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# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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July 13, 2007

BY FAX AND U.S. MAIL

Mr. George T. Manning
Jones Day
1420 Peachtree Street N.E. Suite 800
Atlanta, GA 30309-3053

Dear Mr. Manning:

We were very disappointed that your client Harriet Miers disobeyed the subpoena served on her and did not even appear–much less testify or produce documents as required–before the Subcommittee on Commercial and Administrative Law at 10 a.m. yesterday, July 12, 2007. Enclosed with this letter is a copy of the text of the ruling by Chairwoman Sánchez at yesterday's hearing, rejecting the claims of immunity and privilege as legally invalid, and stating that Ms. Miers is required pursuant to the subpoena to appear in order to testify and produce documents. As the ruling explains, as a private party, Ms. Miers could not legally be compelled by the White House to disregard the subpoena, but instead made her own decision to disregard it and to cite Mr. Fielding's letter.

Federal law makes it very clear that recipients of a congressional subpoena must appear–regardless of whether or not they intend to assert privilege once they arrive. 2 U.S.C. § 192 provides: "Every person who having been summoned as a witness by the authority of either House of Congress . . . willfully makes default, or who, having appeared, refuses to answer any question . . . shall be guilty of a misdemeanor . . . ." 2 U.S.C. § 194 further states that a witness may be held in contempt and prosecuted for three distinct acts: 1) failing "to appear to testify" in response to a subpoena; 2) failing to produce documents pursuant to the subpoena; and 3) failing to answer questions pursuant to the subpoena.

The D.C. Circuit has ruled that "[a] reasonable interpretation of the statute . . . is that a witness is in default if he fails not only to appear but fails to attend, following appearance, so long as the committee requires his attendance." *Townsend v. United States*, 95 F.2d 352, 357 (D.C. Cir. 1938). The Second Circuit has similarly stated: "The statute, 2 U.S.C.A. § 192,

embraces two offenses. . . . The first consists of the willfull default of one who has been summoned as a witness. This offense, obviously, may be committed by willfully refraining, without adequate excuse, from appearing in response to a lawful summons and it may also be committed by appearing and then willfully terminating attendance before being excused." *United States v. Josephson*, 165 F.2d 82, 85 (2d Cir. 1947) (citing *Townsend*, 95 F.2d 352). *See also United States v. Groves*, 18 F.Supp. 3 (W.D. Penn. 1937); *United States v. Hintz*, 193 F.Supp. 325 (N.D. Ill. 1961).

This letter is to formally notify you that we must insist on compliance with the subpoena, and that your client's failure to promptly mitigate her noncompliance could subject her to contempt proceedings, including but not limited to proceedings under 2 U.S.C. §§ 192, 194 and under the inherent contempt authority of the House of Representatives. In light of Chairwoman Sánchez's ruling, we strongly urge Ms. Miers to appear before the Subcommittee pursuant to her subpoena. Please let me know in writing by 5 p.m. this Tuesday, July 17, whether Ms. Miers will comply with the subpoena. If I do not hear from you in the affirmative by then, the Committee will have no choice but to consider appropriate recourse.

With respect to the subpoena's directive that Ms. Miers produce documents, we realize it is possible that Ms. Miers in fact does not possess documents responsive to the subpoena. If that is the case, please notify us of that as well by July 17, in which event that issue can hopefully be resolved.

Sincerely,

John Conyers, Jr.
Chairman

Enclosure

cc: The Honorable Lamar S. Smith
The Honorable Linda T. Sánchez
The Honorable Chris Cannon

# Ruling of Chairwoman Linda Sánchez on Related Executive Privilege and Immunity Claims

According to letters we have received from Ms. Harriet Miers' counsel, her refusal to answer questions and produce relevant documents in accordance with her obligations under the subpoena served on her June 13 is based on letters she has received from current White House Counsel Fred Fielding, asserting related claims of executive privilege and immunity. Many of these claims had already been raised and communicated to us previously.

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

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

**First**, the claims of privilege and immunity are not properly asserted. Ms. Miers is no longer an employee of the White House and is simply relying on a claim of Presidential executive privilege and immunity communicated by the current White House Counsel. No one is here today on behalf of the White House raising that claim.

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

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

For instance, the Shultz case stated that even a statement from a White House counsel that he is authorized to invoke executive privilege is "wholly insufficient to activate a formal claim of executive privilege," and that such a claim must be made by the "President, as head of the 'agency,' the White House."[1]

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[1] Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973).

**Second**, we are aware of absolutely no possible proper basis for Ms. Miers' refusing even to appear today as required by subpoena. The White House Counsel's letter to Ms. Miers's attorney, and her attorney's letters to the Subcommittee, fail to cite a single case in support of the notion that a witness under federal subpoena may simply decline to show up to a hearing. Indeed, no court decision that we are aware of supports the White House's astounding claim that a former White House official has the option of refusing to even appear in response to a Congressional subpoena.

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

And in keeping with this principle, both present and former White House officials have testified before Congress numerous times, including incumbent and former White House Counsels. For example, I mentioned earlier that Beth Nolan has told our Subcommittee that she appeared before Congressional committees four times on matters directly related to her duties as White House Counsel, three of those times while she was still in that position.

As I also mentioned earlier, a Congressional Research Service study documents some 74 instances where White House advisers have testified before Congress since World War II.[2]

Moreover, even the 1999 Office of Legal Counsel opinion referred to in Mr. Fielding's July 10 letter refers only to **current** White House advisers, and not to former advisers; and it acknowledges that the courts might not agree with its conclusion as to current advisors. Such Justice Department opinions, including a new one issued just yesterday to try to support this claim, are not law, they state only the Executive Branch's own view of the law, and have no legal force whatsoever.

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

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

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

This White House's asserted right to secrecy goes beyond even Richard Nixon, who initially refused to allow his White House Counsel, John Dean, to testify before Congress, on almost exactly the same grounds being asserted now, but then agreed that Mr. Dean and other White House officials could testify.[3]

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

In fact, as recently as June 28, a senior White House official at an authorized background briefing specifically stated that the President had "no personal involvement" in receiving advice about the firing of the U.S. Attorneys or in approving or adjusting the list. Ms. Taylor testified yesterday that she was not aware of any personal involvement by the President. We are seeking information from Ms. Miers and other White House officials about their **own** communications and their **own** involvement in the process.

The White House claims that executive privilege nevertheless applies, because it also covers documents and testimony by White House staff who **advise** the President, apparently based on the Espy decision.[4]

But the Espy court made clear that its expansion of the presidential communications privilege applied only when information is sought in a judicial proceeding and "should not be read as in any way affecting the scope of the privilege in the congressional-executive context."[5]

And the Espy court also made clear that the privilege extends only to communications from or to presidential advisers "in the course of preparing advice for the President."[6] But the White House has maintained that the President **never received any advice on, and was not**

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[3] L. Fisher, The Politics of Executive Privilege 59-60 (2004).

[4] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

[5] Id. at 753.

[6] Id. at 752.

**himself involved in,** the U.S. Attorney firings. The presidential communications privilege, even as expanded by the Espy case, simply does not apply here.

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

These words are from the Smith v. FTC case and the Black v. Sheraton case.[7]

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

Fifth, even assuming that the information we have asked for fell within the scope of a properly asserted executive privilege, any such privilege is outweighed by the compelling need for the House and the public to have access to this information.

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

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

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

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[7] Smith v. FTC, 403 F. Supp. 1000, 1018 (D. Del. 1975); Black v. Sheraton Corp., 371 F.Supp. 97, 101 (D.D.C. 1974).

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

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

Why is this important? For several reasons. For one, the evidence obtained thus far raises serious concerns about whether federal laws have been broken in the U.S. Attorney matter – including laws prohibiting obstruction of justice, laws like the Hatch Act against retaliating against federal employees for improper political reasons, and laws prohibiting misleading or obstructing Congress.

The courts have made clear that executive privilege is generally overcome when the information sought concerns government misconduct. Indeed, the court in the Espy case stated that when there is "any reason to believe government misconduct occurred," the deliberative process element of executive privilege "disappears altogether."[8]

In addition, obtaining more complete information on what happened in the U.S. Attorneys matter may well reveal problems warranting new legislation by Congress. This is a well-recognized ground for authorizing Congress to obtain Executive Branch information, as the Supreme Court stated in the case of McGrain v. Daugherty.[9]

Indeed, we have already passed legislation changing the rules for interim appointment of U.S. Attorneys as an outgrowth of our investigation so far.

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

Under the Constitution, both the courts and the Department itself have recognized that U.S. Attorneys are considered "inferior officers," and that rules for their appointment and

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[8] In re Sealed Case, 121 F.3d at 746.

[9] 273 U.S. 135, 174 (1926).

removal are not vested in the sole discretion of the President, but can be set by Congress, just as we did recently in passing the law on interim appointment of U.S. Attorneys.[10]

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

As the Supreme Court ruled in the Watkins case fifty years ago, Congress has "broad" power to investigate "the administration of existing laws" and to "expose corruption, inefficiency, or waste" or similar problems in the Executive Branch.[11]

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

For all the foregoing reasons, I hereby rule that Ms. Miers's refusal to comply with the subpoena and appear at this hearing, and to answer questions and provide relevant documents regarding these concerns, cannot be properly justified on executive privilege or related immunity grounds.

These reasons are without prejudice to one another and to any other defects that may after further examination be found to exist in the asserted privilege.

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[10] See, e.g., United States v. Sotomayor Vazquez, 69 F.Supp.2d 286 (D.Puerto Rico 1999); 2 U.S. Op. Off. Legal Counsel 58 (Feb. 28, 1978).

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