004 Washington State gubernatorial race, failed to indict any case of voter fraud there;[5] and (3) David Iglesias of the District of New Mexico, who was contacted just prior to the 2006 congressional elections by two Members of Congress – both members of the President's political party – disappointed to learn that he did not plan to return indictments *prior* to election day against members of the opposing political party that would have assisted one of the two Members who was seeking reelection.[6] *Id.* at i-iii.

The need to investigate the real reasons for these forced resignations is manifest. As Attorney General Michael B. Mukasey recently acknowledged, a "Department[] investigation[]

[5] *See generally* John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 Seattle U. L. Rev. 265 (2008) (asserting that partisan political considerations led to request for his resignation; documenting the false statements made to Congress about that request; and suggesting that there could be criminal prosecutions for obstruction of justice and perjury by Department officials in connection these terminations).

[6] The suspect reasons offered to Congress for the forced resignations are illustrated most clearly in the case of Mr. Iglesias. Since the Administration could not admit that he was forced out because he did not return an indictment against state officeholders prior to the congressional elections, or pursue other voter fraud cases demanded by local officials in the President's political party, the Principal Associate Deputy Attorney General testified to Congress that Mr. Iglesias was asked to leave (after six years in the job) because he was an "absentee landlord," *i.e.*, he was too often away from the office. H.R. Rep. No. 110-423, at 48, Exhibit 1. No one at the main headquarters of the Department, however, had ever heard of this charge of absenteeism prior to Mr. Iglesias' termination. Pursuant to its Investigation, the Committee learned that this allegation first surfaced during an interview for Mr. Iglesias's replacement with Mr. Iglesias's First Assistant *after* Mr. Iglesias had been forced to resign. Notwithstanding the characterization of his remarks by those interviewing him, the former assistant described Mr. Iglesias as "an excellent U.S. Attorney," and that he did not view Mr. Iglesias as an "absentee landlord." *Id.*

of public corruption . . . that is motivated by partisan politics is just corruption by another name." Remarks Prepared for Delivery by Attorney General Michael B. Mukasey (Mar. 27, 2008), *available at* http://www.usdoj.gov/criminal/pr/speeches/2008/03/03-27-08_rmrks-ag-ca-comwlth.pdf. Discharging U.S. Attorneys because they fail to use the criminal justice system to further the Administration's partisan political ends is not only improper retribution imposed on those individual U.S. Attorneys, but it sends a powerful and inappropriate message to the U.S. Attorneys remaining in office and may wrongfully subject individuals to prosecution for invalid reasons.

In public statements in early 2007, former Attorney General Alberto R. Gonzales, who was Counsel to the President when the forced resignation process began, initially claimed that he was not involved in any discussions about the matter. In later congressional testimony, Mr. Gonzales claimed to have very little memory of the matter.[7] Statement ¶ 22; H.R. Rep. No. 110-423, at 36, Exhibit 1. Principle Associate Deputy Attorney General William Moschella testified before Congress that the forced resignations were all performance related and that any White House involvement was minimal and occurred only at the end of the process. H.R. Rep. No. 110-423, at 19, Exhibit 1. Subsequent testimony and documents provided by Department

[7] According to an author who researched the issue:

> Some aides wanted Gonzales to become more aggressive in confronting his accusers, but the more lawyerly minded aides in the room – apparently fearing a perjury trap if Gonzales misspoke again – favored a conservative approach, advising the Attorney General to point to his faulty memory when pressed for details.
>
> The "I don't recall" strategy won out, and it was a disaster. In one congressional appearance after another, Gonzales gave muddled or even contradictory responses about key issues in the controversy: how the firing list was developed, who weighed in, his own level of personal involvement, the role of Karl Rove and the White House, the impact that sensitive political corruption investigations had in determining who was ousted, and more. Sixty-four times at one particularly painful Senate Judiciary Committee appearance in April, Gonzales said he couldn't remember key details.

Eric Lichtblau, *Bush's Law* 295-96 (2008).

officials, however, suggested that the Gonzales and Moschella statements were false and misleading, thus still leaving unresolved precisely what the reasons were for the terminations and what role the White House played in them. Most significantly, the testimony of more than fifteen senior Department officials revealed that *none* of them could identify who at the Department had recommended the termination of many of those U.S. Attorneys on the list. *Id.* at 43. For example, with regard to Mr. Iglesias, one of the final U.S. Attorneys added to the termination list, not a single Department witness recalled who recommended his addition, and each claimed that he or she had not done so. *Id.* at 47-48. Former Deputy Attorney General James B. Comey testified that he had supervised the departed U.S. Attorneys, was fully familiar with their work, had never recommended that any of them (with one exception) be removed from office, and could not credit the reasons offered for the terminations of the others. *Id.* at 45-46.

Documents produced by the Department and testimony provided by D. Kyle Sampson, the Attorney General's Chief of Staff and a former staffer for Mr. Gonzales when he served as Counsel to the President, revealed that the entire U.S. Attorney removal process had begun in the White House just after the 2004 presidential elections. *Id.* at 43. According to Mr. Sampson, then-White House Deputy Chief of Staff Karl Rove asked someone in the White House Counsel's office whether all ninety-four U.S. Attorneys would be fired or whether some would be selectively replaced. *Id.* at 43-44. At the time of this inquiry, Mr. Rove was being investigated by the U.S. Attorney in Chicago, who was the Special Counsel investigating the disclosure of the identity of CIA covert operative Valerie Plame. *Id.* at 43. Ms. Miers raised the possibility of firing all U.S. Attorneys to Mr. Sampson, by then at the Department, who suggested instead that they force the resignations of a select number of U.S. Attorneys who were not "loyal Bushies." *Id.* at 41, 43-44. Thereafter, in regular consultation with Ms. Miers, Mr.

Sampson compiled from early 2005 through November 2006 a fluid list of U.S. Attorneys who would be asked to resign. Mr. Sampson, under oath, explained that the firing process was a "collaborative back and forth" between the Department and White House personnel and claimed that he could not recall who recommended that a number of the nine U.S. Attorneys be placed on that list. *Id.* at 52-53.

Having exhausted information sources at the Department, and with many questions left unanswered, *id.* at 43, the Committee turned to the White House for information regarding the compilation of the forced resignation list and related matters. The Committee, however, was stonewalled by the White House. Current Counsel to the President, Fred F. Fielding, insisted that he would not permit a single witness to be interviewed or produce a single document unless (1) the Committee agreed in advance that the interviews would be off-the-record and not under oath, (2) the only permissible subject of documents to be produced and interviews would be communications between the White House and third parties, with no document production or testimony allowed with respect to internal White House discussions, and (3) no matter what information emerged in the unrecorded, unsworn interviews or the "unprivileged" documents pre-selected by the White House, the Committee would foreswear in advance any follow-up requests for information and would forego any subpoenas.[8] Statement ¶ 16; Exhibit 5 (Fielding letter of March 20, 2007). Simply to state the conditions is to reveal their unacceptability to any self-respecting investigator, much less a committee of the Congress. Despite numerous efforts initiated by the Committee and its staff to reach an acceptable compromise, all of which are

[8] Mr. Fielding specifically refused to provide the documents involving communications between the White House and third parties when the Committee did not accept his other conditions and these documents have been held hostage to his demands ever since.

documented in the Complaint and the attached Statement, the White House categorically refused to recede from its initial, wholly untenable position.

On June 13, 2007, the Committee issued and served a subpoena on Ms. Miers, who left government service in January 2007, and who was, at the time of service, an attorney in private practice with offices in Washington, D.C. and Dallas, Texas. Statement ¶ 27; Exhibit 14 (Miers subpoena). Based on the emails produced by and the testimony of Department officials, Ms. Miers appeared to be a person quite knowledgeable about the subjects involving the Committee's unanswered questions. The same day, the Committee issued a subpoena *duces tecum* to Mr. Bolten, as custodian of White House records, for documents relating to the forced resignations and related matters. Statement ¶ 26; Exhibit 13 (Bolten subpoena).

On June 28, Mr. Fielding sent a letter to the Committee Chairman stating that the Administration refused, on the ground of executive privilege, to produce a single document in response to Mr. Bolten's subpoena and refused to provide a privilege log or anything other than the most sweeping description of the documents withheld. Statement ¶ 30; Exhibit 16 (Fielding letter of June 28, 2007). The letter omitted mention of the unprivileged documents the White House had originally offered to provide in return for the Committee's forbearance in pursuing the matter further.

Also on June 28, Mr. Fielding sent a letter to Ms. Miers's private attorney, George T. Manning, that "directed" Ms. Miers to refrain from producing any documents pursuant to her subpoena (although the letter did not suggest that she should not produce a privilege log). Statement ¶ 31; Exhibit 17 (Fielding letter of June 28, 2007). On July 9, Mr. Fielding sent a second letter to Mr. Manning, purporting to direct Ms. Miers "not to provide . . . testimony" pursuant to the subpoena, on the ground that any such testimony would be covered by executive

privilege. Statement ¶ 35; Exhibit 20 (Fielding letter of June 9, 2007). The following day, which was only two days prior to Ms. Miers's scheduled hearing, Mr. Manning informed the Committee that based on the Administration's newly raised assertion of "absolute immunity," Ms. Miers would not even *appear* at the hearing as required by the subpoena. Statement ¶ 39; Exhibit 24 (Manning letter of June 10, 2007). The Committee rejected the Administration's position and advised Ms. Miers and Mr. Bolten of the risk of a contempt citation to no avail. Statement ¶ 40; Exhibit 25 (Committee letter of July 11, 2007). Subsequent efforts on the part of the Committee to reach an accommodation were also futile.

On July 25, the Committee voted to hold Ms. Miers and Mr. Bolten in contempt. Statement ¶ 51; H.R. Rep. No. 110-423, at 60, Exhibit 1. Additional efforts initiated by the Committee to reach an accommodation following its vote were met with silence. Statement ¶¶ 52, 53; Exhibit 32 (Conyers letter of July 25, 2007), H.R. Rep. No. 110-423, at 60, Exhibit 1. The Committee filed its Report formally reporting the contempt resolution to the House in November 2007, and a subsequent letter from the Chairman seeking accommodation was rejected by Mr. Fielding. Statement ¶¶ 55, 56; Exhibits 33 (Chairman Conyers letter of November 5, 2007), 34 (Fielding letter of November 9, 2007).

When all efforts at compromise had been exhausted, the matter was brought before the full House, which voted to hold Ms. Miers and Mr. Bolten in contempt of Congress on February 14, 2008 for their willful failure to comply with the Committee's subpoenas. Statement ¶ 57; H. Res. 979, 980, 982 (Feb. 14, 2008), Exhibits 35, 36, 37. On February 28, pursuant to 2 U.S.C. § 194, the Speaker of the House certified the Report to the U.S. Attorney for the District of Columbia, "whose duty it shall be to bring the matter before the grand jury for its action." *See* Statement ¶ 61, Exhibit 38 (Speaker Pelosi letter of February 28, 2007). The following day, the

Attorney General sent a letter to the Speaker, advising that the Department "will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers." Statement ¶ 63; Exhibit 40 (Attorney General Mukasey letter of Feb. 29, 2008). Thereafter, pursuant to H. Res. 980, 110th Cong. (Feb. 14, 2008), this suit was filed to "initiate . . . judicial proceedings . . . to seek [a] declaratory judgment[]" and other "appropriate relief, including injunctive relief" to enforce the subpoenas at issue.

ARGUMENT

I. THE COURT HAS THE POWER AND THE RESPONSBILITY TO RESOLVE THIS CASE AND CONTROVERSY.

A. The Court Has Subject Matter Jurisdiction Under 28 U.S.C. §§ 1331 and 1345.

1. This Case Arises Under the Constitution and Laws of the United States for Purposes of 28 U.S.C. § 1331.

Under 28 U.S.C. § 1331, the district courts have original jurisdiction of civil actions that "arise[] under the Constitution, laws, or treaties of the United States." The Supreme Court "has consistently held" that where "the resolution of [a] case depends directly on construction of the Constitution, ... such suits are authorized by the statute." *Powell v. McCormack*, 395 U.S. 486, 516 (1969).

This Court has subject matter jurisdiction under § 1331 because the Committee's claims arise under the Constitution and laws of the United States. The gravamen of the Complaint is that Defendants violated their legal obligation to comply with duly issued and served congressional subpoenas. Congress's power to subpoena witnesses and enforce subpoenas is derived from the Constitution, as "the constitutional provisions which commit the legislative function to the two houses are intended to include th[e power of inquiry] to the end that the function may be effectively exercised." *McGrain*, 273 U.S. at 175; *see also Barenblatt v. United States*, 360 U.S. 109, 111 (1959). In reviewing the Committee's allegations, the Court will be

required to examine, among other things, the scope of Congress's constitutional power to subpoena witnesses, Congress's ability to compel their appearance and the production of documents, and whether the Constitution authorizes the President to grant immunity from congressional process to private citizens.

This Court previously considered its subject matter jurisdiction under § 1331 in a suit brought by a Senate committee to enforce a subpoena to President Nixon. The District Court held that it did not have jurisdiction under § 1331 because the committee did not satisfy the then-existing $10,000 jurisdictional amount in controversy requirement for federal questions. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 59 (D.D.C. 1973) ("*Senate Select Committee I*"). As the Department itself has recognized, however, because the amount in controversy requirement has since been repealed, Pub. L. No. 94-574, 90 Stat. 2721 (1976); Pub. L. No. 96-486, 94 Stat. 2369 (1980), *Senate Select Committee I* stands as a "precedent[] for bringing such civil suits under the grant of federal question jurisdiction in 28 U.S.C. § 1331." *Response to Congressional Request for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. Off. Legal Counsel 68, 87 (1986) (Charles J. Cooper, Assistant Att'y Gen.) (hereinafter "1986 OLC Opinion").[9]

In *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976) ("*AT&T I*"), the Executive Branch brought suit to enjoin the enforcement of a congressional subpoena against a private party. The Court of Appeals determined that it had subject matter jurisdiction under § 1331 because "[t]he Executive brought the suit claiming that its constitutional powers with respect to national security and foreign affairs included the right to prevent [disclosing certain information]

[9] In fact, the Department specifically noted that it had sought to utilize § 1331 in a previous lawsuit against the House seeking a declaratory judgment that executive privilege justified the withholding of documents sought by a House committee and that the "rationale used by the Department in that suit would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena against executive privilege claims." *Id.* at 88 (referring to *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983)).

to Congress," and "[t]he action therefore arises under the Constitution of the United States." *Id.* at 389. In this case, the interests are simply inverted; the Committee asserts that it has the constitutional power to compel the appearance and document production of former and current presidential aides in the face of Executive Branch contentions that it possesses the constitutional right to prohibit such appearances and productions. If jurisdiction exists to consider Executive Branch claims relating to privilege, as *AT&T I* says it does, then jurisdiction also exists under § 1331 to consider Legislative Branch claims relating to the same issues.

2. The Court Has Subject Matter Jurisdiction Under 28 U.S.C. § 1345.

The Court also has subject matter jurisdiction under 28 U.S.C. § 1345, because this action was commenced "by the United States."[10] The Legislative Branch (and its authorized agent) is clearly as much "the United States" as the Executive Branch. Any argument that the Congress is not part of the United States ultimately "presumes that there is more than one United States . . . and that the United States is something other than the 'sovereign composed of the three branches.'" *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988) (quoting *Nixon*, 418 U.S. at 696). When presented with that contention in another context, the Supreme Court dubbed it "somewhat startling," and asserted that "the three branches are but 'co-ordinate parts of one government.'" *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

In *Senate Select Committee I*, this Court held that a subcommittee of the Senate was not authorized to sue as "the United States." 366 F. Supp. at 56. In reaching this conclusion, the Court relied upon 28 U.S.C. § 516, which states: "Except as otherwise authorized by law, the

[10] Section 1345 provides: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced *by the United States*, or by any agency or officer thereof expressly authorized to sue by Act of Congress." *Id.* (emphasis added).

conduct of litigation in which the United States . . . is a party, or is interested . . . is reserved to officers of the Department of Justice." The Court ruled that § 516's language indicates that only the Department has "the right to sue as the United States when jurisdiction derives from § 1345." *Id.*

This decision, however, is not only patently incorrect,[11] but it also has been superseded by "law" authorizing the Office of General Counsel of the U.S. House of Representatives ("House") to represent the House in litigation. In 1992, pursuant to its authority under the Rulemaking Clause of the Constitution, U.S. Const. art. I, § 5, cl. 2, the House established by Rule "an Office of General Counsel for the purpose of providing legal assistance and representation to the House." Rule II.8, Rules of the House of Representatives (110th Cong.), *available at* http://clerk.house.gov/legislative/rules110/index.html. To effectuate this representation, in 1999 Congress enacted and the President signed into law, 2 U.S.C. § 130f, which states:

> The General Counsel of the House of Representatives and any other counsel in the Office of the General Counsel of the House of Representatives . . . shall be entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States . . . .

Id. § 130f(a). This statute was enacted, in part, to address cases, such as this one, where the Department is unable to represent the Congress. *See* 28 U.S.C. § 530D(a)(1)(B)(ii). Thus, § 130f "otherwise authorize[s] by law" the Office of General Counsel to sue as "the United States" on behalf of the Congress – or an authorized committee of Congress – for purposes of § 1345.

[11] Among other reasons, the District Court's conclusion was incorrect because § 516, which is codified with other provisions dealing with the internal administration of the Department, was not intended to deal with representation of the Congress or one of its committees. Section 516 is simply a housekeeping statute designed to resolve conflicts between governmental agencies and the Department over who will represent the former. *See, e.g., Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 527 (D.C. Cir. 1993); *FTC v. Gagnon*, 390 F.2d 323, 324-35 (8th Cir. 1968).

B. The Committee Has Standing to Sue.

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). To determine whether a "case" or "controversy" exists, the Court must assess whether a party has "standing" to bring its lawsuit:

> [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Where "constitutional question[s are] presented," federal courts have "strictly adhered to the standing requirements to ensure that [their] deliberations will have the benefit of adversary presentation and a full development of the relevant facts." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986); *see also Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (citing *Bender* for the proposition that the Court's standing analysis "has been especially rigorous" where the constitutionality of an action by one of the branches is challenged). In such cases, the Supreme Court has asserted that while it need not "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury," "[p]roper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch [not] shrink from a confrontation with the other two coequal branches of the Federal Government." *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982).

This Circuit has repeatedly recognized that a House of Congress, or its authorized agent, has standing to bring suit to enforce a duly authorized and issued subpoena. *AT&T I* asserted

without reservation that "[i]t is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." 551 F.2d at 391; *see also, e.g.*, *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) ("*Senate Select Committee III*") (entertaining merits of Senate committee's claim to enforce subpoena). This Court also has acknowledged that the "authority in this Circuit indicat[es] that a House of Congress or a committee of Congress [has] standing to sue to retrieve information to which it is entitled." *Walker v. Cheney*, 230 F. Supp. 2d 51, 68 (D.D.C. 2002). Indeed, it is "well established" in this Court "that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities." *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 86 (D.D.C. 1998). Such injuries "arise[] primarily in subpoena enforcement cases, where a house of Congress or a congressional committee seeks to compel information in aid of its legislative function." *Id*.

The Committee's inability to obtain information from Ms. Miers and Mr. Bolten is plainly both an "'actual'" and "concrete and particularized" injury. *Lujan*, 504 U.S. at 560 (citation omitted). The Committee has identified information reasonably believed to be in the possession of Ms. Miers and Mr. Bolten that, if revealed, would assist the Committee in answering questions that are critical to its lawful Investigation. *See* H.R. Rep. No. 110-423, at 54, Exhibit 1. After failing to secure voluntary cooperation from Defendants, the Committee authorized and issued subpoenas that Defendants ignored. Their refusal to comply inflicted upon the Committee "an 'informational injury,'" which this Court has held "sufficiently concrete so as to satisfy the irreducible constitutional minimum of Article III." *U.S. House of Representatives*,

11 F. Supp. 2d at 85 (citation omitted); *see also id.* at 86 ("[A] failure to receive sought-after information constitutes an Article III injury to the legislative body.").

The Committee has a sufficiently "'personal stake' in the alleged dispute." *Raines*, 521 U.S. at 819. The Committee invested a significant amount of time and resources to examine the conduct of the Department and White House officials in its effort to render meaningful conclusions. It conducted hearings, authorized and issued subpoenas, and now waits for the necessary testimony and documents to be provided. Unlike the lawsuits brought by *individuals* to vindicate institutional interests in cases such as *Raines* (six Members of Congress), *Walker* (the Comptroller General, by itself), and *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (thirty-two House Members), in this instance the Committee *itself* is seeking to obtain judicial relief.

The Committee also satisfies the second and third prongs of the Court's standing inquiry. The Committee's injury – being denied information critical to its lawful investigation – is caused directly by (and thus is clearly traceable to) Defendants' failures to comply with their subpoenas. It is also very likely – and thus not "merely speculative," *Friends of the Earth, Inc.*, 528 U.S. at 181 – that a declaration and injunction by this Court mandating Defendants' adherence to their subpoenas would redress the Committee's informational injury.

The additional concerns raised by the Supreme Court regarding individual legislative actor standing in *Raines*, and by this Court in *Walker* and *Kucinich*, are not present here. *Raines* "attach[ed] some importance to the fact that [the suing Members] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."[12] 521 U.S. at 829. Here, however, the Committee and the full House have

[12] Similarly, in *Walker*, this Court noted that "the Comptroller General here has not been expressly authorized by Congress to represent its interests in this lawsuit," and the Comptroller General "has not identified any Member of

voted Defendants in contempt and the full House has voted to authorize the Committee to bring this suit. *See* H. Res. 979, 980, 982, Exhibits 35, 36, 37. Moreover, unlike in *Walker*, where "the record reflect[ed] that Congress as a whole has undertaken no effort to obtain the documents at issue, that no committee has requested the documents, and that no congressional subpoena has been issued," 230 F. Supp. 2d at 68, here, the Committee worked for more than a year to try to acquire the relevant information in furtherance of that objection and authorized and issued subpoenas to Defendants in June 2007.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Supreme Court long ago in *McGrain* recognized that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." 273 U.S. at 175. Based on the unwavering precedents of this Court and the Court of Appeals, there is no question that the Committee has suffered cognizable harm and is entitled to redress from this Court to remedy the injury inflicted upon it by Ms. Miers's and Mr. Bolten's failure to comply with their subpoenas.

C. This Matter Is Otherwise Justiciable Because the Parties Are at a Constitutional Impasse Requiring Judicial Resolution.

Neither the political question doctrine nor any other prudential or equitable concerns bar this suit. Where the enforceability of a congressional subpoena to a member of the Executive Branch is being examined, there is "no doubt that the issues presented . . . are justiciable." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521, 522 (D.D.C. 1974) ("*Senate Select Committee II*"); *see also Senate Select Committee III*, 498 F.2d

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Congress (other than [one Senator]), who has explicitly endorsed his recourse to the judicial branch." 230 F. Supp. 2d at 68; *see also Kucinich*, 236 F. Supp. 2d at 11 (noting that the individual Members suing President and others "have not been authorized, implicitly or explicitly, to bring this lawsuit on behalf of the House, a committee of the House, or Congress as a whole").

725 (reaching the merits of committee's attempt to enforce its subpoena civilly); *United States v. AT&T*, 567 F.2d 121, 126 (D.C. Cir. 1977) ("*AT&T II*") ("The simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution."). Indeed, OLC has, on more than one occasion, opined that a civil action is "[t]he most likely route for Congress to take" to enforce its subpoenas. 1986 OLC Opinion at 87; *see also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 137, 139 n.40 (1984) (Theodore B. Olson, Assistant Att'y Gen.) (asserting that when an Executive Branch official asserts executive privilege during a congressional investigation, "Congress has the clearly available alternative of civil enforcement proceedings"). The central question in such suits is whether the political branches have reached a "constitutional impasse." *U.S. House of Representatives*, 11 F. Supp. 2d at 94; *see also Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring in the judgment).

In *AT&T II*, the D.C. Circuit recognized that "neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement." *AT&T II*, 567 F.2d at 127; *see Davis v. Passman*, 442 U.S. 228, 242 (1979) ("At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' we presume that justiciable constitutional rights are to be enforced through the courts." (internal citation omitted)). Here, neither of the political branches can claim that the text of the Constitution gives it "a clear and unequivocal constitutional title" to determine the outcome of the dispute. Thus, the Court must look to the status of the parties' negotiations to determine whether judicial review is appropriate. This issue

was explored in *AT&T I*. There, due largely to the fact that the parties had previously come close to a settlement, the Court abstained from reaching the merits. *See AT&T I*, 551 F.2d at 394, 395. Rather than dismissing the suit, however, the court retained jurisdiction, left in place an injunction and set forth "the outlines of a possible settlement which may meet the mutual needs of the congressional and executive parties without requiring a judicial resolution of a head-on confrontation." *Id.* at 385. When the parties failed to reach a mutually satisfactory resolution, however, the matter returned to the Court of Appeals, and after the Court outlined its views, the dispute was resolved. *AT&T II*, 567 F.2d at 128.

This Court also has acknowledged that it would be appropriate – at the proper time – for a federal court to resolve inter-branch disputes. In *U.S. v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983), the Executive Branch brought suit seeking a declaration that then-EPA Administrator Anne Gorsuch "acted lawfully in refusing to release certain documents to a congressional subcommittee." *Id.* at 151. The lawsuit was brought following the full House's citation of Ms. Gorsuch for contempt of Congress, but *prior to* the statutory certification of the contempt resolution by the Speaker of the House to the U.S. Attorney for the District of Columbia for presentment to the grand jury. The Court asserted that it "must initially determine whether to resolve the constitutional controversy in the context of a civil action, or defer to established statutory procedures for deciding challenges to congressional contempt citations." *Id.* at 152. It observed that the normal course is that such "objections to congressional investigatory procedures may be raised as *defenses* in a criminal prosecution" under 2 U.S.C. § 194. *Id.* (emphasis added). Accordingly, the Court refused to entertain the Executive Branch's suit, because "[j]udicial resolution of [its] constitutional claim . . . will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding *or*

other legal action taken by Congress." *Id.* at 153 (emphasis added). Thus, while the Court ruled that the Executive Branch's suit was premature, it clearly recognized that the Court would be the appropriate arbiter when and if a final impasse was reached. Here, there is no possibility of a contempt prosecution because the Attorney General refuses to allow the U.S. Attorney for the District of Columbia to fulfill his statutory duty and present the matter to a grand jury, and the Committee is bringing "other legal action" contemplated by the Court's decision.

Once a stalemate is reached, courts must entertain the matter. As the Court of Appeals, per Judge Leventhal explained:

> Where the dispute consists of a clash of authority between two branches . . . judicial abstention does not lead to orderly resolution of the dispute. No one branch is identified as having final authority in the area of concern. If negotiation fails as in a case where one party, because of chance circumstance, has no need to compromise a stalemate will result, with the possibility of detrimental effect on the smooth functioning of government.

AT&T II, 567 F.2d at 126. Likewise, in *Nixon v. Sirica*, also involving a controversy between the coordinate branches (*i.e.*, the Executive and Judicial Branches), the Court of Appeals stated:

> Throughout our history, there have frequently been conflicts between independent organs of the federal government. . . . When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them-one Supreme Court. To leave the proper scope and application of Executive privilege to the President's sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions.

487 F.2d at 715.[13]

[13] Then-Attorney General Elliot L. Richardson testified to the same before Congress: "[I]t seems to me that if the courts of this country have, as they were held by Chief Justice Marshall and have ever since been recognized to have, the power to invalidate legislation or to set aside executive action . . ., then they ought to have the power to adjudicate a claim of privilege as between the other two branches." *To Amend the Freedom of Information Act: Hearing on S. 1142 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciar*y, 93rd Cong. 229 (1973).

In this case, the Committee and the Defendants "have exhausted their attempts at settlement." *Walker*, 230 F. Supp. 2d at 62 n.8. The Counsel to the President has made abundantly clear that the Administration does not want to compromise, and stated that the parties were at an "impasse." *See* Statement ¶¶ 50, 56; Exhibits 31 (Fielding letter of July 23, 2007), 34 (Fielding letter of November 9, 2007). The Committee has attempted, on at least six occasions (including two *following* its vote on contempt), to engage the White House in discussions aimed at reaching an accommodation. *See* Statement ¶¶ 18, 19, 23, 33, 52, 55; Exhibits 6 (Committee letter of March 22, 2007), 7 (Chairmen letter of March 28, 2007), 10 (Committee letter of May 21, 2007), 18 (Chairmen letter of June 29, 2007), 32 (Conyers letter of July 25, 2007), 33 (Conyers letter of November 5, 2007). Those efforts have been rebuffed repeatedly. Thus, the parties are at a constitutional impasse that can only be resolved meaningfully by this Court.[14]

Finally, it should be clear that if the Court were to abstain, it effectively would be granting the Executive Branch *carte blanche* to control access to non-sensitive information, as the executive has often sought but frequently been denied. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997). Thus, judicial restraint here would be, in actuality, judicial *acquiescence*. *See* Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Revie*w, 53 S. Cal. L. Rev. 863, 897 (1983) ("The Court's refusal to consider challenges to executive power is an implicit decision in favor of broad inherent presidential authority.").

These are the critical constitutional principles at stake. Given that the Committee has met all of the relevant thresholds – demonstrating a concrete and particularized injury that is

[14] The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, is one such avenue for meaningful relief without resorting to extreme measures. "The Declaratory Judgment Act is designed to provide a remedy in a case or controversy, while there is still opportunity for peaceable judicial settlement 'before blood has been drawn and tempers irretrievably lost.'" *DiBenedetto v. Morgenthau*, 148 F.2d 223, 225 (D.C. Cir. 1945) (footnotes and citation omitted).

fairly traceable to Defendants' actions; the House's authorization to file and conduct this suit; exhaustion of attempts to reach a reasonable compromise; and a readily available judicial remedy – the Court must reach and decide the merits of the Committee's suit.

II. MS. MIERS HAS A LEGAL OBLIGATION TO APPEAR BEFORE THE COMMITTEE, AND MAY ONLY ASSERT EXECUTIVE PRIVILEGE ON BEHALF OF THE PRESIDENT IN RESPONSE TO SPECIFIC QUESTIONS.

Under Federal Rule of Civil Procedure 56, "[s]ummary judgment . . . is appropriate where the pleadings and the record 'show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 941 (D.C. Cir. 2007) (citation omitted). Count I of the Committee's claim presents a pure question of law on which no genuine issue as to any material fact exists, namely, whether Ms. Miers's failure to appear on grounds of "absolute immunity" was unlawful.

Notwithstanding the possible availability of an assertion of executive privilege, the law requires that all congressional subpoena recipients – including former presidential aides – appear before the Committee when subpoenaed and assert privilege, if warranted, in response to specific questions. If the President himself is subject to judicial process from a grand jury and in a civil suit – and he is – then certainly his *former* aide cannot elude her responsibility to comply with a congressional subpoena. No statute, constitutional provision or judicial precedent authorizes the President to "immunize" a former aide from her obligation to appear in response to a legally binding congressional subpoena. As a result, Ms. Miers's sole legal obligation was to the Committee – to appear and respond appropriately to the Committee's questions – and the President's "directive" to do otherwise is of no force or effect.

A. Ms. Miers's Reliance on the President's Direction to Her Not to Appear Is Unjustified, Unlawful and Ineffectual.

Citing the letters from the Counsel to the President "directing" Ms. Miers, on behalf of the President, not to appear or produce documents in response to her subpoena, Ms. Miers's private counsel claimed that she was "subject to conflicting demands" and thus had "no choice" but "to comply with direction given her by Counsel to the President." Statement ¶ 36; Exhibit 21. This assertion is specious. The President has no power to require Ms. Miers not to appear, and Ms. Miers's only *legal* obligation – by virtue of the subpoena issued to her – was to the Committee. There is, therefore, no legal ground that excused her appearance before the Committee.

Congressional subpoenas clearly have the force of law. They have

> never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. [Otherwise], the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. . . . [E]very person within the jurisdiction of the Government is bound to perform when properly summoned.

United States v. Bryan, 339 U.S. 323, 331 (1950); *see also McGrain*, 273 U.S. at 175 ("[W]here the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. . . . [S]o some means of compulsion are essential to obtain what is needed."). Indeed, a committee's power to subpoena witnesses and documents is "an indispensable ingredient of lawmaking." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975).

On the other hand, no President has the authority to direct a private citizen such as Ms. Miers, to fail to comply with a congressional subpoena. Not surprisingly, in his letter informing the Committee that his client would not be attending the hearing, Mr. Manning was unable to point to a single statute, provision in the Constitution or judicial interpretation that permits the President to direct the conduct of private citizens under such circumstances.

The Supreme Court recently reaffirmed that "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, No. 06-984, 2008 WL 762533, at *3 (U.S. Mar. 25, 2008) (quoting *Youngstown*, 343 U.S. at 585); *cf. id.* at 29 ("'When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.'" (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (alteration omitted)). This case presents the clear paradigm where the President both has no positive authority (and no right) to force Ms. Miers not to appear and where the President has acted contrary to the expressed will of Congress. Ms. Miers can no more lawfully obey a presidential "directive" to break into a psychiatrist's office, ignore a judicial subpoena or bribe witnesses to be silent, than she can rely on a presidential "directive" to violate the Constitution and a criminal statute, *see* 2 U.S.C. § 192, by willfully disobeying a duly issued and served congressional subpoena.

When a President wishes to prevent congressional or judicial testimony, he or she must seek a judicial ruling to enjoin compliance with the subpoena. This was the course followed by the Executive Branch in the *AT&T* cases, discussed above. In 1976, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce ("Oversight Subcommittee") subpoenaed AT&T for documents relating to warrantless wiretapping by the Administration. The Oversight Subcommittee and the White House attempted to reach an accommodation, but ultimately negotiations broke down. Then, "President Ford instructed AT&T, 'as an agent of the United States, to respectfully decline to comply with the Committee subpoena.'" *AT&T I*, 551 F.2d at 387.[15] AT&T understood, however – as

[15] In making this request, President Ford did not rely on a purported inherent authority to prevent private individuals or corporations from testifying on matters of national security; rather, he stated to AT&T's President only that "you are not authorized, *under your agreement with the Executive Branch of the United States Government*, to provide

apparently Ms. Miers does not – that the President lacked legal authority to direct noncompliance with a congressional subpoena, and thus declared its intention to comply with the subpoena. *Id.* As a result, the Department sued AT&T to enjoin its compliance with the subpoena. *Id.*[16] In this case, the President took no similar action before Ms. Miers engaged in a willful contempt of Congress.

Ms. Miers's claim that her former position as a presidential aide vests her with "absolute immunity" from appearing is all the more egregious in light of the heightened obligation of current and former government attorneys to respect the rule of law. While all attorneys are officers of the court and must conduct themselves accordingly, the D.C. Circuit has maintained that government attorneys have an even greater responsibility because they are bound by oath to "'preserve, protect and defend the Constitution of the United States.'" *In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (quoting U.S. Const. art. II, § 1, cl. 8). The Court of Appeals noted that "[t]his is a solemn undertaking, a binding of the person to the cause of constitutional government," and thus "the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." *Id.* at 1273. Ms. Miers thus has an obligation to address the concerns raised by the Committee of improper partisan political considerations driving the administration of the federal criminal justice system by the Department. Her claim that she has "absolute immunity" based on her former government employment while simultaneously ignoring the obligations of her former government position to carry out her responsibilities "to

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this information to the Committee." Letter from President Gerald R. Ford to W.L. Lindholm, President, AT&T (July 22, 1976) (emphasis added), Exhibit 41.

[16] The Department well understands how to seek judicial relief in private litigation to avoid having witnesses testify about "state secrets" or other privileged matters. *See, e.g.*, *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); s*ee also Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 (4th Cir. 1985).

the cause of constitutional government" surely "runs afoul of the [D.C. Circuit's] chutzpah doctrine." *Caribbean Shippers Ass'n, Inc. v. Surface Transp. Bd.*, 145 F.3d 1362, 1365 n.3 (D.C. Cir. 1998).

At bottom, Ms. Miers can point to no source of authority that enables her – as a private citizen – to defy her obligation to respond to her subpoena. The President did not seek an order to enjoin her appearance and thus she had no choice but to appear.

B. Federal Court Decisions and Executive Branch Practice Make Clear That No Immunity Exists for Former Aides to the President.

1. The Case Law Unequivocally Confirms that There Exists No Absolute Privilege for Presidential Aides.

In 1974, the Supreme Court laid to rest the Executive Branch's claim – that has resurfaced in this case – that the President possesses "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Nixon*, 418 U.S. at 706. As the D.C. Circuit recognized a year earlier, the argument for an absolute executive privilege "[l]ack[s] textual support," because to "infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers . . . . are [improper] invitations to refashion the Constitution." *Sirica*, 487 F.2d at 711. Both courts recognized that "control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 714 (quoting *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953)).

Recognizing a claim of absolute immunity in this circumstance would do great violence to the separation of powers. As the en banc Circuit Court in *Sirica* explained:

> If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. . . . Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers.

487 F.2d at 715. Indeed, "[n]o man in this country is so high that he is above the law," and "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

Indeed, this principle has been clear since the earliest days of the Republic, when former Vice President Aaron Burr sought leave of court to issue a subpoena to President Jefferson for a letter containing communications between the President and one of his generals. President Jefferson opposed issuance of the subpoena, citing the separation of powers, and asserting that the document sought "was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose." *United States v. Burr*, 25 F. Cas. 30, 31 (D. Va. 1807) (No. 146920). In ruling that a subpoena could properly be issued to the President, Chief Justice Marshall wrote that "the law does not discriminate between the president and a private citizen." *Id.* at 34. Chief Justice Marshall further stated that if the document did contain "matter which ought not to be disclosed," the proper time for the court to address that consideration would be "*on the return of the subpoena*." *Id.* at 37 (emphasis added).

The Chief Justice's view comports with routine practice when privileges are asserted in response to congressional subpoenas in this Circuit. *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938), held that a congressional witness must *first* attend the hearing, and *then* "may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing . . . ." *Id.* The Court of Appeals compared a congressional hearing to a judicial proceeding, stating that if a judicial witness thought the questions put to him were improper, "that is not a matter for a witness finally to decide," and "he would not be justified in leaving a courtroom." *Id.* It is therefore quite clear that if Ms. Miers wished to assert executive privilege in response to the Committee's questions, she was required to do so "by objection and

refusal to answer."[17] *Id. Cf. United States v. Murdock*, 290 U.S. 389, 397 (1933) (failure to appear and failure to answer questions are "[t]wo distinct offenses"), *overruled on other grounds by Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

This includes witnesses who are instructed to assert executive privilege. In *United States v. Tobin*, 195 F. Supp. 588 (D.D.C. 1961), *rev'd on other grounds*, 306 F. 2d 270 (D.C. Cir. 1962), the District Court convicted and sentenced a state employee for contempt of Congress when he failed to appear pursuant to a subpoena, despite a defense of "executive privilege" asserted by his employers, two state governors. Accordingly, in a civil enforcement action, such a "directive" from a President's lawyer to a *former* aide is similarly unavailing.

It also bears noting that White House aides, in the past, have appeared before congressional committees in overwhelming numbers – both voluntarily and pursuant to subpoenas. Since World War II, close presidential advisers – including former Counsels and Special Assistants – have appeared before congressional committees to offer their testimony on more than *seventy* occasions. *See* Harold C. Relyea & Todd B. Tatelman, *Presidential Advisors' Testimony Before Congressional Committees: An Overview*, Cong. Research Serv., Report for Congress (updated Mar. 17, 2008), Exhibit 8. For example, during her testimony before the Committee in this matter, former Counsel to the President Beth Nolan stated that she had appeared and testified before congressional committees three times while serving as Counsel to the President, and as former Counsel on one other occasion. *See* H.R. Rep. No. 110-423, at 66, Exhibit 1. The Committee is unaware of a single instance where a *former* presidential aide failed

[17] This was the course followed by Sara M. Taylor, the former White House Political Director, who appeared and testified about the forced resignations before the Senate Committee on the Judiciary the same day Ms. Miers refused to appear before the House Committee. During the course of her testimony, Ms. Taylor asserted executive privilege at intermittent junctures. She thus complied with the basic components of her subpoena while maintaining appropriate respect for the concerns of the Executive Branch. *See* H.R. Rep. No. 110-423, at 6, 66, Exhibit 1.

to comply with a subpoena for his or her appearance and testimony and was not prosecuted for such contempt.

2. The Department's Justifications for Absolute Immunity for Former Presidential Aides Are Contrary to Law and Unsound.

In claiming that a former aide to the President is "absolutely immune" from congressional process, the Administration relied heavily on a two-and-a-half page memorandum – issued the day Ms. Miers notified the Committee of her refusal to appear – by Steven G. Bradbury, the Principal Deputy Assistant Attorney General in OLC. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Off. Legal Counsel, Dep't of Justice, to the President of the United States (July 10, 2007), Exhibit 42. In concluding that "Ms. Miers is immune from compulsion to testify before the Committee on this matter and, therefore, is not required to appear to testify," Mr. Bradbury did not cite a *single* judicial decision for this conclusion, but instead relied on former OLC opinions and memoranda as well as statements by a single President.

Mr. Bradbury primarily relied on an OLC memorandum authored in 1971 by former OLC head (and later Chief Justice) William H. Rehnquist. In Mr. Bradbury's memorandum, he quoted Mr. Rehnquist as stating:

> The President and his immediate advisors – 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.

Id. (citing Memorandum from William H. Rehnquist, Assistant Attorney General, OLC, Dep't of Justice, to the President of the United States at 7 (Feb. 5, 1971) ("Rehnquist Memorandum"), Exhibit 43. Significantly, Mr. Bradbury failed to quote the remainder of that paragraph from Mr. Rehnquist's analysis, which supplied the reasoning for his *ex cathedra* statement:

> They [the President's immediate advisers] are presumptively available to the President 24 hours a day, and the necessity of either accommodating a congressional committee or persuading a court to arrange a more convenient time, could impair that availability.

Rehnquist Memorandum at 7, Exhibit 43. Thus, Mr. Rehnquist opined that because the President's advisors *need to be available to him at all times*, they are not required to testify before Congress, or, *a fortiori*, the courts.[18]

It is now clear, as Mr. Rehnquist himself later conceded, that this reasoning is erroneous. As noted above, not long after Mr. Rehnquist's 1971 memorandum was issued, the Supreme Court and the D.C. Circuit rejected such claims of absolute immunity. *See Nixon*, 418 U.S. at 707; *Sirica*, 487 F.2d at 713-15. Indeed, while Chief Justice, Mr. Rehnquist joined a near-unanimous Court in *Clinton v. Jones* in holding that even the President's busy schedule could not postpone until after his term of service a lawsuit against him or his availability for a deposition in the case. 520 U.S. at 691-92. The Supreme Court stated that it "assume[d] that the testimony of the President, both for discovery and for use at trial, may be taken at the White House." *Id.* at 691. That the President is subject to deposition disposes of the notion that the President is absolutely immune from service of process in a civil matter and from having to testify. If the President's position and official duties do not preclude *him* from having to give testimony in appropriate circumstances, it follows *a fortiori* that he cannot bestow upon his former aides an "absolute immunity" from appearing in response to a congressional subpoena.

[18] It bears noting, in light of the great weight placed on Mr. Rehnquist's Memorandum, that just prior to explaining why aides may not be compelled to appear, Mr. Rehnquist stated that his conclusions were "tentative and sketchy." Rehnquist Memorandum at 7, Exhibit 43. Indeed, Mr. Rehnquist himself contradicted his own position during congressional testimony later that year. Just a few months after authoring his 1971 OLC Memorandum, Mr. Rehnquist stated correctly that when presidential aides wish to assert executive privilege, they must *first* appear before Congress and *then* assert the privilege. *See U.S. Government Information Policies and Practices—The Pentagon Papers: Hearing Before the Subcomm. on Foreign Operations and Gov't Info. of the H. Comm. on Gov't Operations*, 92nd Cong. 385 (1971) (testimony of William H. Rehnquist, Assistant Att'y Gen.) (hereinafter "Rehnquist Testimony") (noting that "member[s] of the executive branch . . . . have to report, give [their] name and address and so forth, and then invoke the privilege").

What is even more incredible about Mr. Bradbury's failure to quote the entire paragraph of the Rehnquist Memorandum, is that even if the memorandum's reasoning justified immunity for *current* aides (which it does not), under no circumstances would it validate a claim that a *former* aide is absolutely immune. Obviously, former aides do not need to be "available to the President 24 hours a day," and thus, the logic of the Rehnquist Memorandum cannot possibly serve as a justification for their failure to appear before a committee of the Congress.

For all of the foregoing reasons, the Committee is entitled at this time to summary judgment on Count I of its Complaint. Ms. Miers must appear and testify before the Committee, produce all nonprivileged documents responsive to the subpoena, assert claims of privilege when appropriate and testify about all subjects not covered by privilege.

III. MS. MIERS AND MR. BOLTEN MUST PRODUCE UNPRIVILEGED DOCUMENTS AND PROVIDE PRIVILEGE LOGS DESCRIBING THE RESPONSIVE DOCUMENTS THEY HAVE WITHHELD IN RESPONSE TO THEIR CONGRESSIONAL SUBPOENAS.

Both Ms. Miers and Mr. Bolten claimed they were absolutely immune from producing documents and from providing privilege logs for the documents withheld. These immunity claims are entirely without merit. As demonstrated above, the Supreme Court and this Circuit have unequivocally held that executive privilege is only *qualified* and not absolute. Moreover, in nearly every circumstance in which executive privilege is asserted, Congress and the courts require that the party raising the privilege claim produce a privilege log. A privilege log is essential when a claim of executive privilege is asserted, because it is the only method by which the reviewing body can determine, short of looking at the purportedly privileged documents themselves, the validity of the party's assertions. Were this Court to sanction Defendants' immunity claims of immunity – and absolve them of the need to produce privilege logs – it would render nugatory Congress's authority to investigate matters within its legislative and

oversight jurisdiction, and claims of privilege would become, contrary to the courts' rulings, functionally absolute. Accordingly, the Committee is entitled, as a matter of law, to all nonprivileged documents, and Ms. Miers and Ms. Bolten each must produce a privilege log if they withhold any documents responsive to their subpoenas on any ground, including executive privilege.

A. Defendants Are Legally Obligated to Produce Privilege Logs.

Short of viewing the purportedly privileged documents themselves, the only manner in which Congress and the courts can properly review the soundness of an executive privilege claim is through an itemized description of the documents withheld. Federal courts have not found such procedures to be overly burdensome, intrusive or unnecessary, and in fact, have held such procedures to be necessary to the fair disposition of disputes involving the Executive Branch. *See Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 543 (D.C. Cir. 1977) (asserting that an affiant must "specify the documents for which protection is sought, and . . . explain why the specified documents properly fall within the scope of the privilege"); *Sirica*, 487 F.2d at 721 ("Without compromising the confidentiality of the information, the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims."). The principles underlying those decisions apply with equal, if not greater, force to congressional subpoenas for information.

The D.C. Circuit's decisions in *Dellums I* and *Dellums v. Powell*, 642 F.2d 1351 (D.C. Cir. 1980) ("*Dellums II*") are dispositive. There, a group of antiwar demonstrators who were arrested on the Capitol steps brought a class action suit against President Nixon and Attorney General John Mitchell, among others, alleging that the defendants had engaged in a civil conspiracy to arrest the class members in violation of the First Amendment. *See Dellums II*, 642 F.2d at 1353. In the course of discovery, President Nixon interposed an objection to the

production of all tapes and transcripts sought by the plaintiffs relating to conversations regarding the demonstrations at issue, asserting, *inter alia*, that executive privilege is an absolute bar to discovery of a former President's confidential conversations and documents, and that even if the privilege was not absolute, the plaintiffs did not make a sufficient showing of need. *Id.* at 1353-54.

The D.C. Circuit rejected the President's claim of absolute privilege and affirmed the lower court's ruling that the plaintiffs had made a sufficient showing of need for the materials to overcome the qualified privilege. The Court of Appeals then remanded the case, indicating the procedures the lower court should follow to balance the President's privacy interests with the plaintiff's and the court's need to assess the privilege claims. *Id.* at 1354-55. Most notably, the Court of Appeals required the President to "'present to the District Court all other items covered by the order, with specification of which segments he believes may be disclose and which not. This can be accomplished by itemizing and indexing the material, and correlating indexed items with particular claims of privilege.'" *Id.* at 1355 n.12 (quoting *Sirica*, 487 F.2d at 724).

After the President submitted, on remand, his index of the portions of the transcripts which he claimed to be covered by executive privilege, both the District Court and the Court of Appeals rejected his effort as "'woefully inadequate.'" *Id.* at 1358; *see id.* at 1352-53, 1363. The President fell short of what was required because (1) he failed to provide "an itemized explanation of each segment sought to be protected," (2) his "one-line summaries" of documents withheld were insufficiently detailed, (3) he did not "ma[k]e clear the basis for his claim that . . . the Presidential privilege . . . would be violated by the release of any of the conversations." *Id.* at 1361. The Court of Appeals again remanded the case, directing President Nixon to, among other things, "provide a clear and cogent summary of exactly what material is being withheld . . .

and what material is being produced without objection," and to "remember[] that the underlying purpose of the . . . index is to permit the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves." *Id.* at 1360.

As the *Dellums* cases make clear, even the *President himself* must produce a detailed privilege log when withholding documents on the ground of executive privilege. Privilege logs are essential for executive privilege review because without them (or similarly descriptive information to explain the basis for withholding a document), the reviewing body is unable to assess (1) what *kind* of executive privilege is being asserted (*i.e.*, presidential communications or deliberative process), (2) whether the material is actually privileged, and (3) whether the need of the party seeking the documents outweigh the public's interest in keeping those materials out of public view. *See In re Sealed Case*, 121 F.3d 729, 737-738 (D.C. Cir. 1997). For example, if it is unclear who authored or received a particular communication, it may be difficult to determine which executive privilege applies, if any. *See id.* at 745. In addition, without a privilege log, it is impossible for the reviewing body to balance the competing interests that must be weighed in assessing the applicability of the privilege. Put differently, "[t]he litigant's need for the information cannot be balanced against its sensitive and critical role in the government's decision making process *without any indication of what that information is*." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404-05 (D.C. Cir. 1984) (emphasis added); *see also Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 101 (D.D.C. 1974) ("Without this specificity, it is impossible for a court to analyze the claim short of disclosure of the very thing sought to be protected.").

The courts routinely require the Executive Branch to provide privilege logs for documents withheld on the basis of executive privilege. In the FOIA context, for example, when a private citizen seeks information that is purportedly privileged, courts do not "accept conclusory and generalized allegations of exemptions," but rather "require a relatively detailed analysis" of why such exemptions apply to each document. *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973). Such "detailed analysis" takes the form of what is commonly known as a "'*Vaughn* index,'" *see Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 107 (D.D.C. 2005), which is "achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document." *Vaughn*, 484 F.2d at 827.

In *Vaughn*, the D.C. Circuit noted that "it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information." *Id.* at 823. This is because "only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information." *Id.* Based on this reality, the Court of Appeals recognized that without an index, *i.e.*, a privilege log, "[t]he best [the requester] can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain [privileged] information." *Id.* at 824. Thus, this Circuit "require[s] that when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cen., Inc. v. Air Force*, 566 F.2d 242, 250-51 (D.C. Cir. 1977); *see also Judicial Watch, Inc. v. U.S. Dep't of Justice*, No. 01-6392006 WL 2038513, at *2 (D.D.C. July 19, 2006)

(asserting that "the agency's *Vaughn* index must set forth with particularity the justification for the exclusion, relating it to the particular part of the document to which it applies, and the agency's affidavits supporting the *Vaughn* Index must not be conclusory or too broadly sweeping").

It would be wholly anomalous if private citizens were generally entitled to privilege logs in FOIA cases, while the Congress was powerless to compel one during a valid investigation into the operation of the Executive Branch. This is likely why, prior to the current Administration, the executive has routinely produced privilege logs in response to congressional investigations. For example, in 1997 the House Committee on Government Reform and Oversight conducted an investigation into "whether the White House had improperly influenced a Department of Interior . . . decision to deny an application for a reservation gaming facility." Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability* 131 (2002). The White House sought to withhold documents sought by the Committee, and the "White House privilege log provided to the committee identified ten documents that were considered 'subject to executive privilege,' 'subject to attorney client communications privilege,' or 'subject to attorney work product privilege.'" *Id*. at 132. The White House subsequently gave the Committee access to documents while maintaining that they were subject to executive privilege, while the Committee rejected these privilege claims. *Id.* at 132-34.[19]

[19] This also commonly occurs in the grand jury context. For example, in response to a grand jury subpoena for documents issued by the Office of Independent Counsel during the Clinton administration, Special Counsel to the President, in response to a letter request from the Deputy Independent Counsel, supplied information specifically describing responsive documents withheld (including the date and author of documents), as well as the bases for withholding, which included executive privilege. Instructions for the subpoena specifically directed provision of a privilege log specifying the basis for withholding documents on executive privilege and other bases. *See* Grand Jury Subpoena to the White House and Letters from Jane C. Sherburne, Esq. to John Bates, Esq. (Attached collectively as Exhibit 44); *see also In re Sealed Case*, 121 F.3d at 735.

Similarly, in 1996, the House Committee on Government Reform and Oversight subpoenaed from the White House documents relevant its investigation of the 1993 firings of employees of the White House Travel Office. *Id*. at 125. The White House initially produced approximately 40,000 pages of documents and withheld approximately 3,000 pages, on grounds of executive privilege, and provided only a description of three broad categories of withheld documents, which the Committee rejected as "'vague, broad and non-descriptive . . . [which] if accepted by the committee, would be tantamount to accepting a type of broad, undifferentiated claim of executive privilege which was rejected by the court in *U.S. v. Nixon*.'" *Id*. at 125-26. As the House proceeded to consider a contempt resolution, the White House produced an additional 1,000 pages of previously withheld documents and a "privilege log which indexed the remaining withheld documents." Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogatives of Executive Privilege*, 81 Minn. L. Rev. 631, 666 (1997). Ultimately, the White House made all of the remaining withheld documents available to the Committee. *See* Rozell at 126.

It is also noteworthy that, in response to a FOIA request seeking documents related to the very same forced resignations of U.S. Attorneys underlying the Committee's Investigation, the Department provided a *Vaughn* index with respect to documents it withheld on the basis of the presidential communications and deliberative process privileges. *See Democratic Nat'l Comm. v. U.S. Dep't of Justice*, No. 07-712, 2008 WL 803421, at *1, *2 (D.D.C. Mar. 27, 2008); DOJ *Vaughn* Index (providing group number, date, description, specific privilege asserted, and pages of documents withheld), Exhibit 45. There is no reason why Ms. Miers and Mr. Bolten should be exempted here from producing privilege logs.

B. The Constitution Requires that Defendants Provide a Privilege Log for Any Documents Responsive to Their Subpoenas That Are Withheld on the Basis of a Qualified Privilege in Order for the Committee to Fulfill Its Constitutional Responsibilities.

The implications of the Defendants' position are staggering for the separation of powers. As discussed above, Congress's power to investigate is deeply rooted in the Constitution. *See McGrain*, 273 U.S. at 175. Access to information is a key part of Congress's ability to legislate intelligently and to oversee effectively the proper functioning of the Government. *See* Rehnquist Testimony at 360 ("It is well established that the power to legislate implies the power to obtain information necessary for Congress to inform itself about the subject to be legislated upon, in order that the legislative function may be exercised effectively and intelligently.").

Congress is impaired in fulfilling this duty where, as here, a privilege from disclosure is claimed. No doubt, on occasion, a claim of privilege may be justified. *See Watkins*, 354 U.S. at 188 (noting that "constitutional rights of witnesses [must] be respected by the Congress as they are in a court of justice"). In such instances, the subpoenaed party claiming privilege must first explain to the investigating committee in detail the basis for his or her privilege claim, and then the committee must assess the claim's validity. *See Quinn v. United States*, 349 U.S. 155, 164 (1955) (noting that it is "incumbent on the committee" to decide whether "to accept the claim" of privilege); *Emspak v. United States*, 349 U.S. 190, 202 (1955) (same); *Sanders v. McClellan*, 463 F.2d 894, 899 (D.C. Cir. 1972) (describing the process of registering constitutional claims with a committee, including the committee's ability to weigh such objections). If the committee finds the claim to be valid, then it will proceed without the documents or testimony in question. *Quinn*, 349 U.S. at 165.

Congress, however, cannot *blindly* accept a claim of privilege. To do so would be to abdicate its responsibility under the Constitution to develop effective laws and to oversee the

manner in which the Executive Branch is implementing its legislation. Moreover, such passive acceptance would encourage subpoena recipients with frivolous claims of privilege to raise them without fear of consequence. The result would leave Congress without a meaningful manner in which to compel production of significant information, thus effectively nullifying its power to investigate.

The Supreme Court recognized the importance of *specific* privilege objections to congressional committees in *Hutcheson v. United States*, 369 U.S. 599 (1962). There, the petitioner refused to answer questions posed by a Senate committee on the ground that they related to a state court case in which he was under indictment. He was subsequently found guilty of violating 2 U.S.C. § 192, based on his refusal to answer those questions. *Hutcheson*, 369 U.S. at 600, 605-06. On appeal, the petitioner restyled his objection to the committee's questions as a violation of the Due Process Clause of the Fifth Amendment. While the Court acknowledged "that a congressional committee's right to inquire is 'subject to' all relevant 'limitations placed by the Constitution on governmental action,'" *id.* at 610 (quoting *Barenblatt*, 360 U.S. at 112), it explained that objections to questioning on such grounds "must be adequately raised before the inquiring committee if [they are] to be fully preserved for review in this Court," *id.* at 611. "To hold otherwise," the Court stated, "would enable a witness to toy with a congressional committee in a manner obnoxious to the rule that such committees are entitled to be clearly apprised of the grounds on which a witness asserts a right of refusal to answer." *Id.*

The Committee's subpoenas to Ms. Miers and Mr. Bolten instructed that if any responsive documents were withheld on the basis of privilege, the respondents were to provide information specifically describing the documents withheld and the basis for withholding them. *See* Miers Subpoena, Definitions and Instructions ¶ 7, Exhibit 14; Bolten Subpoena, Instructions

¶ 9, Exhibit 13. While counsel for Ms. Miers did not offer an explanation for her refusal to provide a privilege log,[20] the Counsel to the President, on Mr. Bolten's behalf, asserted only that he is

> aware of no authority by which a congressional committee may "direct" the Executive to undertake the task of creating and providing an extensive description of every document covered by an assertion of Executive Privilege. Given the descriptions of the materials in question that have already been provided, this demand is unreasonable because it represents a substantial incursion into Presidential prerogatives and because, in view of the open-ended scope of the Committee's inquiry, it would impose a burden of very significant proportions.

Statement ¶ 34; Exhibit 19 (Fielding letter of July 9, 2007). The only "descriptions" that had been provided were the two categories of documents the Counsel to the President offered in his March 20 correspondence and the statement in a Department letter to the President that the withheld internal White House documents "discuss the wisdom of such a proposal [to replace U.S. Attorneys], specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissal. *See* Statement ¶ 16, ¶ 28; Exhibits 5 (Fielding letter of March 20, 2007), 15 (Clement letter of June 27, 2007). If anything, this latter description makes all the more clear the relevance of the withheld documents to the Committee's inquires. Without a more detailed explanation of what documents were withheld and the reasons for their withholding, the Committee was unable to assess whether it was prudent to accept any of Defendants' specific privilege claims with respect to the documents withheld. *See* H.R. Rep. No. 110-423, at 78, Exhibit 1 (noting that Ms. Miers and Mr. Bolten improperly failed to provide privilege logs).

[20] Although counsel for Ms. Miers asserted that the White House directed her not to provide the Committee with documents or testimony, he cited no such directive in declining to produce a privilege log. *See* Statement ¶ 39; Exhibit 24 (Manning letter of July 10, 2007). The Committee offered Ms. Miers the option of confirming that she did not possess any documents responsive to her subpoena. *See* Statement ¶ 45; Exhibit 27 (Chairman Conyers letter of July 13, 2007). The offer was not accepted.

Moreover, the Counsel to the President's claim that preparation of a privilege log would be unreasonably burdensome is specious, because according to the Solicitor General, Mr. Fielding's office has already identified all of the "documents . . . responsive to the subpoenas," and the Solicitor General has reviewed them. H.R. Rep. No. 110-423, at 2, 22, Exhibit 1. The log can be prepared by clerical personnel and the asserted legal grounds can be supplied by attorneys in the White House Counsel's office, all without any disruption to the President. Accordingly, the Committee was left with no choice but to issue a general ruling rejecting Ms. Miers's and Mr. Bolten's claims of absolute immunity. *See* H.R. Rep. No. 110-423, at 78, Exhibit 1.

Ms. Miers and Mr. Bolten have absolutely no legal basis for disobeying the subpoenas and refusing to produce a privilege log to itemize and support their invocations of executive privilege. The Court should direct Ms. Miers and Mr. to produce privilege logs that explain what documents they have withheld and the purported legal reason for withholding them. In addition, the Court should direct Defendants to produce forthwith any withheld documents that are nonprivileged, such as communications with third parties.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment at this time on Counts I and II, enforce the Committee's subpoenas, require Ms. Miers to appear and testify, raising claims of executive privilege only when appropriate and in response to specific questions; require both Defendants to produce nonprivileged responsive documents; and, for those documents withheld, require the Defendants to provide to the Committee and the Court a detailed privilege log specifying which documents have been withheld and on what legal ground.

Respectfully submitted,

_____/s/ Irvin B. Nathan_____

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Dated: April 10, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES *Plaintiff*, v. HARRIET MIERS, et al. *Defendants*.	Case No. 1:08-cv-004909 (JDB)

PLAINTIFF JUDICIARY COMMITTEE'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Fed. R. Civ. P. 56 and Local Civil Rules 7(h) and 56.1, Plaintiff Committee on the Judiciary of the United States House of Representatives sets forth the following statement of material facts as to which there is no genuine issue:

1. Defendant Harriet Miers served as Counsel to President George W. Bush from 2004 until she resigned from government service on January 31, 2007. *See* H.R. Rep. No. 110-423, at 64 (2007) ("Report").[1]

2. Defendant Joshua Bolten is, and has been since April 14, 2006, Chief of Staff to President George W. Bush. *See* H.R. Rep. No. 110-423, at 63. Exhibit 1.

[1] Report of the Committee on the Judiciary, House of Representatives, together with Additional Views and Minority Views ("Report")) (on file with the Committee and *available at* http://judiciary.house.gov/Media/PDFS/ContemptReport071105.pdf). Exhibit 1. Mincberg Declaration ¶ 4.

3. The Committee on the Judiciary is a standing Committee of the United States House of Representatives, duly established pursuant to House Rule X.1(k), Rules of the House of Representatives (110th Cong.).[2] The Rules of the House are adopted pursuant to the Rulemaking Clause of the Constitution. U.S. Const. art. I, § 5, cl. 2.

4. House Rule X grants to the Judiciary Committee legislative and oversight jurisdiction over, *inter alia*, "judicial proceedings, civil and criminal," and "criminal law enforcement"; the "application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction"; the "operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction"; and "any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction." House Rules X.1(k)(1), (7); House Rules X.2(b)(1)(A)-(C).

5. House Rule XI specifically authorizes the Judiciary Committee and its subcommittees to "require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary." *Id*. at XI.2(m)(1)(B). The Rule also provides that the power to issue subpoenas may be delegated to the Committee chairman. *Id*. at Rule XI.2(m)(3)(A)(i).

6. Under Rule V(b)(3) of the Judiciary Committee's Rules of Procedure, the Subcommittee on Commercial and Administrative Law has legislative and oversight jurisdiction over, *inter alia*, "appropriate matters as referred by the Chairman."

[2] The House Rules are *available at* http://clerk.house.gov/legislative/rules110/index.html.

Committee on the Judiciary Rules of Procedure, *available at* http://www.gpo.gov/congress/house/house10cal/104con/ix.pdf.

7. On or about December 7, 2006, the Department of Justice asked for the resignations of seven U.S. Attorneys: Daniel Bogden (D. Nev.); Paul K. Charlton (D. Ariz.); Margaret Chiara (W.D. Mich.); David Iglesias (D. N.M.); Carol Lam (S.D. Cal.); John McKay (W.D. Wash.); and Kevin Ryan (N.D. Cal.). Earlier in the year, the Department asked for the resignations of two other U.S. Attorneys: H.E. "Bud" Cummins III (E.D. Ark.) and Todd Graves (W.D. Mo.). All of these U.S. Attorneys submitted their resignations. H.R. Rep. No. 110-423, at 105. Exhibit 1.

8. In early 2007, the Judiciary Committee and its Subcommittee on Commercial and Administrative Law began investigating the forced resignations of the nine United States Attorneys and related matters ("Investigation"). H.R. Rep. No. 110-423, at 2, 22. Exhibit 1.

9. The Investigation was undertaken pursuant to the authority delegated by the House of Representatives to the Judiciary Committee. *See* House Rules X.1(k) and XI, Rules of the House of Representatives (110th Congress), *available at* http://clerk.house.gov/legislative/rules110/110th.pdf.

10. The Report stated the legislative purposes of this Investigation fall into two categories: "(1) investigating and exposing any possible malfeasance, abuse of authority, or violation of existing laws on the part of the Executive Branch related to these concerns, and (2) considering whether the conduct uncovered may warrant additions or modifications to existing Federal law, such as more clearly prohibiting the

kinds of improper political interference with prosecutorial decisions as have been alleged here." H.R. Rep. No. 110-423, at 7. Exhibit 1.

11. On March 6, 2007, the Committee held its first hearing in connection with the Investigation and took the testimony of six recently dismissed U.S. Attorneys and then-Principal Associate Deputy Attorney General of the Department of Justice, William E. Moschella. *See* H.R. 580, *Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); H.R. Rep. No. 110-423, at 2. Exhibit 1.

12. On March 8, 2007, Committee Chairman John Conyers, Jr. and Subcommittee Chairwoman Linda T. Sánchez wrote to then-Attorney General Alberto R. Gonzales requesting that the Department make certain officials available for follow-up questioning and provide documents related to the Investigation. A true and accurate copy of the letter is attached as Exhibit 2. Mincberg Declaration, ¶ 5.

13. On March 9, 2007, Chairman Conyers and Chairwoman Sánchez wrote Ms. Miers and requested to interview her on a voluntary basis about her knowledge and activities concerning the forced resignations of U.S. Attorneys and related matters. A true and accurate copy of the letter is attached as Exhibit 3. Mincberg Declaration, ¶ 6.

14. Ms. Miers did not respond to this letter. As set forth in the Report: "Chairman Conyers then attempted to engage the White House regarding the terms and conditions of interviews involving White House witnesses, including Ms. Miers." H.R. Rep. No. 110-423, at 64. Exhibit 1.

15. On March 9, 2007, Chairman Conyers and Chairwoman Sánchez wrote to the Counsel to the President, Fred F. Fielding, and requested that the Administration produce several categories of documents and other information relating to the Investigation by March 16, 2007. Further, the Committee asked that the Administration make certain White House officials available for interviews and questioning. A true and accurate copy of the letter is attached as Exhibit 4. Mincberg Declaration, ¶ 7.

16. On March 20, 2007, Counsel to the President wrote to Chairman Conyers, Chairwoman Sánchez, Chairman of the Senate Judiciary Committee, Patrick Leahy, and the Ranking Members to set forth the following proposal:

> In response to the invitations for interviews extended by the Committees, I am prepared to agree to make available for interviews the President's former Counsel; current Deputy Chief of Staff and Senior Advisor; Deputy Counsel; and a Special Assistant in the Office of Political Affairs. We are prepared to agree to the following terms, which, considering applicable constitutional principles relating to the Presidency and your Committees' interests, we believe are fair, reasonable, and respectful. We believe that such interviews should be a last resort, and should be conducted, if needed, only after Congress has heard from Department of Justice officials about the decision to request resignations of the U.S. Attorneys.
>
> Such interviews may cover, and would be limited to, the subject of (a) communications between the White House and persons outside the White House concerning the request for resignations of the U.S. Attorneys in question; and (b) communications between the White House and Members of Congress concerning those requests. Those interviews should be conducted by both Committees jointly. Questioning of White House officials would be conducted by a Member or limited number of Members, who would be accompanied by committee staff. Such interviews would be private and conducted without the need for an oath, transcript, subsequent testimony, or the subsequent issuance of subpoenas. A representative of the Office of the Counsel to the President would attend these interviews and personal counsel to the invited officials may be present at their election.
>
> As an additional accommodation, and as a party of this proposal, we are prepared to provide to your Committees copies of two categories of documents: (a)

> communications between the White House and the Department of Justice concerning the request for resignations of the U.S. Attorneys in question; and (b) communications on the same subject between White House staff and third parties, including Members of Congress or their staffs on the subject.

A true and accurate copy of the letter is attached as Exhibit 5. Mincberg Declaration, ¶ 8.

17. On March 21, 2007, the Committee voted to authorize the issuance of subpoenas to Ms. Miers and Mr. Bolten, among others. *Meeting to Consider Subpoena Authorization Concerning the Recent Termination of United States Attorneys and Related Subjects Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); H.R. Rep. No. 110-423, at 4, 61-62. Exhibit 1.

18. On March 22, 2007, Chairman Conyers and Chairwoman Sánchez wrote to the Counsel to the President stating the Committee "cannot accept your proposal for a number of reasons" including its belief that:

> [T]he failure to permit any transcript of our interviews with White House officials is an invitation to confusion and will not permit us to obtain a straightforward and clear record. Also, limiting the questioning (and document production) to discussions by and between outside parties will further prevent our Members from learning the full picture concerning the reasons for the firings and related issues.

The Report stated that "the letter made clear that the Committee was still willing to negotiate with the White House, and accordingly, Chairman Conyers withheld issuing subpoenas at that time." H.R. Rep. No. 110-423, at 62. Exhibit 1. A true and accurate copy of the letter is attached as Exhibit 6. Mincberg Declaration, ¶ 9.

19. On March 28, 2007, Chairman Conyers and Chairman Leahy again wrote to the Counsel to the President, urging the Administration to provide all relevant documents without delay. As an initial step, the Chairmen asked the Administration to produce the documents it had indicated on March 20, 2007, it was willing to produce.

The Chairmen further suggested the parties narrow the dispute over White House documents to those the Administration referred to as "internal" and then devise a process for proceeding with those "internal" documents. Finally, the Chairmen requested that the Administration collect and produce emails and documents from all relevant email accounts, addresses and domains, and that it not limit its production to official White House email and document retention systems. A true and accurate copy of the letter is attached as Exhibit 7. Mincberg Declaration, ¶ 10.

20. A study by the Congressional Research Service documents some 74 instances where serving White House advisers have testified before Congress since World War II. These instances have included White House Counsel on multiple occasions and other high-ranking White House aides. Harold C. Relyea & Todd B. Tatelman, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, Cong. Research Serv., Report for Congress (updated Mar. 17, 2008). Exhibit 8. H.R. Rep. No. 110-423, at 21, 66. Exhibit 1.

21. On April 12, 2007, Counsel to the President wrote to Chairman Leahy and Chairman Conyers and reiterated the Administration's original conditions for providing information to the Committee, as set forth in the letter of March 20, 2007. Noting that Congress had "reject[ed] . . . the President's proposal," the Administration declined to produce the documents that it had been prepared to release as part of the "package of accommodations." A true and accurate copy of the letter is attached as Exhibit 9. Mincberg Declaration, ¶ 11.

22. On May 10, 2007, Attorney General Gonzales appeared before the full Judicial Committee for an oversight hearing that focused on the U.S. Attorney

controversy. During his testimony, Attorney General Gonzales did not decline to answer any questions about the forced resignations on legal grounds, although he did not fully answer many questions, citing a lack of recollection. *See e.g. The Continuing Investigation into the U.S. Attorneys Controversy: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Attorney General Gonzales) at 34-35, 38, 50-51, 68-69, 80-81, 87-89, 92-93, 166-167, 171, and 189.

23. On May 21, 2007, Chairman Conyers and Chairwoman Sánchez wrote to the Counsel to the President for a fourth time to make an appeal for voluntary cooperation. They stated "it is becoming increasingly clear that we will not be able to complete our investigation without full and complete cooperation from the White House." Their letter concluded: "[i]f the White House persists in refusing to provide information to the House Judiciary Committee, or even to discuss providing such information, on a voluntary basis, we will have no alternative but to begin to resort to compulsory process in order to carry out our oversight responsibilities." A true and accurate copy of the letter is attached as Exhibit 10. Mincberg Declaration, ¶ 12.

24. On May 23, 2007, Monica Goodling, former Senior Counsel to Attorney General Gonzales and the Department's White House Liaison, appeared before the full Committee after a grant of limited use immunity. *See The Continuing Investigation into the U.S. Attorneys Controversy: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Monica Goodling). On March 30, 2007, her counsel, John M. Dowd and Jeffrey M. King, of Akin Gump Strauss Hauer & Feld LLP, had written to inform the Committee that "Ms. Gooding will assert her Fifth Amendment right not to answer any questions regarding the firings of U.S. Attorneys, or any other

questions related to that subject matter." A true and accurate copy of the letter is attached as Exhibit 11. Mincberg Declaration, ¶ 13.

25. On June 7, 2007, Counsel to the President wrote to Chairman Leahy, Chairman Conyers, and Chairwoman Sánchez, and reiterated the Administration's initial position and state "[w]e are not unmindful that the President's proposal does not comport fully with your Committees' original requests." A true and accurate copy of the letter is attached as Exhibit 12. Mincberg Declaration, ¶ 14.

26. On June 13, 2007, the Committee issued a subpoena to Mr. Bolten, as the White House custodian of records, returnable by June 28, 2007, to produce documents related to the Investigation. The subpoena directed that if the Administration withheld any documents from production on the grounds of privilege it must produce a privilege log. A true and accurate copy of the subpoena is attached as Exhibit 13. Mincberg Declaration, ¶ 15.

27. Also on June 13, 2007, the Subcommittee issued a subpoena to Ms. Miers, returnable July 12, 2007, for testimony and documents relevant to the Investigation. The subpoena was served that day by agreement upon Ms. Miers's counsel, George T. Manning. The subpoena directed that if Ms. Miers withheld any documents from production on the grounds of privilege she must produce a privilege log. A true and accurate copy of the subpoena is attached as Exhibit 14. Mincberg Declaration, ¶ 16.

28. On June 27, 2007, Solicitor General and Acting Attorney General, Paul D. Clement, provided the President with a letter stating: "It is my considered legal judgment that you may assert executive privilege over the subpoenaed documents and

testimony." That letter did not state or suggest that a former aide to a President could fail to appear before a Committee in response to a subpoena or offer any legal basis to decline to produce a privilege log for documents subpoenaed and withheld. A true and accurate copy of the letter is attached as Exhibit 15. Mincberg Declaration, ¶17.

29. The Report stated that in the June 27, 2007, letter, Solicitor General Clement acknowledged the existence of responsive White House documents that discuss "the wisdom of such a proposal [to force U.S. Attorneys to resign], specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals." *See* H.R. Rep. No. 110-423, at 52-53, 63 n.282. Exhibit 1.

30. On June 28, 2007, Counsel to the President wrote to Chairman Leahy and Chairman Conyers regarding the Administration's document production due that day. Counsel stated: "the President has decided to assert Executive Privilege and therefore the White House will not be making any production in response to these subpoenas for documents." Further, he informed the Committee that the President had directed Ms. Miers "not to produce any documents." A true and accurate copy of the letter is attached as Exhibit 16. Mincberg Declaration, ¶ 18.

31. Also on June 28, 2007, Counsel to the President wrote to Mr. Manning requesting that he inform his client, Ms. Miers, "that the President has directed her not to produce any documents in response to the subpoena," citing executive privilege. A true and accurate copy of the letter is attached as Exhibit 17. Mincberg Declaration, ¶ 19.

32. Mr. Bolten did not produce any documents to the Committee as required by the subpoena. H.R. Rep. No. 110-423, at 63-64. Exhibit 1.

33. On June 29, 2007, Chairman Leahy and Chairman Conyers wrote to the Counsel for the President, and requested that the White House "provide us with the specific factual and legal bases for your claims regarding each document withheld via a privilege log," as required by subpoena, by July 9, 2007. The letter also requested a signed statement by the President "with respect to the assertion of privilege" by the same date. A true and accurate copy of the letter is attached as Exhibit 18. Mincberg Declaration, ¶ 20.

34. On July 9, 2007, the Counsel to the President wrote Chairman Leahy and Chairman Conyers to decline to produce either a privilege log or a personal letter from the President asserting executive privilege. A true and accurate copy of the letter is attached as Exhibit 19. Mincberg Declaration, ¶ 21.

35. Also on July 9, 2007, Counsel to the President wrote Mr. Manning to inform him that, consistent with the advice provided by the Acting Attorney General in his letter to the President of June 27, 2007, "the President had decided to assert Executive Privilege with respect to testimony sought from Ms. Miers." Counsel requested that Ms. Miers be informed "that the President has directed her not to provide this testimony" and "continues to direct Ms. Miers not to produce such documents." A true and accurate copy of the letter is attached as Exhibit 20. Mincberg Declaration, ¶ 22.

36. Later on July 9, 2007, Mr. Manning wrote to Chairman Conyers and Ranking Member Lamar S. Smith to inform them that, "in light of the President's assertion of Executive Privilege, Ms. Miers cannot provide the documents and testimony

that the Committee seeks." A true and accurate copy of the letter is attached as Exhibit 21. Mincberg Declaration, ¶ 23.

37. On July 10, 2007, Chairman Conyers and Chairwoman Sánchez wrote Mr. Manning confirming their understanding "that your client Ms. Harriet Miers will appear to testify before the Subcommittee." They reiterated their understanding that Ms. Miers "may decline to produce documents or answer certain questions . . . but it is of course incumbent on Ms. Miers to appear at the hearing pursuant to the subpoena." A true and accurate copy of the letter is attached as Exhibit 22. Mincberg Declaration, ¶ 24.

38. Also on July 10, 2007, Counsel to the President wrote Mr. Manning concerning whether Ms. Miers was required to appear before the Subcommittee on July 12, 2007. Citing a memorandum also dated July 10, 2007, Counsel wrote:

> We have been advised by the Department of Justice that Ms. Miers has absolute immunity from compelled Congressional testimony as to matters occurring while she was a senior advisor to the President. *See* Attachment A (*Memorandum for the Counsel to the President re: Immunity of Former Counsel to the President from Compelled Congressional Testimony*, dated July 10, 2007). As the Department's opinion points out, "[t]he President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee." … Ms. Miers cannot be compelled to appear before Congress.
>
> Therefore, in view of this constitutional immunity, I respectfully request that you inform Ms. Miers that the President has directed her not to appear at the House Judiciary Committee hearing on Thursday, July 12, 2007.

A true and accurate copy of the letter is attached as Exhibit 23. Mincberg Declaration, ¶ 25.

39. Also on July 10, 2007, Mr. Manning wrote Chairman Conyers and Chairwoman Sánchez to convey that "the Counsel to the President has recently informed Ms. Miers that in view of the immunity of the President's senior advisors 'from

testimonial compulsion by a Congressional committee'. . . the President has directed" Ms. Miers not to appear at the hearing. A true and accurate copy of the letter is attached as Exhibit 24. Mincberg Declaration, ¶ 26.

40. On July 11, 2007, Chairman Conyers and Chairwoman Sánchez informed Mr. Manning by letter that "[w]e are aware of absolutely no court decision that supports the notion that a former White House official has the option of refusing to even appear in response to a Congressional subpoena." The letter urged Ms. Miers to appear, assert any claim of privilege at the hearing, or risk subjecting herself to proceedings for contempt of Congress. A true and accurate copy of the letter is attached as Exhibit 25. Mincberg Declaration, ¶ 27.

41. Later on July 11, 2007, Mr. Manning responded by letter to Chairman Conyers and Chairwoman Sánchez, reiterating that "Ms. Miers will not appear at the July 12, 2007 hearing." A true and accurate copy of the letter is attached as Exhibit 26. Mincberg Declaration, ¶ 28.

42. Also on July 11, 2007, former White House Political Director Sara M. Taylor appeared pursuant to a subpoena before the Senate Committee on the Judiciary, which was also investigating the forced resignations of the nine U.S. Attorneys. *See* Rep. No. 110-423, at 6, 66 (2007). Exhibit 1. Represented at the hearing by personal counsel, Ms. Taylor invoked executive privilege as directed by the Administration in response to certain questions but answered others. *See Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part VI, Before the S. Comm. on the Judiciary,* 110th Cong.

(2007) (testimony of Sara M. Taylor, former Deputy Assistant to the President and the Director of the Office of Political Affairs at the White House).

43. On July 12, 2007, the Subcommittee met as scheduled and Ms. Miers failed to appear. *See The Continuing Investigation into the U.S. Attorneys Controversy: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Linda T. Sánchez, Chairwoman).

44. At the July 12, 2007 hearing Chairwoman Sánchez issued a ruling, sustained by the Subcommittee by a vote of 7-5, which rejected Ms. Miers's privilege and immunity claims. The first count of the Resolution reflected Ms. Miers's refusal to appear at all; the second count reflected her refusal to testify; and the third count reflected her refusal to produce documents as required by the subpoena issued to her. 153 Cong. Rec. D967-01 (2007); H.R. Rep. No. 110-423, at 3, 6. Exhibit 1.

45. On July 13, 2007, Chairman Conyers wrote Mr. Manning, enclosed a copy of the ruling, warned of the possibility of contempt proceedings, and offered Ms. Miers a final opportunity to comply with the subpoena. A true and accurate copy of the letter is attached as Exhibit 27. Mincberg Declaration, ¶ 29.

46. On July 17, 2007, Mr. Manning replied to Chairman Conyers's July 13, 2007, letter. Citing executive privilege and immunity, counsel reiterated that Ms. Miers would not appear before the Committee, or otherwise produce documents or provide testimony. A true and accurate copy of the letter is attached as Exhibit 28. Mincberg Declaration, ¶ 30.

47. On July 17, 2007, Chairman Conyers and Chairwoman Sánchez wrote to the Counsel to the President to inform him that the Subcommittee would meet

on July 19, 2007 to consider Mr. Bolten's executive privilege claims. They stated refusal to produce documents could subject Mr. Bolten to contempt proceedings under 2 U.S.C. § 194 and under the inherent contempt authority of the Congress. A true and accurate copy of the letter is attached as Exhibit 29. Mincberg Declaration, ¶ 31.

48. On July 19, 2007, the Subcommittee met as scheduled. Chairwoman Sánchez issued a second ruling rejecting the Administration's claim of executive privilege, including refusal to provide a privilege log, and the Subcommittee sustained that ruling. H.R. Rep. No. 110-423, at 6. Exhibit 1.

49. On July 19, 2007, Chairman Conyers sent a letter to the Counsel to the President, enclosing a copy of the ruling, insisting on compliance with the subpoena, and informing him that failure to mitigate Mr. Bolten's noncompliance could result in contempt proceedings. The Chairman requested to know by July 23, 2007, whether the White House would comply with the subpoena. A true and accurate copy of the letter is attached as Exhibit 30. Mincberg Declaration, ¶ 32.

50. On July 23, 2007, Counsel to the President informed Chairman Conyers "the President's position remains unchanged." A true and accurate copy of the letter is attached as Exhibit 31. Mincberg Declaration, ¶ 33.

51. On July 25, 2007, the Committee met in open session and adopted a resolution "recommending that the House of Representatives find that former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten be cited for contempt of Congress for refusal to comply with subpoenas issued by the Committee." The Committee voted to report their conduct to the full House. *See* 153 Cong. Rec. D1051-01 (2007); H.R. Rep. No. 110-423, at 8. Exhibit 1.

52. On July 25, 2007, Chairman Conyers wrote to the Counsel to the President and provided him with a copy of the Committee's Report. Chairman Conyers urged negotiations aimed at reaching a mutually agreeable compromise, noted that "[m]any possible paths are available to reach an agreement in this matter", and offered other compromise proposals based on the Committee's earlier suggestions and on a recent example of a successful accommodation between Congress and the Executive Branch on another sensitive matter. A true and accurate copy of the letter is attached as Exhibit 32. Mincberg Declaration, ¶ 34.

53. As set forth in the Report, Congress received no response to this letter from the Administration. *See* H.R. Rep. No. 110-423, at 60. Exhibit 1.

54. On November 5, 2007, the Committee filed its Report with the full House: "Recommending that the House of Representatives find Harriet Miers and Joshua Bolten, Chief of Staff, White House, in Contempt of Congress for Refusal to Comply with Subpoenas Duly Issued by the Committee on the Judiciary." *See* 153 Cong. Rec. D1473-02 (2007).

55. On November 5, 2007, Chairman Conyers wrote again to the Counsel to the President, seeking to resolve the issue on a cooperative basis and offering a proposal for resolving the dispute. A true and accurate copy of the letter is attached as Exhibit 33. Mincberg Declaration, ¶ 35.

56. On November 9, 2007, Counsel to the President wrote Chairman Conyers to reject his offer and urge Congress to accept the Administration's original proposal. A true and accurate copy of the letter is attached as Exhibit 34. Mincberg Declaration, ¶ 36.

57. On February 14, 2008, the House of Representatives by a vote of 223-32 held Ms. Miers and Mr. Bolten in contempt of Congress and passed H. Res. 979, 980, and 982. H. Res. 979, 110th Cong. (Feb. 14, 2008). Exhibit 35. H. Res. 980, 110th Cong. (Feb. 14, 2008). Exhibit 36. H. Res. 982, 110th Cong. (Feb. 14, 2008). Exhibit 37.

58. H. Res. 979 provides that, "pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House shall certify the report of the Committee on the Judiciary, detailing the refusal of former White House Counsel Harriet Miers" to appear before, to testify before, and to produce documents to, the Subcommittee, to the U.S. Attorney for the District of Columbia, "to the end that Ms. Miers be proceeded against in the manner and form provided by law." H. Res. 979 further provides that, "pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House shall certify the report of the Committee on the Judiciary, detailing the refusal of White House Chief of Staff Joshua Bolten to produce documents to the Committee on the Judiciary as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Bolten be proceeded against in the manner and form provided by law." H. Res. 979, 110th Cong. (Feb. 14, 2008). Exhibit 35.

59. H. Res. 980 authorizes the Chairman of the Committee to "initiate or intervene in judicial proceedings in any Federal court of competent jurisdiction on behalf of the Committee . . . to seek declaratory judgments affirming the duty of any individual to comply with any subpoena that is a subject House Resolution 979" and "to seek appropriate ancillary relief, including injunctive relief." At the authorization of the Speaker, H. Res. 980 also authorizes the Office of General Counsel of the House of

Representatives to represent the Committee "in any legislation pursuant to this resolution." *See* H. Res. 980, 110th Cong. (Feb. 14, 2008). Exhibit 36.

60. H. Res. 982 adopted both H. Res. 979 and H. Res. 980. H. Res. 982, 110th Cong. (Feb. 14, 2008). Exhibit 37.

61. On February 28, 2008, Speaker of the House Nancy Pelosi certified the Committee's Report to Jeffrey A. Taylor, U.S. Attorney for the District of Columbia. A true and accurate copy of the letter is attached as Exhibit 38. Mincberg Declaration, ¶ 37.

62. Also on February 28, 2008, Speaker Pelosi wrote to Attorney General Michael B. Mukasey, stating that "[t]here is no authority by which persons may wholly ignore a subpoena and fail to appear as directed because a President unilaterally instructs them to do so." The Speaker noted that the Attorney General had previously testified that he would not allow the U.S. Attorney for the District of Columbia to enforce the contempt citation or to present the matter to the grand jury. The Speaker urged him to reconsider his position. A true and accurate copy of the letter is attached as Exhibit 39. Mincberg Declaration, ¶ 38.

63. On February 29, 2008, Attorney General Mukasey responded that "the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers." A true and accurate copy of the letter is attached as Exhibit 40. Mincberg Declaration, ¶ 39.

Respectfully submitted,

/s/ Irvin B. Nathan_____
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U.S. House of Representatives

DATED: April 10, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES *Plaintiff*, HARRIET MIERS, et al. *Defendants*.	)	Case No. 1:08-cv-00409 (JDB)

DECLARATION OF ELLIOT M. MINCBERG

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am the Chief Counsel, for Oversight and Investigation, for the United States House of Representatives Committee on the Judiciary ("Committee"). I have been with the Committee since January, 2007.

2. I am one of the attorneys assigned to the investigation of the forced resignations of nine United States Attorneys and related matters. As such, I have personal knowledge of the correspondence sent to and received by the Committee.

3. I make this declaration in support of the Plaintiff Judiciary Committee's Statement of Material Facts As To Which There Is No Genuine Issue.

4. Exhibit 1 is a true and correct copy of H.R. Rep. No. 110-423 (2007) (Report of the Committee on the Judiciary, House of Representatives, together with Additional Views and Minority Views ("Report")) (on file with the Committee and *available at* http://judiciary.house.gov/Media/PDFS/ContemptReport071105.pdf).

5. Exhibit 2 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman of the House Judiciary Subcommittee on Commercial and Administrative Law ("Subcommittee"), to Alberto R. Gonzales, Attorney General (March 8, 2007) (on file with the Committee).

6. Exhibit 3 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee, to Harriet E. Miers (March 9, 2007) (on file with the Committee).

7. Exhibit 4 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee, to Fred F. Fielding, Counsel to the President (March 9, 2007) (on file with the Committee).

8. Exhibit 5 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Committee on the Judiciary, John Conyers, Jr., Chairman, Committee, Arlen Specter, Ranking Member, Senate Judiciary Committee, Lamar S. Smith, Ranking Member, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee (March 20, 2007) (on file with the Committee).

9. Exhibit 6 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee, to Fred F. Fielding, Counsel to the President (March 22, 2007) (on file with the Committee).

10. Exhibit 7 is a true and correct copy of the letter from Patrick Leahy, Chairman, Senate Committee on the Judiciary, and John Conyers, Jr., Chairman, Committee, to Fred F. Fielding, Counsel to the President (March 28, 2007) (on file with the Committee).

11. Exhibit 9 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Committee on the Judiciary, John Conyers, Jr., Chairman, Committee (April 12, 2007) (on file with the Committee).

12. Exhibit 10 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee, to Fred F. Fielding, Counsel to the President (May 21, 2007) (with enclosed documents from the U.S. Department of Justice, identified with Bates numbers DAG000000010-11) (on file with the Committee).

13. Exhibit 11 is a true and correct copy of the letter from John M. Dowd, Partner, and Jeffrey M. King, Partner, Akin Gump Strauss Hauer & Feld LLP, to John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee (March 30, 2007) (with enclosed Declaration of Monica M. Goodling) (on file with the Committee).

14. Exhibit 12 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Committee on the Judiciary, John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee (June 7, 2007) (on file with the Committee).

15. Exhibit 13 is a true and correct copy of the subpoena to Joshua Bolten, Chief of Staff, or appropriate custodian of records, White House, from the Committee (June 13, 2007) (on file with the Committee).

16. Exhibit 14 is a true and correct copy of the subpoena to Harriet Miers from the Subcommittee (June 13, 2007) (on file with the Committee).

17. Exhibit 15 is a true and correct copy of the letter from Paul D. Clement, Solicitor General and Acting Attorney General, to George W. Bush, President (June 27, 2007), that was enclosed with the letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Committee on the Judiciary, John Conyers, Jr., Chairman, Committee (June 28, 2007) and also enclosed with the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee, and Lamar S. Smith, Ranking Member, Committee (July 9, 2007) (on file with the Committee).

18. Exhibit 16 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Committee on the Judiciary, John Conyers, Jr., Chairman, Committee (June 28, 2007) (with enclosed letter from Paul D. Clement, Solicitor General and Acting Attorney General, to George W. Bush, President (June 27, 2007)) (on file with the Committee).

19. Exhibit 17 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (June 28, 2007) that was enclosed with the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee, and Lamar S. Smith, Ranking Member, Committee (July 9, 2007) (on file with the Committee).

20. Exhibit 18 is a true and correct copy of the letter from Patrick Leahy, Chairman, Senate Committee on the Judiciary, and John Conyers, Jr., Chairman, Committee, to Fred F. Fielding, Counsel to the President (June 29, 2007) (on file with the Committee).

21. Exhibit 19 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Committee on the Judiciary, John Conyers, Jr., Chairman, Committee (July 9, 2007) (on file with the Committee).

22. Exhibit 20 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (July 9, 2007) that was enclosed with the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee, and Lamar S. Smith, Ranking Member, Committee (July 9, 2007) (on file with the Committee).

23. Exhibit 21 is a true and correct copy of the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee, and Lamar S. Smith, Ranking Member, Committee (July 9, 2007) (with enclosed letters from: Fred F. Fielding, Counsel to the President, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (June 28, 2007) and (July 9, 2007); and, from Paul D. Clement, Solicitor General and Acting Attorney General, to George W. Bush, President (June 27, 2007)) (on file with the Committee).

24. Exhibit 22 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (July 10, 2007) (on file with the Committee).

25. Exhibit 23 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (July 10, 2007) (Attachment A not included) that was enclosed with the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee (July 10, 2007) (on file with the Committee).

26. Exhibit 24 is a true and correct copy of the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee (July 10, 2007) (with enclosed letter from Fred F. Fielding, Counsel to the President, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (July 10, 2007)) (on file with the Committee).

27. Exhibit 25 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (July 11, 2007) (on file with the Committee).

28. Exhibit 26 is a true and correct copy of the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee (July 11, 2007) (on file with the Committee).

29. Exhibit 27 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, to George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers (July 13, 2007) (with enclosed "Ruling of Chairwoman Linda Sánchez on Related Executive Privilege and Immunity Claims") (on file with the Committee).

30. Exhibit 28 is a true and correct copy of the letter from George T. Manning, Partner, Jones Day, and Personal Counsel to Harriet E. Miers, to John Conyers, Jr., Chairman, Committee (July 17, 2007) (on file with the Committee).

31. Exhibit 29 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, and Linda T. Sánchez, Chairwoman, Subcommittee, to Fred F. Fielding, Counsel to the President (July 17, 2007) (on file with the Committee).

32. Exhibit 30 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, to Fred F. Fielding, Counsel to the President (July 19, 2007) (with enclosed "Ruling of Chairwoman Sánchez on White House Executive Privilege Claims") (on file with the Committee).

33. Exhibit 31 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to John Conyers, Jr., Chairman, Committee (July 23, 2007) (on file with the Committee).

34. Exhibit 32 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, to Fred F. Fielding, Counsel to the President (July 25, 2007) (with enclosed Committee Report, as approved by the House on July 25, 2007) (on file with the Committee).

35. Exhibit 33 is a true and correct copy of the letter from John Conyers, Jr., Chairman, Committee, to Fred F. Fielding, Counsel to the President (Nov. 5, 2007) (on file with the Committee).

36. Exhibit 34 is a true and correct copy of the letter from Fred F. Fielding, Counsel to the President, to John Conyers, Jr., Chairman, Committee (Nov. 9, 2007) (on file with the Committee).

37. Exhibit 38 is a true and correct copy of the letter from Nancy Pelosi, Speaker, United States House of Representatives, to Jeffrey A. Taylor, United States Attorney, District of Columbia (Feb. 28, 2008) (with enclosed H. Res. 979) (on file with the Committee).

38. Exhibit 39 is a true and correct copy of the letter from Nancy Pelosi, Speaker, United States House of Representatives, to Michael B. Mukasey, Attorney General (Feb. 28, 2008) (with enclosed H. Res. 979) (on file with the Committee).

39. Exhibit 40 is a true and correct copy of the letter from Michael B. Mukasey, Attorney General, to Nancy Pelosi, Speaker, United States House of Representatives (Feb. 29, 2008) (with enclosed letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General (July 24, 2007)) (on file with the Committee).

40. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of April 2008.

Elliot M. Mincberg

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2008, a copy of the foregoing Plaintiff Committee on the Judiciary's Motion for Partial Summary Judgment, Memorandum of Points and Authorities in Support of Plaintiff Committee on the Judiciary's Motion for Partial Summary Judgment, Statement of Material Facts as to Which There Is No Genuine Issue, Declaration of Elliot M. Mincberg, Proposed Order Granting Plaintiff's Motion for Partial Summary Judgment, and accompanying Exhibits (in six parts) were filed electronically. Exhibit 1 was served in hard copy to the Clerk of the Court and to the Defendants pursuant to Local Rule 5.4(e)(1), which requires that parties filing "[e]xhibits or attachments that . . . exceed 500 pages" to serve such materials by mail or hand delivery with the Court. A courtesy copy of Exhibit 1 was provided to the Judge. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

_____/s/ Richard A. Kaplan_____
Richard A. Kaplan, D.C. Bar # 978813