ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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July 19, 2007

BY FAX AND U.S. MAIL

Mr. Fred F. Fielding
Counsel to the President
Office of the Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Fielding:

I am disappointed that the President's Chief of Staff Josh Bolten has continued to disobey the subpoena served on him on June 13, 2007, and has not produced the documents called for by that subpoena. Enclosed with this letter is a copy of the text of a ruling by Chairwoman Sánchez at today's meeting of the Subcommittee on Commercial and Administrative Law rejecting the claims of privilege that you have sought to raise in response to that subpoena. The ruling was sustained by a 7-3 vote of the Subcommittee..

This letter is to formally notify you that I must insist on compliance with the subpoena, and that Mr. Bolten's failure to promptly mitigate his noncompliance could result in contempt proceedings, including but not limited to proceedings under 2 U.S.C. §§ 192, 194 or under the inherent contempt authority of the House of Representatives. In light of Chairwoman Sánchez's ruling, we strongly urge immediate production of the responsive documents pursuant to the subpoena. Please let me know in writing by 10 a.m. on Monday July 23, 2007, whether Mr. Bolten will comply. If I do not hear from you in the affirmative by then, the Committee will have no choice but to consider appropriate recourse.

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 White House Executive Privilege Claims

We have received letters from White House Counsel Fred Fielding on June 28 and July 9 refusing to produce documents concerning our U.S. Attorney investigation that were called for in our June 13 subpoena to White House Chief of Staff Joshua Bolten, and further refusing to even provide the necessary information to explain his purported executive privilege claim. On July 17, Chairman Conyers and I again wrote to Mr. Fielding, notified him we would formally consider those privilege claims today, and again urged compliance with the June 13 subpoena.

Let me say at the outset that we take executive privilege claims seriously, and treat them with the careful consideration we believe is appropriate. In this case, we have given the White House's privilege claims careful consideration, and the Chair is prepared to rule that those claims are not legally valid and that Joshua Bolten of the White House is required pursuant to subpoena to produce the documents called for.

After I make my ruling, I will entertain a motion to sustain it, but first I would like to set forth the legal grounds for it. A number of these grounds are similar to the grounds in the ruling sustained by this Subcommittee on July 12 overruling the related executive privilege and immunity claims sought to be raised by Harriet Miers through her counsel, and where appropriate, I will incorporate the reasoning and legal authorities by reference. The grounds for my ruling today are as follows:

First, the claims of executive privilege are not properly asserted. We have not received a statement from the President himself asserting the privilege, even though Chairman Conyers has specifically requested one. As stated in my July 12 ruling and as incorporated by reference herein, the courts have ruled that a personal assertion of executive privilege by the President is legally required for the privilege claim to be valid, as, for example, in the Shultz case.[1]

The **second** basis for my ruling is essentially the same as the fourth ground for my July 12 ruling as to Ms. Miers, which is incorporated by reference herein. The courts have required a party raising a claim of executive privilege as to documents 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."[2] Such a privilege log has been specifically requested from the White House, both in the subpoena and in a subsequent letter, and the White House has specifically refused. In other words, the White House is refusing not only to produce documents pursuant to subpoena, but also to even explain why the documents are being withheld. In effect, the White House is asking Congress and the American people to simply trust on blind faith that the documents are appropriately being kept secret. Our system of government does not permit the White House to demand this type of blind faith and secrecy.

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

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

The **third** basis for my ruling is essentially the same as the third ground for my July 12 ruling as to Ms. Miers, which is incorporated by reference herein. The White House has failed to demonstrate that the documents we are seeking from the White House are covered by executive privilege, because they do not concern communications to or from the President, or to or from White House advisers "in the course of preparing advice for the President."[3] Indeed, the White House has unequivocally asserted that the President **never received any advice on, and was not himself involved in,** the U.S. Attorney firings. Therefore, under the Espy case and other relevant case law, the presidential communications privilege simply does not apply here.

The **fourth** basis for my ruling is essentially the same as the fifth ground for my July 12 ruling as to Ms. Miers, which is incorporated by reference herein. Even assuming that the information we have asked for falls 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. In addition to my explanation for this basis for my ruling on July 12, it should also be noted that the White House claim is weakened by the fact that the Administration itself, through the Justice Department, has released a number of White House e-mails on this subject, including even internal White House e-mails, and that the White House has offered to make more such material available as part of its "all-or-nothing" proposal that certain White House aides be interviewed without either an oath or a transcript. How can it be credibly argued, therefore, that Executive Branch interests will be seriously harmed when a significant amount of the very same type of information has been, or has been offered to be, publicly released?

For all the foregoing reasons, I hereby rule that the refusal of Joshua Bolten of the White House to comply with the June 13 subpoena and produce documents as directed cannot be properly justified on executive privilege grounds and that Mr. Bolten is legally required to produce these documents.

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