

ADDITIONAL VIEWS OF CHAIRMAN CONYERS AND  
SUBCOMMITTEE CHAIR SÁNCHEZ

It was with great reluctance that the Committee on the Judiciary voted to refer to the full House of Representatives a Report and Resolution on the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten to Comply with Subpoenas by the House Judiciary Committee. The Committee did not take this action lightly, but only after concluding that it was necessary both to gain a complete picture of the facts regarding the U.S. Attorney firings that occurred last year – including the role of White House personnel – and more fundamentally to fulfill our constitutional obligations as a co-equal branch of government.

This issue – which involves fundamental prerogatives of the House – should not be seen as partisan or ideological, and it is our hope that the vote by the full House will be bipartisan and strong. The last time a contempt citation against an Executive Branch official who claimed executive privilege was considered on the full House floor, for example, the vote was 413 to 0.<sup>1</sup> With respect to the current controversy, members of both parties agree that the Judiciary Committee’s subpoenas should be enforced. Former Reagan Justice Department official Bruce Fein and former Nixon White House Counsel John Dean have agreed that the White House’s privilege claims are weak and that the Administration should comply with Congress’s requests for information.<sup>2</sup> At a Judiciary Committee hearing on concerns about politicized prosecutions last month, Republican former Attorney General Richard Thornburgh agreed that the U.S. Attorney firings raised serious issues and that politically-motivated wrongdoing had been revealed, testifying “we came to learn, in part from your committee’s investigation. . . that the Department of Justice, in its evaluation of its prosecutors, in certain cases, fired U.S. attorneys not for performance-based reasons, but for political ones.”<sup>3</sup>

Observers across the political spectrum agree that the Committee’s subpoenas must be enforced. The conservative Chicago Tribune has harshly criticized “White House stonewalling.”<sup>4</sup> Following the Committee vote, the New York Times editorial board wrote: “The House Judiciary Committee did its duty yesterday, voting to cite Harriet Miers, the former White House counsel, and Joshua Bolten, the White House chief of staff, for contempt. The Bush administration has been acting lawlessly in refusing to hand over information that Congress needs to carry out its responsibility to oversee the executive branch and investigate its actions when needed. If the White House continues its obstruction, Congress should use all of the contempt powers at its disposal.”<sup>5</sup>

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<sup>1</sup> Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power*, CRS Report for Congress, RL 31836, April 2, 2003, at 33.

<sup>2</sup> See Fein, *Executive Nonsense*, Slate, July 11, 2007; Dean, *New Developments in the U.S. Attorney Controversy*, Findlaw, Mar. 23, 2007.

<sup>3</sup> See Thornburgh, Oct. 23, 2007, Subcomms. on Crime, Terrorism and Homeland Security and on Commercial and Admin. Law, Testimony at 6.

<sup>4</sup> Editorial, *White House Stonewalling*, Chicago Tribune, July 25, 2007, at C20.

<sup>5</sup> Editorial, *Defying the Imperial Presidency*, New York Times, July 26, 2007.

The Committee's actions on this matter have been careful and deliberate. In order to pursue its investigation, the Committee has done what Congress has always done – it sought out documents and testimony, initially on a voluntary basis, and through compulsory process only as a last resort. The investigation did not begin with the White House, but has ended up there only after the review of thousands of pages of documents and testimony and interviews of 20 current and former Department of Justice employees did not uncover the truth. The Committee has been open at all times to reasonable compromise, and has been fully respectful and cognizant of the prerogatives of the Executive Branch. As of July 25, 2007, the Committee had written the White House eight times seeking to resolve this matter. As of this time, the White House Counsel has not even responded to Chairman Conyers's July 25 letter.

While the Committee has remained open to reasonable compromise, neither it – nor the Congress – can accept the “take it or leave it” offer made by the White House, which would not produce the information needed for the Committee's inquiry, would not allow for transcribed interviews, and would yield only the most limited sorts of information and then only if Congress agreed in advance not to ask any more questions in the future, regardless of what facts were learned. That is the only “proposal” the Committee has received from the White House Counsel. As an institutional matter for Congress, such an approach is clearly unacceptable.

This is not a confrontation the Committee – or the Congress – has sought, and it is one that may yet be avoided, but only if the Congress moves forward to enforce its process. On the merits, the case for contempt is strong. Unlike other disputes involving executive privilege, the President here has never personally asserted privilege, and the White House has maintained that the President was not personally involved in the U.S. Attorney firing decisions. No privilege log describing the materials being withheld has been provided to the Congress, and the claim of privilege is extraordinarily broad, covering even materials that were apparently submitted unbidden by private parties to Administration officials. Furthermore, even if the privilege were properly asserted, under the “balancing of interests” analysis that a court would conduct under governing law, the Committee clearly has the better of the argument and should prevail. Claims of executive privilege are especially weak where, as here, (i) the President was not personally involved, (ii) there is evidence of wrongdoing, (iii) Congress has exhausted all other avenues for obtaining the information, and (iv) there is no overriding issue of national security. It is for these reasons that four outside experts have written to the Committee supporting its position on the question of executive privilege.<sup>6</sup> And the refusal of former White House Counsel Harriet Miers even to attend a hearing pursuant to subpoena, especially when other former White House

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<sup>6</sup> For example, Professor Erwin Chemerinsky of Duke Law School explained that “it is difficult to imagine a more compelling case on behalf of Congress.” Washington attorney Beth Nolan, herself a former White House counsel, states that the White House's claims are “inconsistent with the obligations of the Executive Branch in the constitutional accommodation process.” Professor Charles Tiefer, former House Solicitor and General Counsel, writes that the executive privilege claims are “patently without merit.” And former House counsel Stanley M. Brand concludes that the Committee's right to the information requested is “unassailable” and that it is “hard to envision a stronger claim.” Their letters are also included with these additional views.

officials were permitted to testify on the U.S. Attorney matter before a Senate Committee<sup>7</sup>, has absolutely no proper legal basis.

If the House is to conduct meaningful oversight in the future, it has little choice but to vote to cite Joshua Bolten and Harriet Miers in contempt for failure to comply with authorized Committee subpoenas. The following additional views on these issues, which consist in large part of information submitted to the Judiciary Committee in a memorandum of July 24, 2007, from Chairman Conyers, provide detailed factual and legal background for members as they consider this important matter.

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<sup>7</sup> The day after Ms. Miers refused to appear before the House Judiciary Committee as subpoenaed, Sara Taylor, former Deputy Assistant to the President and White House Director of Political Affairs, testified before the Senate Judiciary Committee pursuant to subpoena. Several weeks later, J. Scott Jennings, of the White House Office of Political Affairs, appeared before the Senate Judiciary Committee pursuant to subpoena.

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### EXECUTIVE SUMMARY

To date, the Committee's investigation – which has reviewed materials provided by the Department of Justice in depth and obtained testimony from 20 current and former Department of Justice employees – has uncovered serious evidence of wrongdoing by the Department and White House staff with respect to the forced resignations of U.S. Attorneys during 2006 and related matters. This includes evidence that:

- (a) the decision to fire or retain some U.S. Attorneys may have been based in part on whether or not their offices were pursuing or not pursuing public corruption or vote fraud cases based on partisan political factors, or otherwise bringing cases which could have an impact on pending elections;
- (b) Department officials appear to have made false or misleading statements to Congress, many of which sought to minimize the role of White House personnel in the U.S. Attorney firings, or otherwise obstruct the Committee's investigation, and with some participation by White House personnel; and
- (c) actions by some Department personnel may have violated civil service laws and some White House employees may have violated the Presidential Records Act.

Based on this evidence, and because of the apparent involvement of White House personnel in the U.S. Attorney firings and their aftermath, the Committee has sought to obtain relevant documents from the White House and documents and testimony from former White House Counsel Harriet Miers – who appears to have been significantly involved in the matter – on a voluntary basis and, only after taking all reasonable efforts to obtain a compromise, on a compulsory basis. The Committee's subpoenas have been met with consistent resistance, including wide-ranging assertions of executive privilege and immunity from testimony. This has gone so far that the Administration indicated in July that it would refuse to allow the District of Columbia U.S. Attorney's office to pursue any Congressional contempt citation against the White House's wishes. In addition to the many infirmities and deficiencies in the manner in which the White House Counsel has sought to assert executive privilege, in the present circumstance such privilege claims would be strongly outweighed by the Committee's need to obtain such information.

#### Evidence the Terminations May Have Been Motivated by Improper Political Factors/Reasons

- David Iglesias (D. N.M.) – There appears to have been a concerted effort by Republican Party officials in New Mexico to cause Mr. Iglesias to be terminated for failing to pursue vote fraud charges that would assist Republican electoral prospects. The head of the state Republican Party more than once asked then-White House Political Director Karl Rove to have Mr. Iglesias replaced, and he was told by Mr. Rove, before the firings were made public, that Iglesias was

“gone.” Other state GOP officials also met with White House and Department personnel to press this request. Counselor to the Attorney General Matthew Friedrich testified that, shortly before David Iglesias was fired, several New Mexico Republicans had told him that they “were working towards” having Mr. Iglesias removed and that they had communicated with Karl Rove and Senator Domenici on that subject. President Bush himself passed on complaints concerning alleged vote fraud issues in New Mexico directly to the Attorney General, as did Senator Domenici. In addition, Mr. Iglesias testified he was pressured directly by both Representative Heather Wilson and Senator Pete Domenici (a political mentor to Rep. Wilson) to expedite indictments in a corruption case involving local Democrats on the eve of Rep. Wilson’s tightly contested Congressional election.<sup>8</sup>

- John McKay (W.D. Wash.) – There are indications John McKay was forced to resign in part due to his failure to pursue non-meritorious vote fraud charges that could have impacted the outcome of the 2004 Washington Governor’s race. Those charges by State Republican officials and complaints about Mr. McKay were forwarded to the Department of Justice and also made their way to the White House. When Mr. McKay was interviewed for a federal judgeship by Harriet Miers and her then-deputy William Kelley, he was asked why he had “mishandled” the vote fraud matter.
- Steven Biskupic (E.D. Wisc.) – There is also evidence Wisconsin U.S. Attorney Steven Biskupic was added to the firing list after he failed to pursue vote fraud charges advantageous to Republicans in his state, and that he was removed from the list only after he brought cases beneficial to Republican Party interests. State Republican Party officials brought their complaints to Karl Rove’s attention, who later passed them on to Kyle Sampson, then-Chief of Staff for the Attorney General. In February 2005, just weeks before Mr. Biskupic was added to the firing list, Mr. Rove reviewed information about alleged vote fraud activity in Mr. Biskupic’s district, as evidenced by a document with the notation “Discuss w/ Harriet.” Later that year, Mr. Biskupic proceeded to bring 14 vote fraud cases – a total equal to ten percent of all vote fraud cases brought throughout the country in the four-year period through 2006 – of which he lost nine. He also brought a public corruption case in January 2006 that was used to argue that the Democratic Governor of Wisconsin was corrupt, and in that month Mr. Biskupic’s name was removed from the firing list. Eventually, that case was thrown out by the Seventh Circuit, which found the evidence to be “beyond thin” and issued a remarkable

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<sup>8</sup> At the Commercial and Administrative Law Subcommittee’s March 6, 2007, hearing, Mr. Iglesias testified that Senator Domenici called him at home and asked about the timing of the potential indictments: “He wanted to know if they’d be filed before November, and I [said] I didn’t think so....And then he said, ‘Well, I’m very sorry to hear that,’ and then the line went dead.” Iglesias, Mar. 6, 2006, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10.

order directing that Ms. Thompson be immediately released on the very day of oral argument.

- Todd Graves (W.D. Mo.) – The Committee has received evidence that not only was the forced resignation of one U.S. Attorney concealed for a substantial portion of its investigation – that of Todd Graves in January 2006 – but that this termination may also have been linked to Republican concerns about enforcement of vote fraud matters regardless of the local prosecutor’s judgment. Mr. Graves testified to the Senate Judiciary Committee that, in the fall of 2005, he “slow walked” a legal action challenging Missouri’s maintenance of its voter rolls, which had been advocated by Bradley Schlozman, then the Principal Deputy Assistant Attorney General for the Civil Rights Division. Mr. Graves’ name was added to the firing list in January 2006 soon after he showed this lack of enthusiasm for the voter rolls case and he was asked to resign in that same month. Bradley Schlozman, who was almost immediately appointed to replace Mr. Graves, pursued the voter rolls case (which was eventually dismissed by a federal district court), and also initiated a group of vote fraud actions shortly before the 2006 elections, in possible violation of the Department’s guidelines for pursuing such sensitive actions shortly before elections.
- Carol Lam (S.D. Cal.) – There is evidence indicating that Carol Lam may have been terminated at least in part due to her aggressive pursuit of Republican corruption cases. Ms. Lam had successfully prosecuted former California Congressman Duke Cunningham for bribery, and was in the midst of pursuing the third ranking official in the CIA, Kyle “Dusty” Foggo, as well as Brent Wilkes, a defense contractor with links to several other Republican Congressmen. Tellingly, one day after Ms. Lam notified Main Justice officials that she was executing search warrants involving Mr. Foggo and Mr. Wilkes, Kyle Sampson wrote an email to William Kelley of the White House Counsel’s Office stating that he wanted to talk to Mr. Kelley about “[t]he real problem we have right now with Carol Lam that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her 4-year term expires.” Ms. Lam told the Committee that her request to delay her departure to address case-related concerns was not well received and that she was told she should “stop thinking in terms of the cases in the office.” These commands, she was told, came from “the very highest levels of the government.” When the head of the FBI’s San Diego Office was asked about her departure, he stated that “I guarantee politics is involved.”
- Leura Canary and the Siegelman Case (M.D. Ala.) – The Committee has received evidence that Ms. Canary’s office, may have been improperly pressed to prosecute former Democratic Governor Don Siegelman. The Committee has received an affidavit and taken sworn testimony from Ms. Dana Jill Simpson, a Republican attorney in Alabama who had worked for Mr. Siegelman’s 2002 Republican

opponent, stating that she heard Mr. Canary say that Karl Rove and two U.S. Attorneys in Alabama were working to “take care of” Mr. Siegelman and that Mr. Rove had already “spoken with the Department of Justice” about the matter. Ms. Simpson further testified that she overheard an additional statement that Karl Rove was pressing the Justice Department to prosecute Siegelman in early 2005. And indeed, other evidence indicates that, at that very time, Department officials were pressing local prosecutors about the Mr. Siegelman investigation, and several months later a new case was brought against the former governor. Meanwhile, evidence that state Republican officeholders had engaged in the same conduct for which Mr. Siegelman was indicted does not appear to have been investigated or followed up.<sup>9</sup>

#### False or Misleading Statements and Efforts to Obstruct Committee Investigation

- Former Attorney General Alberto Gonzales – The former Attorney General stated publicly that he “was not involved in seeing any memos, was not involved in any discussions about what was going on” with the U.S. Attorney firings. Kyle Sampson contradicted that statement, however, testifying that he did not “think the Attorney General’s statement that he was not involved in any discussions about U.S. attorney removals [was] accurate.” Former Department of Justice Counsel and White House Liaison Monica Goodling also disputed that statement and Mr. Gonzales’ calendar shows that he attended a meeting in his office on this very matter on November 27, 2006. The former Attorney General has also made sharply conflicting statements regarding the role played in the U.S. Attorney firings by former Deputy Attorney General McNulty, at some points stating that the then Deputy was a central actor whose views were critical to the ultimate decision to fire these prosecutors, and at other times that Mr. McNulty was minimally involved in the process. At least some of Mr. Gonzales’ incompatible statements on that subject must not have been accurate. Finally, the former Attorney General’s testimony to the Committee that he had not spoken to potential fact witnesses regarding the details of the U.S. Attorney firings in order to preserve the “integrity” of the pending investigations also appears to have been less than completely candid in view of Monica Goodling’s testimony to the Judiciary Committee that, just before she left the Department, Mr. Gonzales rehearsed his recollections with her in an “uncomfortable” conversation.
- Former Deputy Attorney General Paul McNulty and his Principal Associate Will Moschella – Both of these individuals testified that the White House had a

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<sup>9</sup> The resulting conviction of Mr. Siegelman has proved controversial, and is now under consideration by the Judiciary Committee as part of a potentially broader pattern of alleged selective or politically-motivated prosecution. On October 23, 2007, the Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security and its Subcommittee on Commercial and Administrative Law held a joint hearing on this subject; Nossiter, *Democrats See Politics in a Governor’s Jail*, New York Times, June 27, 2007; Zagorin, *Rove Linked to Alabama Case*, Time Magazine, Oct. 10, 2007; and Zagorin, *Selective Justice in Alabama?*, Oct. 4, 2007.



minimal role in the terminations, with Mr. McNulty testifying before the Senate Judiciary Committee merely that he had assumed that “White House personnel ... was consulted before making the phone calls,” and Mr. Moschella testifying before the House Judiciary Committee only that the White House was “eventually” consulted “because these are political appointees.” Subsequent to their testimony, the Committee has learned that White House personnel played an important role in the U.S. Attorney firings for at least two years; for example, the idea of replacing U.S. Attorneys originated with Karl Rove and was pressed by White House Counsel Harriet Miers. And Ms. Miers received multiple drafts of the firing list over a two-year period. Monica Goodling quite directly accused Mr. McNulty of having made false statements to the Senate Judiciary Committee about his knowledge of White House involvement and other matters, and stated that he went so far as to instruct Ms. Goodling not to attend a confidential briefing for Senate Judiciary Committee members because her presence might encourage Senators to ask questions about the White House. These do not appear to be insignificant or unintended omissions, as Kyle Sampson testified that former Attorney General Gonzales was upset about the contents of that briefing because it brought aspects of the White House role “into the public sphere,” and he also described individuals in the White House as being equally upset that “that the White House had sort of been brought, you know, in a public way, into this rising controversy.”

- Former Chief of Staff to the Attorney General, Kyle Sampson – Mr. Sampson appears to have made at least two significant misstatements to Congress. First, on January 18, 2007, he emailed the Senate Judiciary Committee Chief Counsel that “last year, eight USAs [were] asked to resign” and further assured him “per my prior reps to you, the number of USAs asked to resign in the last year won't change: eight.” However, as the Committee subsequently learned, Mr. Graves was in fact forced to resign in January 2006 and including him in the list results in a total of nine U.S. Attorneys fired last year. Second, on February 23, 2007, Kyle Sampson drafted a Department letter, which was also approved by Chris Oprison of the White House Counsel's office, stating that Karl Rove did not play any role in the decision to appoint Tim Griffin as interim U.S. Attorney for the Eastern District of Arkansas. Documents subsequently came to light showing that before proposing that statement be made to Congress, Kyle Sampson had written to Mr. Oprison that the appointment of Mr. Griffin was “important to Harriet, Karl, etc.,” and just a week before Mr. Oprison signed off on the statement, Tim Griffin had sent an email both Karl Rove and Mr. Oprison and others regarding the U.S. Attorney position.
- Former Chief of Staff to the Deputy Attorney General, Mike Elston – The Committee has received statements that at least three of the terminated U.S. Attorneys felt threatened by efforts by Mr. Elston to dissuade them from telling

their stories to the Committee after news of the firings broke. Of these communications, John McKay stated that “I greatly resented what I felt Mr. Elston was trying to do: buy my silence by promising that the Attorney General would not demean me in his Senate testimony.” Mr. McKay also stated that the call seemed “sinister” and that he believed Mr. Elston was “prepared to threaten [him] further” if he did not stay quiet. Paul Charlton wrote that “In that conversation I believe that Elston was offering me a quid pro quo agreement: my silence in exchange for the Attorney General’s.” Bud Cummins wrote that “[Elston] essentially said that if the controversy continued, then some of the USAs would have to be thrown under the bus.” Equally troubling, during the Committee’s investigation, sitting U.S. Attorney Mary Beth Buchanan directly accused Mr. Elston of lying to her about how her name and others came to be identified as possible candidates for replacement. Ms. Buchanan asserted that, contrary to Mr. Elston’s assertion that he had collected information from others in the Department in identifying names for possible removal, she believes he had suggested she be placed on the removal list simply so that a colleague of Mr. Elston’s could have her job. Because Mr. Elston had made similar statements to the Committee in his formal interview, Ms. Buchanan’s charge that the statements were false raises serious issues regarding the possible culpability of Mr. Elston.

#### Violations of Civil Service Requirements and the Presidential Records Act

- In her testimony before the Committee, Ms. Goodling admitted that she “crossed the line” and violated civil service requirements when she utilized political factors in making personnel decisions for career positions such as Assistant U.S. Attorneys and Immigration Judges. It has also been disclosed that White House staff may have violated the Presidential Records Act by failing to properly save emails sent using Republican National Committee email accounts that concerned official business, including the U.S. Attorney firings.

Based in part on the above evidence, and because of the continuing failure of any individual in the Administration to assume responsibility for developing the list of terminated U.S. Attorneys, the Committee has sought to obtain information from the White House and Ms. Miers. The Committee initially sought to obtain the information on a voluntary basis on March 9, 2007, and only issued subpoenas on June 13. On March 20, 2007, White House Counsel made a “take it or leave it” proposal, under which the Committee was offered limited availability of some documents and limited access to witnesses, but without any transcripts and under severe limitations as to permissible areas for questioning. The White House also insisted that a condition of its proposal was that the Committee commit in advance not to subsequently pursue any additional White House-related information by any other means, regardless of what the initial review of documents and informal discussions should reveal. The Committee sent many additional letters to the White House, attempting to work towards a compromise or at least open meaningful negotiations, but to no avail. In each case, the White House has responded by

merely repeating the same unreasonable terms of its “take it or leave it” offer. The Committee’s requests have at all times been narrowly targeted and in direct response to its legitimate oversight and legislative needs stemming from the investigation.

The principal objection asserted by the White House has been an across-the-board assertion of executive privilege to every item of information the Committee has requested. Executive privilege is not cited expressly in the Constitution or in any federal statute; rather, it is a constitutional law doctrine recognized by the Supreme Court in 1974 in the U.S. v. Nixon case. There is ample precedent for White House cooperation with an inquiry like this one; the Congressional Research Service has found that presidential advisors have testified before Congressional committees on no less than 74 occasions. Between 1996 and 2001 alone, 17 top Clinton White House advisors provided testimony to Congress.

In the present case, executive privilege has not been asserted consistent with past legal practice or requirements. The President has never personally asserted the privilege, the Committee has never been given a privilege log and, most strikingly, the privilege is asserted on a subject as to which the White House concedes that the President had no personal involvement and received no advice from staff. Also, with regard to Ms. Miers, the White House has cited no cases supporting the remarkable idea that a former advisor is entitled to absolute immunity from even appearing at a hearing pursuant to subpoena.

Even if executive privilege were properly asserted, the privilege is not absolute, but rather is subject to a “balancing of interests” based on the needs of the President and the Congress. In the present case, where there is clear evidence of wrongdoing leading to the White House, where the information is important for considering possible legislative changes, where the Committee has sought to obtain the information elsewhere and has sought to obtain a reasonable accommodation, and where there is no overriding issue of national security, it is clear the Committee’s oversight and legislative interests should prevail.

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## I. The Committee's Investigation Has Uncovered Significant Evidence of Wrongdoing

Over the past seven months, the Committee has uncovered a great deal about the forced resignations of nine U.S. Attorneys that occurred in 2006.<sup>10</sup> The idea to replace all or some U.S. Attorneys during President Bush's second term originated with Karl Rove in early 2005 (himself under investigation by a sitting U.S. Attorney at the time).<sup>11</sup> According to one report, "the plan to fire all 93 U.S. Attorneys originated with then-White House political adviser Karl Rove. It was seen as a way to get political cover for firing the small number of U.S. Attorneys the White House actually wanted to get rid of."<sup>12</sup> The idea was then apparently taken up by Harriet Miers and Kyle Sampson. As Mr. Sampson would later explain to Associate Attorney General Bill Mercer, apparently Ms. Miers was so enthusiastic about this idea that Mr. Sampson had needed to "beat back" the proposal in favor of a more limited removal plan.<sup>13</sup>

Over the next two years, more than twenty-five U.S. Attorneys were considered at one time or another for replacement.<sup>14</sup> The Congressional Research Service (CRS) has found the firings to be without precedent.<sup>15</sup> Prior to these nine forced resignations, the CRS identified only ten U.S. Attorneys forced to resign during the last twenty-five years other than routine turnover

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<sup>10</sup> The U.S. Attorneys forced to resign in 2006 were H.E. "Bud" Cummins, III, U.S. Attorney for the Eastern District of Arkansas; John McKay, U.S. Attorney for the Western District of Washington; David Iglesias, U.S. Attorney for the District of New Mexico; Paul K. Charlton, U.S. Attorney for the District of Arizona; Carol Lam, U.S. Attorney for the Southern District of California; Daniel Bogden, U.S. Attorney for the District of Nevada; Kevin Ryan, U.S. Attorney for the Northern District of California; Margaret Chiara, U.S. Attorney for the Western District of Michigan; and Todd Graves of the Western District of Missouri.

<sup>11</sup> OAG 180; VandeHei, *Rove Testifies 5th Time On Leak*, Washington Post, Apr. 27, 2007.

<sup>12</sup> Shapiro, *Documents Show Justice Ranking US Attorneys*, NPR, Apr. 13, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=9575434>.

<sup>13</sup> ASG 001-04. The Department of Justice assigned each document produced to the Committee a unique "bates number" consisting of a three (or in one case five) letter prefix and a number. The assigned prefixes generally reference the office within the Department from which the documents were obtained. The most common prefixes are "OAG" for the Office of the Attorney General, "DAG" for the Office of the Deputy Attorney General, "OLA" for the Office of Legal Affairs, "ASG" for the Office of the Associate Attorney General, and "EOUSA" for the Executive Office of United States Attorneys. In some circumstances, the Department affixed an additional letter to the prefixes containing further information. Where the Department was required to substitute or correct a previously-produced document, it has added an "N" to the prefix. Where the Department has made unredacted versions of the documents available for review, it has added a "U" to the prefix. In this memorandum, the documents, which largely consist of email communications and associated materials, are cited by reference to those bates numbers. The Committee appreciates the well-organized and informative coding system used by the Department in producing documents on this matter.

In addition, all letters and interview transcripts cited in this Memorandum are on file with the House Committee on the Judiciary.

<sup>14</sup> Eggen & Goldstein, *Justice Weighed Firing 1 in 4*, Washington Post, May 17, 2007.

<sup>15</sup> Kevin M. Scott, *United States Attorneys Who Left Office Involuntarily, 1981-2006*, CRS Memorandum for Congress, Mar. 19, 2007.

when the presidency changes hands.<sup>16</sup> And those ten replacements appear to have been based on relatively obvious and undisputable reasons such as misconduct or unethical behavior.<sup>17</sup>

The Committee's investigation has also shown that the process conducted by Kyle Sampson resulting in these firings was not based on any recognizable concept of "performance." As described below, most of the fired U.S. Attorneys appear to have been top performers, and the reasons given to the Congress and the public in support of their removal have not been substantiated.<sup>18</sup> The Administration's decision to present such apparently pretextual reasons necessarily raises questions about the true motives behind the firings. The unwillingness of any Department of Justice person to claim responsibility for placing the majority of these prosecutors on the firing list only exacerbates such concerns.<sup>19</sup>

Politics appears to have been on the minds of the participants in this process from its very earliest days through the final approval of the plan. In the first email yet identified regarding the replacement plan, Kyle Sampson wrote: "if Karl thinks there would be political will to do it, then so do I."<sup>20</sup> And the email from then Deputy White House Counsel William Kelley approving the firings is similar: "We're a go for the US Atty Plan. WH lcg, political, and communications have signed off and acknowledged that we have to be committed to following through once the pressure comes."<sup>21</sup>

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<sup>16</sup> Id.

<sup>17</sup> Id. At the July 25, 2007, House Judiciary Committee meeting to vote on contempt citations for Harriet Miers and Joshua Bolten, Ranking Member Lamar Smith asserted that President Clinton removed 139 U.S. Attorneys, while President Bush removed 56. See Smith, July 25, 2007, H. Comm. on the Judiciary, Hearing at 4. The numbers for President Clinton, however, appear to include all U.S. Attorneys who resigned at the outset of his Administration in keeping with traditional practice, plus all U.S. Attorneys who left during his two terms, while the numbers for President Bush include only those U.S. Attorneys who were replaced during his two terms and do not include the U.S. Attorneys who resigned at the outset of the Administration. As with past presidents who followed presidents of the opposite party, President Bush asked all Clinton-appointed U.S. Attorneys to resign after he took office. See Press Release, U.S. Department of Justice, "White House and Justice Department Begin U.S. Attorney Transition," Mar. 14, 2001, available online at <http://www.usdoj.gov/opa/pr/2001/March/107ag.htm>. If the numbers for Presidents Bush and Clinton are counted in a consistent manner and initial Administration-change resignations are not included for either President, it appears that 46 U.S. Attorneys left office during the Clinton Administration, while 56 left office during the George W. Bush Administration. See Kevin M. Scott, *Senate-Confirmed U.S. Attorneys Who Left Office For Reasons Other than Change In Presidential Administration, 1993-2007*, CRS Memorandum for Congress, Aug. 14, 2007, at 1. Further, there is no indication that all 46 of those U.S. Attorneys were "removed" by President Clinton; indeed, many left office to assume federal judgeships or Executive Branch positions and one was replaced because he died. Id. at 2-3.

Thus, no credible evidence contradicts CRS's conclusion that, over the 25 years before the nine 2006 firings, not including Administration-change resignations, a total of only ten U.S. Attorneys have been asked to resign involuntarily. Kevin M. Scott, *United States Attorneys Who Left Office Involuntarily, 1981-2006*, CRS Memorandum for Congress, Mar. 19, 2007.

<sup>18</sup> See Section I.D.1. below.

<sup>19</sup> See Section I.D.2. below.

<sup>20</sup> OAG 180.

<sup>21</sup> DAG 571-74.

Although the Committee has learned a great deal, with non-White House sources of information largely exhausted as to the U.S. Attorneys fired in 2006, serious questions remain open regarding the firings: If no one at the Justice Department identified most of these U.S. Attorneys for firing, who did? If the reasons given to Congress and the public to support the firings are false, what were the real reasons? If the White House role was innocent and routine, why was a concerted effort made to hide it? If criminal conduct or abuse of executive power occurred, who was involved and what is the degree of their culpability? Both the evidence of misconduct already discovered and such key unanswered questions clearly necessitate documents and testimony from White House sources.<sup>22</sup>

**A. There is Evidence of Politically-Biased Prosecutions and Removal of U.S. Attorneys**

The Committee's investigation suggests that U.S. Attorneys may have been placed on or removed from the firing list based on their actions in bringing or not bringing politically sensitive prosecutions. In other cases, it seems relatively clear that Republican complaints about the enforcement decisions made by some U.S. Attorneys in controversial vote fraud cases may also have led to their being placed on or removed from the list. Forcing a U.S. Attorney to resign for such reasons would clearly be an abuse of executive power; in some circumstances, it could also be a violation of law. As the venerable and nonpartisan American Judicature Society recently explained, the firing of these U.S. Attorneys "raises issues of prosecutorial fairness, the permissible roles of policy and politics, and the maintenance of citizen trust in the rule of law. From each of these perspectives, on the basis of the facts as we know them today, the dismissals are indefensible."<sup>23</sup>

**1. David Iglesias (D. N.M.)**

The Committee has obtained substantial evidence that the firing of David Iglesias may have been a political act.<sup>24</sup> The Department of Justice has claimed that David Iglesias was fired because he was an "absentee landlord" and a poor manager of the New Mexico U.S. Attorney's office.<sup>25</sup> As described in detail below, however, the "absentee landlord" theory arose only well after Mr. Iglesias had been fired and could not have actually played a role in the Department's

<sup>22</sup> The Department of Justice's Office of the Inspector General and Office of Professional Responsibility are also reviewing these and related issues and apparently have interviewed some of the fired U.S. Attorneys. Reports also indicate that former Attorney General Gonzales has not cooperated with the investigation. See Morlin, *Gonzales Could be Prosecuted, McKay Says*, Spokane Spokesman Review, Oct. 20, 2007.

<sup>23</sup> American Judicature Society, *Putting Justice Back in the Department*, June 23, 2007.

<sup>24</sup> Mr. Iglesias appears to have reached this same conclusion, stating in private correspondence as the controversy unfolded that he was asked to move on for political reasons and that this had been a "political fragging, pure and simple." Available at [http://joemonahansnewmexico.blogspot.com/2007\\_02\\_01\\_joemonahansnewmexico\\_archive.html#6695857227222791754#6695857227222791754](http://joemonahansnewmexico.blogspot.com/2007_02_01_joemonahansnewmexico_archive.html#6695857227222791754#6695857227222791754).

<sup>25</sup> Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9; Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony Part 2 at 57, 61.

decision to force him out.<sup>26</sup> Furthermore, evidence that Mr. Iglesias was considered for promotions and praised as an “up-and-comer” prior to his removal casts further doubt on the Department’s claim that he was fired because he was not an adequate U.S. Attorney.<sup>27</sup>

On the other hand, the evidence of improper political motives appears compelling. The Committee’s investigation to date suggests that Mr. Iglesias may have been targeted based on two distinct, but equally improper, political reasons, as described below. Unfortunately, because no one at the Justice Department has claimed responsibility for suggesting Mr. Iglesias be placed on the firing list, and because Kyle Sampson claims not to remember who made that suggestion even though Mr. Iglesias was one of the final U.S. Attorneys placed on the list,<sup>28</sup> it may not be possible to determine the exact role each such reason played in the firing without access to information from those at the White House who appear to have played a role in his removal.

The first reason that Mr. Iglesias may have been targeted for removal is that he appears to have angered sitting Members of Congress from New Mexico by his failure to bring politically useful indictments of Democratic figures prior to the November 2006 election. David Iglesias testified to the Judiciary Committee that he received disturbing telephone calls from Senator Pete Domenici and Representative Heather Wilson in October 2006 seeking information about the potential indictments.<sup>29</sup> Mr. Iglesias further testified that Senator Domenici was abrupt and hung up when Mr. Iglesias indicated indictments would not be coming before the election, and that Representative Wilson “was not happy with [his] answer.”<sup>30</sup> Those calls were contemporaneous with Mr. Iglesias’ being added to the firing list maintained by Kyle Sampson, which occurred sometime between October 17 and November 7, 2006.<sup>31</sup> And the record also contains evidence that Senator Domenici called then Deputy Attorney General McNulty during that same month and complained about David Iglesias.<sup>32</sup>

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<sup>26</sup> See Section I.D.2. below.

<sup>27</sup> OAG 155; OAG 158-62.

<sup>28</sup> Mr. Sampson testified to the Senate Judiciary Committee and also in an on-the-record interview with Committee investigators that he did not remember who suggested Mr. Iglesias be placed on the list. Sampson, Apr. 15, 2007, Interview at 143. He also told the Senate Judiciary Committee that Mr. Iglesias was one of a group of four U.S. Attorneys added to the firing list at the end of the process, three of whom were removed after a closer look. Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony Part 2 at 13-15. However, that testimony appears to have been inaccurate. The Committee’s review of unredacted copies of the firing list establishes that none of the other U.S. Attorneys who appear on the November 7, 2006, list – the first one that includes Mr. Iglesias, see DAG 010-011 – but who were ultimately taken off, were newly added at the time. Instead, the other U.S. Attorneys who appear on the unredacted version of that November 7, 2006, list had all appeared as possible candidates for removal on prior lists, some going back to the first known versions of the list. Thus, based on the evidence available at this point, there does not appear to have been a “group” of U.S. Attorneys added near the end of the process.

<sup>29</sup> Iglesias, Mar. 6, 2006, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10.

<sup>30</sup> Iglesias, Mar. 6, 2006, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10; Iglesias, Mar. 6, 2007, S. Comm. on the Judiciary, Testimony at 12-13.

<sup>31</sup> Compare DAG 546-47 (Oct. 17 list without Iglesias) with DAG 010-11 (Nov. 7 list with Iglesias).

<sup>32</sup> DAG 2462, McNulty, Apr. 27, 2007, Interview at 53-54, 62.

To the extent such calls were intended to affect Mr. Iglesias' prosecutorial decisionmaking regarding pending investigative matters, they were clearly improper and may have constituted obstruction of justice or attempted obstruction.<sup>33</sup> And if David Iglesias was fired in order to affect the course of the pending investigations, that too could be unlawful. Firing a U.S. Attorney in order to impede or obstruct a pending criminal case, or a pending criminal investigation, could constitute an obstruction of justice.<sup>34</sup> And even former Attorney General Gonzales has acknowledged that replacing a U.S. Attorney to affect a pending matter would be improper.<sup>35</sup> Finally, to the extent Mr. Iglesias may have been fired in retaliation for his failure to bring a politically useful prosecution, the firing could also violate the criminal Hatch Act prohibition on retaliation contained in 18 U.S.C. § 606.<sup>36</sup> Under that provision, discharging a federal employee who failed to contribute a "valuable thing" for political purposes is a federal crime, and terms such as "valuable thing" or "thing of value" are traditionally given a very broad reading that could well reach failure to bring politically useful prosecutions.<sup>37</sup> While further information is needed to make final judgments on the potential violations that may have occurred with the firing of Mr. Iglesias, one twenty-five year Department veteran has publicly expressed his tentative views on the matter: "It is especially unheard of for U.S. attorneys to be targeted and removed on the basis of pressure and complaints from political figures dissatisfied with their handling of politically sensitive investigations and their unwillingness to 'play ball.' Enough information has already been disclosed to support the conclusion that this is exactly what happened here, at least in the case of former U.S. Attorney David C. Iglesias of New Mexico (and quite possibly in several others as well)."<sup>38</sup>

The other reason Mr. Iglesias appears to have been targeted for replacement is because he had drawn the ire of New Mexico state Republicans for his vote fraud enforcement decisions and for failing to bring a particular vote fraud matter that they wanted pursued. New Mexico Republican party Chief Allen Weh reportedly pressed Karl Rove through an aide to have Mr. Iglesias replaced in 2005 because he was dissatisfied by Mr. Iglesias' charging decisions in vote fraud matters.<sup>39</sup> That issue was apparently important enough to Mr. Weh that he raised his complaints about Mr. Iglesias again directly with Mr. Rove in December 2006 and was told by Mr. Rove at that time, apparently just one day after the firing calls were made, that "he's gone."<sup>40</sup>

<sup>33</sup> See 18 U.S.C. § 1503. Press reports indicate that the House Ethics Committee has interviewed Mr. Iglesias regarding the call he received from Representative Wilson. See Brosnahan, *House Ethics Committee to ask Iglesias about call from Heather Wilson*, Albuquerque Times, July 31, 2007.

<sup>34</sup> See 18 U.S.C. §§ 1503, 1505, 1512(c)(2).

<sup>35</sup> Statement of Attorney General Alberto Gonzales Before the H. Comm. on the Judiciary, May 10, 2007, at 2.

<sup>36</sup> 18 U.S.C. § 606 provides in part that a federal employee who "discharges . . . any other officer or employee [for] withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined under this title or imprisoned not more than three years, or both."

<sup>37</sup> See, e.g., *U.S. v. Cicco*, 10 F.3d 980, 984 (3<sup>rd</sup> Cir. 1994); *U.S. v. Schwartz*, 785 F.2d 673, 680-81 (9<sup>th</sup> Cir. 1986); *U.S. v. Singleton*, 144 F.3d 1343, 1350 (10<sup>th</sup> Cir. 1998), reversed on other grounds by 165 F.3d 1297 (10<sup>th</sup> Cir. 1999), rehearing en banc.

<sup>38</sup> Koppel, *Bush justice is a National disgrace*, Denver Post, July 5, 2007.

<sup>39</sup> Talev & Taylor, *Rove was asked to fire U.S. Attorney*, McClatchy Newspapers, Mar. 10, 2007; Gisik, *Rove Played Role in Iglesias Dismissal*, Albuquerque Tribune, Mar. 12, 2007.

<sup>40</sup> *Id.*



Two other New Mexico Republicans, Mickey Barnett and Pat Rogers, came to Washington, D.C., in Summer 2006 and met with then aide to Karl Rove Scott Jennings, as well as Monica Goodling and Counselor to the Attorney General Matthew Friedrich.<sup>41</sup> Mr. Friedrich testified that Mr. Rogers and Mr. Barnett were concerned about Mr. Iglesias failing to bring a particular vote fraud case against the ACORN community organization – he stated that “they were not happy with Dave Iglesias.”<sup>42</sup> Mr. Friedrich also testified that he met a second time with Mr. Barnett and Mr. Rogers over Thanksgiving 2006, and they informed him that they “were working towards” having Mr. Iglesias removed and that they had communicated with Karl Rove and Senator Domenici on that subject.<sup>43</sup>

In failing to satisfy state Republican concerns about the need for vigorous enforcement of alleged vote fraud cases, David Iglesias appears to have run up against a powerful political force.<sup>44</sup> The evidence shows that Karl Rove monitored this issue and heard complaints about some U.S. Attorneys on the subject, again including David Iglesias.<sup>45</sup> Mr. Rove’s interest in this subject was so acute that, in April 2006, he spoke about the issue to the Republican National Lawyers Association and named a number of jurisdictions that supposedly posed heightened vote fraud risks, including New Mexico, Wisconsin, and Washington, as well as other politically important states such as Florida and Missouri, where U.S. Attorneys were at one point or another on the firing list.<sup>46</sup>

Trying to achieve political advantage by firing a U.S. Attorney who refuses to bring vote fraud cases that he has in good faith judged to be nonmeritorious or unworthy of prosecution would be, at a minimum, an abuse of executive power. Some commentators have argued that using the prosecutorial power in this fashion might violate the President’s constitutional obligation to “take care” that the laws are faithfully executed.<sup>47</sup> While any undue pressure on a prosecutor to subordinate his or her personal judgment of the facts and law of a particular case to

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<sup>41</sup> OAG 114, 572; Friedrich, May 4, 2007, Interview at 31-40.

<sup>42</sup> Friedrich, May 4, 2007, Interview at 34-35.

<sup>43</sup> Friedrich, May 4, 2007, Interview at 38-39. Ultimately, after Mr. Iglesias was fired, Mr. Rogers’ name was among those submitted by Senator Domenici as a possible replacement U.S. Attorney. OAG 1752.

<sup>44</sup> Such prosecutions are controversial because they risk intimidating voters and chilling or suppressing voter participation, and some experts believe that overzealous enforcement of nonmeritorious vote fraud cases could disproportionately affect potential Democratic voters, concerns that appear especially salient in the current political environment where members of the Election Assistance Commission are reported to have overruled staff experts and altered a non-partisan report that had concluded there was “little polling place fraud” in the United States. Urbina, *U.S. Panel is Said to Alter Finding on Voter Fraud*, New York Times, Apr. 11, 2007. See also Lipton & Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, New York Times, Apr. 12, 2007 (“Most of those charged have been Democrats, voting records show.”).

<sup>45</sup> OAG 850-51; Sampson, Apr. 15, 2007, Interview at 26-27; Eggen & Goldstein, *Vote Fraud Complaints by GOP Drive Dismissals*, Washington Post, May 14, 2007 (“Rove, in particular, was preoccupied with pressing Gonzales and his aides about alleged voting problems in a handful of battleground states.”).

<sup>46</sup> Apr. 7, 2006, Speech by Karl Rove to Republican National Lawyers Association, available at <http://www.talkingpointsmemo.com/archives/013817.php>.

<sup>47</sup> U.S. Const. Art. II, Section 3; see discussion available at <http://balkin.blogspot.com/2007/03/did-anyone-in-white-house-act.html>.

the partisan objectives of political bosses is improper, when the case at hand involves citizens' participation in the electoral process the harm would be especially acute.

Whether such misconduct would be unlawful raises complex issues and would depend on a range of facts not currently known. To the extent Mr. Iglesias or any of the prosecutors was fired in order to influence coming elections, the firing would possibly violate a civil portion of the Hatch Act, 5 U.S.C. § 7323(a)(1).<sup>48</sup> Indeed, the Office of Special Counsel, which has jurisdiction over non-criminal Hatch Act matters, has opened an investigation into that and related issues.<sup>49</sup> If Mr. Iglesias or another prosecutor was fired in retaliation for failing to bring vote fraud cases that lacked a reasonable legal or factual basis, the firing could also violate the criminal Hatch Act prohibition on retaliation contained in 18 U.S.C. § 606.<sup>50</sup>

To the extent a prosecutor was fired in order to bring in a more compliant individual to pursue politically advantageous cases, such misconduct could possibly violate the prohibitions on obstructing government proceedings contained in 18 U.S.C. § 1505<sup>51</sup> and 18 U.S.C. § 1512(c)(2).<sup>52</sup> In the vote fraud context, if such a firing was designed to signal to other U.S. Attorneys that politically advantageous vote fraud cases must be charged on pain of termination, regardless of the prosecutor's judgement of the merits of the particular case, that too could amount to an obstruction or interference with those investigations.

Finally, if the evidence is understood to reveal a plan to improperly utilize vote fraud laws in order to suppress or discourage citizens from exercising their constitutional right to vote, such misconduct may violate federal civil rights law.<sup>53</sup> Depending on the scope of the plan, of course, federal conspiracy and aiding and abetting laws would greatly widen the circle of potential defendants on these and all the other cited violations.<sup>54</sup>

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<sup>48</sup> 5 U.S.C. § 7323(a)(1) provides that a federal employee may not "use his official authority or influence for the purpose of interfering with or affecting the result of an election."

<sup>49</sup> Smith, *Task Force to Examine Alleged Improper Politicking*, Washington Post, April 25, 2007.

<sup>50</sup> 18 U.S.C. § 606 provides in part that a federal employee who "discharges . . . any other officer or employee [for] withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined under this title or imprisoned not more than three years, or both."

<sup>51</sup> 18 U.S.C. § 1505 provides in part: "Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . [s]hall be fined under this title, imprisoned not more than 5 years . . . or both."

<sup>52</sup> 18 U.S.C. § 1512(c)(2) provides in part: "Whoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."

<sup>53</sup> 18 U.S.C. § 242 provides in part that "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both."

<sup>54</sup> See, e.g., 18 U.S.C. §§ 2, 371.

## 2. John McKay (W.D. Wash.)

In the case of John McKay, no credible reason for his appearance on the March 2005 firing list<sup>55</sup> has been offered by any Department witness.<sup>56</sup> On the other hand, the Committee's investigation has established that Republican concerns about Mr. McKay's failure to bring vote fraud charges in the wake of the extraordinarily close 2004 gubernatorial election in Washington state were widely circulated in the months following that election,<sup>57</sup> including in correspondence with the Department of Justice.<sup>58</sup> And complaints by Washington state Republican officials that Mr. McKay had "mishandled" the 2004 election were well known to officials in the White House.<sup>59</sup> Mr. McKay described for the Committee being confronted with those Republican concerns by Harriet Miers and her then deputy, William Kelley, when Mr. McKay interviewed for a federal judgeship in August 2006, several months before he was fired.<sup>60</sup>

Committee concern that the firing was in large part a White House reaction to such partisan criticisms of Mr. McKay is only heightened by the fact that, during this same time, Kyle Sampson appears to have personally held a positive view of Mr. McKay's performance, complaining that "our U.S. Attorney, John McKay, got screwed by Washington's judicial selection commission" and stating just months before McKay was fired that "re John, it's highly unlikely that we could do better in Seattle."<sup>61</sup> A few days later, Mr. Sampson further wrote that "I already have raised, on behalf of AG, the [judgeship] issue with the White House folks (Counsel's office and political affairs)."<sup>62</sup> The nomination was not pursued, however, and just months later, White House personnel approved the firing of John McKay.

The firing of Mr. McKay raises substantial questions of improper, and possibly unlawful, conduct, including concerns about many of the possible legal violations described above, particularly those relating to imposing undue pressure on prosecutors' vote fraud enforcement activities and those regarding retaliation for a prosecutor's failure to deliver politically useful indictments. White House information may well be able to clear up the concerns raised by the available record, including those concerning the views and actions of Ms. Miers and Mr. Kelley regarding Mr. McKay.

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<sup>55</sup> OAG 005- OAGN 008.

<sup>56</sup> For a detailed analysis of the reasons offered to support the firing of John McKay, see Section I.B.2. below.

<sup>57</sup> Bowermaster, *GOP Chair Called McKay About '04 Election*, Seattle Times, March 14, 2007; Postman, *GOP Says Election Tainted By Fraud*, Seattle Times, May 18, 2005.

<sup>58</sup> OAG 754-73.

<sup>59</sup> Bowermaster, *McKay went from hero to zero with Justice Department*, Seattle Times, Mar. 21, 2007.

<sup>60</sup> John McKay Response to Questions From Subcommittee Chair Linda Sánchez (on file with the H. Comm. on the Judiciary).

<sup>61</sup> In an email discussion with Kyle Sampson, Debra Yang, then the U.S. Attorney for the Central District of California, further praises McKay, stating that he "would be terrific in that [judgeship], and has really done good work as the USA, but you know that already." Sampson responds that "And, re John, it's highly unlikely that we could do better in Seattle." Yang replies: "He's a great soldier." OAG 203-04.

<sup>62</sup> OAG 207-208.

### 3. Steven Biskupic (E.D. Wisc.)

No Justice Department witness has explained why Milwaukee U.S. Attorney Steven Biskupic appeared on the March 2005 firing list.<sup>63</sup> Kyle Sampson recalled only that Mr. Biskupic was not a “prominent” U.S. Attorney.<sup>64</sup> On the other hand, the Administration did produce documents describing vote fraud issues in Mr. Biskupic’s district during the 2004 elections that Karl Rove appears to have printed and viewed just weeks before Mr. Biskupic was placed on the firing list, and which contain the handwritten notation “Discuss w/Harriet.”<sup>65</sup> The record also contains a lengthy catalog of Republican complaints about Mr. Biskupic’s failure to bring more vote fraud cases during this time, some of which reached Mr. Rove, and some of which Mr. Rove may have passed on to Kyle Sampson.<sup>66</sup>

It is also known that later, after he appeared on the firing list, Mr. Biskupic’s office brought fourteen controversial vote fraud prosecutions relating to the 2004 election, a high level of activity on this issue that has been reported to make up more than ten percent of all federal vote fraud cases brought in the United States between 2002 and 2006.<sup>67</sup> And despite the generally high federal criminal conviction rate, convictions were secured in only five of those fourteen vote fraud cases, further raising concerns that Mr. Biskupic’s charging decisions on this politically sensitive issue may have been overly aggressive and politically-tinged.<sup>68</sup>

At the same time, and also after he appeared on the firing list in 2005, Mr. Biskupic’s office commenced an investigation into claims that Wisconsin civil servant Georgia Thompson wrongfully awarded a contract to a bidder whose director was a political contributor to Democratic Governor Jim Doyle.<sup>69</sup> An indictment was delivered in that case in January 2006, the very same month that Mr. Biskupic’s name was removed from the firing list.<sup>70</sup> Mr. Biskupic’s office continued with the prosecution, even though the firm awarded the contract had submitted the lowest bid and had tied for first place on the bid-scoring system, and also in the absence of any evidence that Ms. Thompson was aware of the questioned political

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<sup>63</sup> OAG 005 - OAGN 008. The Committee has only been provided with a redacted version of OAG 005 but Committee staff has reviewed the unredacted version of this document and can confirm public reports that Mr. Biskupic’s name is one of those that Kyle Sampson states he has added to the list “based on some additional information I got tonight.”

<sup>64</sup> Sampson, Apr. 18, 2007, Interview at 51-52.

<sup>65</sup> OAG 850-51.

<sup>66</sup> OAG 820-47; see also Unnumbered Documents produced by the Department of Justice on May 17, 2007, in response to Apr. 10, 2007, letter of Senator Patrick J. Leahy (on file with the H. Comm. on the Judiciary); Sampson, Apr. 15, 2007, Interview at 168-70; Bice, *State GOP Official Pushed Vote Fraud Issue*, Milwaukee Journal Sentinel, Apr. 7, 2007; Stein, *82 Felons May Have Voted in State*, Wisconsin State Journal, Apr. 13, 2007.

<sup>67</sup> Glauber, *Her First Vote Put Her In Prison*, Milwaukee Journal Sentinel, May 21, 2007; Lipton & Urbina, *In Five-Year Effort, Scant Evidence of Voter Fraud*, New York Times, Apr. 12, 2007 (“Of the hundreds of people initially suspected of violations in Milwaukee, 14 – most black, poor, Democratic and first-time voters – ever faced federal charges. . . . Even the 14 proved frustrating for the Justice Department. It won five cases in court.”).

<sup>68</sup> *Id.*

<sup>69</sup> Barton, Forster, and Walters, *State Official Indicted*, Milwaukee Journal Sentinel, Jan. 24, 2006.

<sup>70</sup> *Id.*

contributions.<sup>71</sup> That verdict was recently overturned by the United States Court of Appeals for the Seventh Circuit, in a remarkable opinion issued immediately upon oral argument that declared Ms. Thompson innocent and ordered her immediate release, declaring the evidence to be “beyond thin.”<sup>72</sup> This ruling came too late, of course, to prevent Governor Doyle’s opponent from using the conviction to impact the 2006 election.<sup>73</sup> As Ms. Thompson’s union explained in a letter to the Committee, “[D]uring that time, the Republican party spent millions of dollars on advertising portraying Ms. Thompson as a symbol of corruption of the incumbent Democratic regime.”<sup>74</sup>

Whether any improper or unlawful conduct occurred regarding the prosecution of Ms. Thompson or the prosecution of any of the vote fraud cases brought during the time Mr. Biskupic was on the firing list is uncertain. Mr. Biskupic has forcefully stated that he did not ever know that he was on any Department of Justice firing list, and no evidence reviewed by the Committee contradicts that statement.<sup>75</sup> However, White House information has not yet been reviewed. If a prosecutor’s selection of targets for investigation was based even partially on an effort to avoid losing his job, rather than on his judgment of the merits of the particular cases, that of course would be extremely troubling.<sup>76</sup>

#### 4. Todd Graves (W.D. Mo.)

In the case of Todd Graves, the issue once again appears rather stark based on available information. So far during the Committee’s investigation, the only reason suggested for the firing of Mr. Graves is Monica Goodling’s assertion that he was asked to resign over what appears to have been a minor Hatch Act issue evaluated by the Inspector General.<sup>77</sup> Mr. Graves testified before the Senate Judiciary Committee, however, that the Inspector General’s investigation had been opened at Mr. Graves’ own request as a matter of caution after an employee raised the matter (which appears to have concerned his appearance at a fundraiser with the Vice President).<sup>78</sup> Because that investigation seems to have been closed with no finding of

<sup>71</sup> *U.S. v. Thompson*, 484 F.3d 877, 878-79 (7th Cir. 2007).

<sup>72</sup> *U.S. v. Thompson*, 484 F.3d 877, 878 (7th Cir. 2007); Walters & Diedrich, *Ex-State Official Freed*, Milwaukee Journal Sentinel, Apr. 6, 2007.

<sup>73</sup> Lueders, *Biskupic tried to ‘squeeze’ Georgia Thompson*, Isthmus, May 17, 2007, available at <http://www.thedailypage.com/isthmus/article.php?article=7081>.

<sup>74</sup> Letter from Timothy E. Hawks and B. Michele Sumara, Attorneys for AFT-Wisconsin, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Oct. 10, 2007.

<sup>75</sup> Johnson, *Politics Had No Role, Biskupic Says*, Milwaukee Journal Sentinel, Apr. 15, 2007.

<sup>76</sup> In the wake of the 2004 election, Steven Biskupic and David Iglesias established Election Fraud Task Force operations. See Goldstein, *Justice Dept. Recognized Prosecutor’s Work on Election Fraud Before His Firing*, Mar. 19, 2007. It is revealing that two prosecutors held up by the Department of Justice as expert on this subject would nevertheless receive such heavy political criticism on the issue from local Republicans, and that the Department would apparently respond to that criticism not by defending its challenged prosecutors but possibly by placing them on a firing list.

<sup>77</sup> Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 76.

<sup>78</sup> Graves, June 5, 2007, S. Comm. on the Judiciary, Testimony at 62-63.

wrongdoing by Mr. Graves, it is difficult to accept Ms. Goodling's suggestion that this was the reason Mr. Graves was forced to resign as U.S. Attorney.<sup>79</sup>

In these circumstances, there is a substantial concern that the real reason Mr. Graves was replaced was because he was insufficiently enthusiastic about a controversial lawsuit regarding Missouri's voter rolls that was pressed by Main Justice officials, including Bradley Schlozman, who almost immediately was appointed to replace Mr. Graves after he was directed to step down.<sup>80</sup> In validation of Mr. Graves' judgment, that case was dismissed by the district court in April 2007 for a host of reasons, including lack of evidence of vote fraud.<sup>81</sup>

The importance of vote fraud enforcement issues in the replacement of Mr. Graves with Mr. Schlozman is further suggested by Mr. Schlozman's decision to obtain and publicly announce four vote fraud indictments in the days just before the 2006 elections, a questionable act that may have violated the policies set forth in the Department's Election Crimes Manual.<sup>82</sup> According to press reports, at least one of those indictments had previously been "rejected by a Missouri prosecutor as being too weak and as inappropriate to pursue so close to the elections."<sup>83</sup> Mr. Schlozman's misleading testimony before the Senate Judiciary Committee, in which he claimed that Main Justice officials had "directed" him to bring those indictments at that time, and which he was compelled to "clarify" within days, only further heightens concern about the matter.<sup>84</sup>

## 5. Carol Lam (S.D. Cal.)

Carol Lam of San Diego was fired while conducting a major and expanding public corruption prosecution. The Department has claimed that Ms. Lam was fired because of ongoing problems regarding her District's immigration enforcement policies and gun crime prosecution statistics, but a fair look suggests those issues are far from clear. Ms. Lam provided a convincing explanation for her gun prosecution policies, and Mr. Comey, who supervised Ms. Lam on this issue, testified that gun numbers alone "tell you nothing in a vacuum" and that he did not consider Ms. Lam's gun performance a reason for her to be fired.<sup>85</sup> Furthermore, Mr. Comey

<sup>79</sup> Graves, June 5, 2007, S. Comm. on the Judiciary, Testimony at 62-63; McChaffey, *US Attorney Todd Graves Report Disputes Monica Goodling Testimony*, Kansas City Daily Record, May 28, 2007.

<sup>80</sup> Savage, *Missouri attorney a focus in firings*, Boston Globe, May 6, 2007; Morris, *Attorney Scandal May Be Tied to Missouri Voting*, NPR, May 3, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=9981606>.

<sup>81</sup> See *United States v. Missouri*, 2007 WL 1115204 (W.D. Mo., Apr. 13, 2007).

<sup>82</sup> See generally Schlozman, S. Comm. on the Judiciary, Testimony, June 5, 2007; Savage, *Missouri attorney a focus in firings*, Boston Globe, May 6, 2007; Morris, *Attorney Scandal May Be Tied to Missouri Voting*, NPR, May 3, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=9981606>.

<sup>83</sup> Gordon, *Politics may have played a role in voter fraud allegations in Missouri*, McClatchy Newspapers, June 9, 2007.

<sup>84</sup> See Schlozman, June 5, 2007, S. Comm. on the Judiciary, Testimony and June 11, 2007, letter of Bradley Schlozman to S. Comm. on the Judiciary Chairman Patrick J. Leahy purporting to "clarify" that testimony.

<sup>85</sup> See Carol Lam's Response to Questions from Subcommittee Chair Linda Sánchez (on file with the H. Comm. on the Judiciary); Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 15, 17-18.

testified that, of the group of U.S. Attorneys with low gun numbers that he contacted as part of an effort to manage U.S. Attorney production on this issue, only Carol Lam was fired.<sup>86</sup> In December 2006, at the very same time senior Department officials were demanding her resignation, the Department had also sent a delegation to meet with Carol Lam and “to study why the city of San Diego had [its] lowest violent crime rate in 25 years.”<sup>87</sup> On immigration, at the same time the Department claims it was preparing to terminate Ms. Lam for her immigration performance, it was defending Ms. Lam’s immigration enforcement approach to Senator Feinstein and Representative Issa.<sup>88</sup> Moreover, Will Moschella who worked on this issue while in the Office of Legislative Affairs told Committee investigators that he “knew about the issues relating to immigration and Carol Lam [and] certainly wouldn’t have equated that in my mind with ... [g]rounds for termination.”<sup>89</sup>

On the other hand, evidence collected to date suggests improper political factors may have been involved in the decision. On May 10, 2006, Kyle Sampson wrote to William Kelley in the White House Counsel’s office stating that he wanted to talk to Kelley about “[t]he real problem we have right now with Carol Lam that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her 4-year term expires.”<sup>90</sup> According to press reports, which in turn quoted statements by Senator Feinstein, this email came just one day after Ms. Lam had notified Justice Department officials that she would be executing search warrants in the criminal investigation of CIA number three Kyle “Dusty” Foggo and politically-powerful defense contractor Brent Wilkes.<sup>91</sup> While it is certainly true that some in Congress and some in the Department of Justice had ongoing concerns about Ms. Lam’s immigration enforcement approach, given the emphatic and time-specific language in this email (“the real problem we have right now with Carol Lam”<sup>92</sup>), it is difficult to credit Kyle Sampson’s testimony that he was simply referring to the Department’s concern about the long-simmering immigration issue when he sent this message to the White House Counsel’s office.<sup>93</sup>

The circumstances and manner of Ms. Lam’s firing have raised concerns about the Administration’s true motives on the part of others as well. After Ms. Lam was fired, the head of the FBI’s San Diego office Dan Dzwilowski (who would resign soon after these comments) stated: “Lam’s continued employment as U.S. attorney is crucial to the success of multiple ongoing investigations. . . . I can’t speak for what’s behind all that, what’s the driving force behind this or the rationale. I guarantee politics is involved.”<sup>94</sup> The Department’s refusal to

<sup>86</sup> Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 17-18.

<sup>87</sup> Lam, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 22.

<sup>88</sup> ASG 255; DAG 467-70, 484-87, OAG 548-53, DAG 347-50.

<sup>89</sup> Moschella, Apr. 24, 2007, Interview at 39.

<sup>90</sup> OAG 22.

<sup>91</sup> Eggen, *Prosecutor’s Firing Was Urged During Probe*, Washington Post, Mar. 19, 2007; Ragavan, *Note to Gonzales on CIA Prosecution Preceded Firing of U.S. Attorney*, US News and World Report, Mar. 19, 2007.

<sup>92</sup> Emphasis added.

<sup>93</sup> Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony at 14, 26-27.

<sup>94</sup> Thornton, *Lam Stays Silent About Losing Job*, San Diego Union Tribune, Jan. 13, 2007.

consider an extension of time for Ms. Lam as she apparently worked to resolve questions regarding the potential indictments of Brent Wilkes and Dusty Foggo also raises concern, particularly since some of the U.S. Attorneys who do not appear to have been pursuing such politically sensitive matters were granted requested extensions.<sup>95</sup> According to Ms. Lam, she was told that her “request for more time based on case-related considerations was ‘not being received positively’ and that she should ‘stop thinking in terms of the cases in the office.’”<sup>96</sup> These commands, Ms. Lam was told, came from “the very highest levels of the government.”<sup>97</sup> The specific direction to Ms. Lam that she should not worry about “the cases in the office” on orders from “the highest levels of the government” only reinforces concern that the politics of those cases did in fact play a role in her firing.<sup>98</sup>

As noted above, the Department has certainly identified information making clear that some of her superiors were frustrated with Ms. Lam and what some considered her undue independence. On the other hand, other aspects of her dismissal give great cause for concern, especially given the political sensitivity of the investigation Ms. Lam was leading at the time she was replaced. White House information, such as follow up to Mr. Sampson’s email stating that he needed to talk to William Kelley about the “real problem” with Carol Lam, is needed to bring clarity to this important issue.

#### 6. Leura Canary and the Siegelman Case (M.D. Ala.)

Concerns about the apparently political nature of these firings are only heightened by the emerging allegations that some U.S. Attorneys who were retained by the Department – including the so-called “loyal Bushies”<sup>99</sup> – may have selectively prosecuted Democrats. The Judiciary Committee Subcommittees on Crime, Terrorism and Homeland Security and Commercial and Administrative Law held a hearing on this issue, at which Republican former U.S. Attorney General Richard Thornburgh as well as a former U.S. Attorney from Alabama expressed deep concern about prosecutions that may have been improperly impacted by political considerations. Bringing the force of the federal criminal justice apparatus to bear on an individual based in any

<sup>95</sup> On January 5, 2007, for example, Kyle Sampson emailed several Department officials stating “we granted 1-month extensions for Dan and Margaret, but not Carol – right?” See DAG 2614.

<sup>96</sup> See Carol Lam’s Response to Questions from Subcommittee Chair Linda Sánchez at 7 (on file with the H. Comm. on the Judiciary).

<sup>97</sup> Id.

<sup>98</sup> At the Committee’s meeting to consider the contempt report, some Republican Members appeared to suggest that Ms. Lam’s testimony at a Subcommittee hearing specifically contradicted the claim that such political factors played a role in her firing. See, e.g., July 25, 2007, Subcomm. on Commercial and Admin. Law, Hearing at 24 (comments of Representative Keller, asserting that Ms. Lam testified that “No, I have no such evidence.”); id. at 27 (comments of Representative Lungren). Of course, there is no reason that Ms. Lam would have knowledge of the true motives of those who fired her. Indeed, her full testimony was: “Q: Do you have evidence that your role in prosecuting Duke Cunningham is the reason you were asked to resign? A: I was not looking for evidence. I don’t have any indication one way or the other. Q: I know you weren’t looking for it, but do you have any evidence that . . . that you were asked to resign as- A: No, sir.” Lam, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, Hearing at 64 (emphasis added).

<sup>99</sup> OAG 180.



way on that person's political affiliation is a clear abuse of the prosecutorial function, and may well violate the person's civil rights.

Evidence that such wrongdoing may have occurred includes a recent academic study finding that federal prosecutors during the Bush Administration have indicted Democratic officeholders far more frequently than their Republican counterparts. According to updated data presented at the Subcommittees' hearing, of the 820 cases they identified, 47 involved independents, 142 involved Republicans, and 641 involved Democrats, and noted that local Democrats were five times as likely as Republicans to be subject to criminal charges from the Department of Justice.<sup>100</sup>

Against that background, cases like the 2006 conviction of Alabama's former Democratic Governor Don Siegelman have caused concern. In May 2007, Ms. Dana Jill Simpson, a Republican attorney in Alabama who had worked for Mr. Siegelman's 2002 Republican opponent, swore in an affidavit that she was told by a political associate of Karl Rove, Bill Canary, who was also the husband of Alabama U.S. Attorney Leura Canary, that Mr. Rove and the Alabama U.S. Attorneys were working to "take care of" Mr. Siegelman and that Rove had already "spoken with the Department of Justice" about the matter.<sup>101</sup> Committee staff interviewed Ms. Simpson under oath, who reaffirmed this information and described being told of further contacts by Mr. Rove with the Justice Department urging the prosecution of Mr. Siegelman in late 2004.<sup>102</sup> Furthermore, testimony at the Subcommittee's hearing on allegations of selective prosecution indicated that, at the very time Ms. Simpson asserts that she was told Mr. Rove was interceding with the Justice Department, Mr. Siegelman's attorneys were told that officials in the Department had ordered local prosecutors to give the case a "top to bottom" review and the prosecution did at that time take on a new and aggressive life.<sup>103</sup> There have been other reported irregularities in the case against Mr. Siegelman that raise questions about his prosecution, issues serious enough that 44 former state Attorneys General recently signed a petition "urging the United States Congress to investigate the circumstances surrounding the investigation, prosecution, sentencing and detention" of Mr. Siegelman.<sup>104</sup> Once again, further information, and in particular information from Mr. Rove in response to Ms. Simpson's serious allegations, is needed to address such suspicions and begin the process of restoring public confidence in the integrity and impartiality of the Justice Department in its enforcement of federal criminal law.

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<sup>100</sup> Shields, Oct. 23, 2007, Subcomms. On Crime, Terrorism, and Homeland Security and Commercial and Admin. Law, Testimony at 4.

<sup>101</sup> Simpson, May 21, 2007, Affidavit at 3.

<sup>102</sup> See Simpson, Sept. 14, 2007 Interview at 50-57; Nossiter, *Democrats See Politics In Governor's Jail*, New York Times, Sept. 11, 2007.

<sup>103</sup> Jones, Oct. 23, 2007, Subcomms. On Crime, Terrorism, and Homeland Security and Commercial and Admin. Law, Hearing at 18.

<sup>104</sup> Letter from 44 former state attorneys general, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Patrick Leahy, Chairman, S. Comm. on the Judiciary, July 13, 2007.

**B. Current and Former Justice Department Officials May Have Made False or Misleading Statements to Congress, Many of Which Served to Obscure or Downplay The Role Played By White House Personnel In The Firings**

As the U.S. Attorney firings have come to light, Department of Justice personnel, apparently acting at times with the approval and encouragement of White House personnel, have made a number of conflicting, inaccurate, and misleading statements. Some of these misstatements have been formally retracted or corrected; others have not. The resulting confusion has hampered the Committee's investigation and distorted the American public's understanding of these important issues. It is possible that some of these false statements amount to perjury,<sup>105</sup> or criminal false statement violations,<sup>106</sup> or obstruction of Congressional proceedings.<sup>107</sup> More information, and particularly White House information, is needed to fully assess the degree of any illegality, and the appropriate defendants on any such charges.

**1. Potentially Inaccurate Statements by Former Attorney General Alberto Gonzales**

In March 2007, before the release of documents regarding the controversy, then-Attorney General Alberto Gonzales stated that he "was not involved in seeing any memos, was not involved in any discussions about what was going on."<sup>108</sup> That seems to have been an incorrect statement, as both Kyle Sampson and Monica Goodling later testified.<sup>109</sup> The former Attorney General has also made sharply conflicting statements about the role of former Deputy Attorney General McNulty in the firings, stating at one point that Mr. McNulty's views on the issue of replacing U.S. Attorneys were of paramount importance to him<sup>110</sup> and at another point that one of the biggest flaws of the process was that it did not sufficiently involve Mr. McNulty.<sup>111</sup> Even Mr. Gonzales' broad statement that "I would never, ever make a change in a United States attorney position for political reasons . . . I just would not do it"<sup>112</sup> is arguably false since, at a minimum, firing Bud Cummins simply so that Rove aide Tim Griffin could have that position

<sup>105</sup> 18 U.S.C. § 1621 provides in part: "Whoever . . . having taken an oath before a competent tribunal, officer, or person . . . that he will testify . . . truly . . . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true. . . is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both."

<sup>106</sup> 18 U.S.C. § 1001 provides in part: "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement . . . shall be fined under this title, imprisoned not more than 5 years, . . . or both."

<sup>107</sup> 18 U.S.C. § 1505 provides in part: "Whoever corruptly. . . obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress . . . [s]hall be fined under this title, imprisoned not more than 5 years, . . . or both."

<sup>108</sup> Transcript of Mar. 13, 2007, Press Statements by Attorney General Alberto Gonzales.

<sup>109</sup> Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony at 15; Sampson, April 15, 2007, Interview at 20-21; Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 95-97.

<sup>110</sup> May 15, 2007, Remarks of Alberto Gonzales at the National Press Club at 12, 14.

<sup>111</sup> Gonzales, Apr. 19, 2007, S. Comm. on the Judiciary, Testimony at 46-47.

<sup>112</sup> Gonzales, Jan. 18, 2007, S. Comm. on the Judiciary, Testimony at 22.

appears to be a political act. And other fired U.S. Attorneys testified that they had been told the firings would allow their replacements to “build their resumes [and] get in experience as a United States attorney” to support future appointments to federal judgeships “or other political types of positions,”<sup>113</sup> which similarly appears to be a political basis for firing a U.S. Attorney.

Other statements of concern by the former Attorney General include his testimony regarding calls received from Senator Domenici in late 2005 and early 2006. Mr. Gonzales testified that, in those calls, the Senator criticized the performance of David Iglesias, which was useful testimony for the Administration because it suggested that Senator Domenici had concerns about Mr. Iglesias well before the controversy surrounding the 2006 election.<sup>114</sup> But Department documents and testimony of other witnesses strongly indicate that the calls actually concerned the Senator’s request that more resources be provided to Mr. Iglesias’ district. Principal Associate Deputy Attorney General Will Moschella, for example, was present during each of these calls and testified that he understood them all to be focused on the Senator’s concern that more resources be provided to Mr. Iglesias.<sup>115</sup> Mr Moschella further testified that the Attorney General never relayed to him that the calls were critical of Mr. Iglesias.<sup>116</sup> Supporting Mr. Moschella’s recollections of the calls, the email scheduling one of these calls states, “Senator Domenici would like to talk to the AG regarding his concerns about staffing shortages in the U.S. Attorneys office (District of NM).”<sup>117</sup> And in fact, in response to the Senator’s concern, new prosecutorial resources were provided to Mr. Iglesias in July 2006.<sup>118</sup>

Mr. Gonzales also testified that he had not discussed the firings issue with other fact witnesses in order to preserve the integrity of the ongoing investigations.<sup>119</sup> Monica Goodling, however, told the Committee that he had rehearsed his recollections with her before she went on leave in an “uncomfortable” private conversation,<sup>120</sup> another matter of concern.<sup>121</sup>

<sup>113</sup> See Bogden March 6, 2007, Testimony at 26; see also Charlton March 6, 2007, Testimony at 23 (“this was being done so that other individuals would have the opportunity to quote, ‘touch base’ end quote, as United States Attorneys before the end of the president’s term.”).

<sup>114</sup> Gonzales, May 10, 2007, H. Comm. on the Judiciary, Testimony at 10, 73, 100-04; Gonzales, April 19, 2007, S. Comm. on the Judiciary, Testimony at 13.

<sup>115</sup> Moschella, Apr. 24, 2007, Interview at 127-143.

<sup>116</sup> *Id.*

<sup>117</sup> OAG 185; see also DAG 2200-01, 2204-2207, 2370-74; OAG 65-80, 184-85, 196-98, 918-20, 940-42, 1817-18, 1226, 1228, 1230; ASG 009-10.

<sup>118</sup> Prepared Remarks of Attorney General Alberto R. Gonzales Announcing the Addition of Twenty-Five Federal Prosecutors to U.S./Mexico Border Districts, July 31, 2006, available online at [http://www.usdoj.gov/ag/speeches/2006/ag\\_speech\\_0607311.html](http://www.usdoj.gov/ag/speeches/2006/ag_speech_0607311.html).

<sup>119</sup> Gonzales, May 10, 2007, H. Comm. on the Judiciary, Testimony at 8-9.

<sup>120</sup> Goodling May 23, 2007, H. Comm. on the Judiciary, Testimony at 173-78.

<sup>121</sup> On July 24, 2007, Mr. Gonzales confirmed that this conversation did in fact occur, although he asserted that he was not trying to coach Ms. Goodling but merely “to console and reassure an emotionally distraught woman” and to “reassure her, as far as I knew, no one had done anything intentionally wrong.” Gonzales, July 24, 2007, S. Comm. on the Judiciary, Hearing at 69. It is questionable at best to suggest that it would have been consoling to Monica Goodling for the Attorney General to talk through his version of the facts of the U.S. Attorney firings with her at that time, and this issue is now under investigation by the Department’s Office of the Inspector General and Office of Professional Responsibility.

## 2. Potentially Inaccurate Statements by Former Deputy Attorney General Paul McNulty and his Principal Associate Will Moschella

Potentially unlawful false statements also may have been made in support of the Administration's effort to minimize and obscure the role of White House personnel in the firings. For example, in February 2007, then Deputy Attorney General Paul McNulty testified before the Senate Judiciary Committee that "These are Presidential appointments . . . so the White House personnel, I'm sure, was consulted prior to making the phone calls,"<sup>122</sup> an incomplete statement that appears to have understated the involvement of White House individuals in the inception, development, and approval of the firing plan. No one within the Department or the White House ever formally corrected those statements, and Principal Associate Will Moschella provided similar misinformation to the House Judiciary Committee.<sup>123</sup>

Press reports around the time of Mr. Moschella's testimony reinforced this version of events, with articles in *The Washington Post* and *The New York Times* citing White House and Justice Department sources and inaccurately asserting that discussions about the firings began in October 2006, that White House personnel did not encourage the dismissals, and that the White House was merely consulted for final sign off as a matter of "standard operating procedure."<sup>124</sup> In one email regarding these articles, Kyle Sampson offers "kudos" to the Department's press aide and to Mr. McNulty for their work in shaping these articles, even though the articles contained a version of events minimizing the role played by White House personnel that Mr. Sampson must have known was inaccurate or incomplete.<sup>125</sup> That email was received by Mr. Moschella just days before he testified to this Committee, and he testified consistent with the inaccuracies in that article that were arguably approved or vouched for by Mr. Sampson.<sup>126</sup>

The Committee also has concern about the statements made by Mr. McNulty and Mr. Moschella to the Senate and House Judiciary Committees regarding the firing of David Iglesias. Neither official testified that the firing may have been based in whole or in part on a call received by Mr. McNulty from Senator Domenici in October 2006, even though Mr. McNulty stated during his subsequent interview with the Committee that such a call from Senator Domenici was at least important to his decision not to object to Mr. Iglesias' presence on the firing list.<sup>127</sup> Furthermore, the omission of that information may have been deliberate. Monica Goodling stated in her testimony before the Committee that the issue of the call from Sen. Domenici had come up during a preparation session in advance of Mr. McNulty's briefing

<sup>122</sup> McNulty, Feb. 6, 2007, S. Comm. on the Judiciary, Testimony at 36.

<sup>123</sup> Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 14.

<sup>124</sup> Solomon & Eggen, *White House Backed U.S. Attorney Firings*, Washington Post, Mar. 3, 2007; Johnston, Lipton & Yardley, *A New Mystery to Prosecutors: Their Lost Jobs*, N.Y. Times, Mar. 4, 2007. See also OAG 1235-37, DAG 2520-22.

<sup>125</sup> OAG 1484.

<sup>126</sup> See Moschella, March 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 12, 14 (stating that "It was a process starting [-] in October" and that the Department had sent its proposal to the White House to "let them know" and sign off).

<sup>127</sup> McNulty April 27, 2007, Interview 62.

to members of the Senate Judiciary Committee in early February 2007, and that Mr. McNulty directed her to omit that reference from the materials she was drafting for him to use.<sup>128</sup>

### 3. Potentially Inaccurate Statements by Former Chief of Staff to the Attorney General Kyle Sampson

Mr. Sampson has made a number of statements to Congress that may have been inaccurate. One such statement appears to have concealed the forced resignation of U.S. Attorney Todd Graves, which was not confirmed by the Department as a forced (as opposed to voluntary) resignation until May 2007. On January 18, 2007, Kyle Sampson emailed the Senate Judiciary Committee's Chief Counsel that "last year, eight USAs asked to resign" and further assured him, "per my prior reps to you, the number of USAs asked to resign in the last year won't change: eight."<sup>129</sup> Such misstatements hampered the Committee's investigation by concealing Mr. Graves' connection to the firing process while many hearings and interviews on the matter were conducted, and caused the Committee to expend substantial resources trying to learn which U.S. Attorneys had been forced to resign by the Department and which had not.<sup>130</sup>

Mr. Sampson also led the drafting of a letter sent by Richard Hertling on February 23, 2007, to several U.S. Senators that inaccurately stated that "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin," a letter that the Department subsequently acknowledged was in part "contradicted by Department documents."<sup>131</sup> Mr. Sampson's knowledge of the inaccuracy of his statement regarding Mr. Rove is shown by his prior email stating "getting [Mr. Griffin] appointed was important to Harriet, Karl, etc."<sup>132</sup> Mr. Sampson's effort to explain this contradiction to the Senate Judiciary Committee by claiming that he had merely assumed that the Griffin appointment was important to Mr. Rove, and had not truly "known" that fact, is hard to credit. White House information, and particularly documents of Mr. Rove, would be critical in determining whether Mr. Sampson's statements on this issue were truthful.

Mr. Sampson's testimony regarding the reasons for the firings and the development and maintenance of the firing list may itself prove to have been false or incomplete. As described below, many of the reasons offered by Mr. Sampson for the removal of these U.S. Attorneys do

<sup>128</sup> Goodling May 23, 2007, H. Comm. on the Judiciary, Prepared Remarks at 2-3. Indeed, before the Committee, Monica Goodling directly accused the Deputy Attorney General of giving inaccurate testimony in four different respects. *Id.* at 1-2.

<sup>129</sup> OAG 1805-06.

<sup>130</sup> The Attorney General's prepared testimony to the House Judiciary Committee in May 2007 also suggested that only eight U.S. Attorneys had been fired, referencing "the decision to request the resignations of eight (of the 93) U.S. Attorneys," although there appears to be no fair basis for excluding Mr. Graves from the discussion of these issues other than the fact that the Committee had not learned at that time that Mr. Graves' resignation had been forced. *See* Alberto Gonzales May 10, 2007, H. Comm. on the Judiciary, Prepared Testimony at 2.

<sup>131</sup> Letter from Richard Hertling to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Mar. 28, 2007.

<sup>132</sup> OAG 127.

not appear to hold up to scrutiny.<sup>133</sup> And Mr. Sampson's inability to remember many important details of the process, including critical recent details such as who suggested that David Iglesias be placed on the firing list just months prior to Mr. Sampson's testimony on the subject, is particularly troubling.<sup>134</sup> Finally, the Committee has some concern about the email described above, transmitted to Mr. Moschella as he was preparing to testify before this Committee, in which Mr. Sampson appeared to validate an inaccurate version of events.

#### 4. Potentially Inaccurate Statements and Obstruction of Justice by the Former Chief of Staff to the Deputy Attorney General Mike Elston

The Committee has substantial concerns about calls placed by Mike Elston, former Chief of Staff to the Deputy Attorney General, to three of the fired U.S. Attorneys in January and March 2007. All three of the U.S. Attorneys have told the Committee that they viewed those calls as threatening. John McKay wrote that "I greatly resented what I felt Mr. Elston was trying to do: buy my silence by promising that the Attorney General would not demean me in his Senate testimony."<sup>135</sup> Mr. McKay also stated that the call seemed "sinister" and that he believed Mr. Elston was "prepared to threaten [him] further" if he did not stay quiet.<sup>136</sup> Paul Charlton wrote that "In that conversation I believe that Elston was offering me a quid pro quo agreement: my silence in exchange for the Attorney General's."<sup>137</sup> Bud Cummins wrote that "[Elston] essentially said that if the controversy continued, then some of the USA's would have to be 'thrown under the bus.'<sup>138</sup> Mr. Elston has denied any effort to intimidate these witnesses,<sup>139</sup> but has not adequately explained how three experienced federal prosecutors all misinterpreted their separate discussions with him in such similar ways.

In her on-the-record interview, sitting U.S. Attorney for the Western District of Pennsylvania Mary Beth Buchanan accused Mike Elston of lying to her about how he generated a group of names as possible candidates for replacement in an email Mr. Elston sent to Kyle Sampson on November 1.<sup>140</sup> Mr. Elston offered the same allegedly untrue explanation for this email to the Committee and the public that he provided to Ms. Buchanan – that he collected the listed names after talking to various Department officials.<sup>141</sup> Ms. Buchanan, however, asserted at her interview that Mr. Elston made up this list of names himself and, in particular, that she was

<sup>133</sup> See Section I.D.1. and I.D.2. below.

<sup>134</sup> Sampson, Apr. 15, 2007, Interview at 143.

<sup>135</sup> John McKay's Response to Questions from Subcommittee Chair Linda Sánchez at 2 (on file with the H. Comm. on the Judiciary).

<sup>136</sup> *Id.*

<sup>137</sup> Paul Charlton's Response to Questions from Subcommittee Chair Linda Sánchez at 2 (on file with the H. Comm. on the Judiciary).

<sup>138</sup> Bud Cummins's Response to Questions from Subcommittee Chair Linda Sánchez at 4 (on file with the H. Comm. on the Judiciary).

<sup>139</sup> Elston, Mar. 30, 2007, Interview at 141-42, 191-96, 201-02.

<sup>140</sup> Buchanan, June 15, 2007, Interview at 121-22. See also OAG 039; Ward, *Buchanan naming 'out of context'*, Pittsburgh Post Gazette, May 18, 2007.

<sup>141</sup> Elston, Mar. 30, 2007, Interview at 37, 64-65; Ward, *Buchanan naming 'out of context'*, Pittsburgh Post Gazette, May 18, 2007.

included in the list because Mr. Elston had a colleague who wanted to replace Ms. Buchanan as U.S. Attorney for the Western District of Pennsylvania.<sup>142</sup> The extent to which this investigation has included direct accusations by senior Department personnel that other Department officials have made untrue statements is highly disturbing and requires further investigation.

### C. Civil Service Requirements and the Presidential Records Act May Have Been Violated

The Committee's investigation into the U.S. Attorney firings and related matters has indicated that, under the current Administration, the Department of Justice has been deeply politicized.<sup>143</sup> Kyle Sampson's March 2005 draft of the firing list, for example, specifically ranked U.S. Attorneys based on their "loyalty to the President and the Attorney General."<sup>144</sup> Multiple other Department documents stress the importance of loyalty.<sup>145</sup> And John McKay has described a troubling address given by then Attorney General Gonzales in which Mr. Gonzales apparently told an assembly of U.S. Attorneys that "I work for the White House, you work for the White House," remarks that Mr. McKay and other attendees found inconsistent with traditional notions of prosecutorial independence.<sup>146</sup> The depth of the problem is plainly shown by the remarkable public comments of a twenty-five year Department veteran: "I can honestly say that I have never been as ashamed of the department and government that I serve as I am at this time. The public record now plainly demonstrates that both the DOJ and the government as a whole have been thoroughly politicized in a manner that is inappropriate, unethical and indeed

<sup>142</sup> Buchanan, June 15, 2007, Interview at 121-22, 125-26.

<sup>143</sup> Apparently, the problem extends beyond the confines of the Justice Department, with recent reports confirming that detailed political briefings have been given by White House officials to members of the General Services Administration, to State Department officials, including sitting Ambassadors, to members of the U.S. Agency for International Development, and even at the Peace Corps. Babbington, *Senators Challenge White House Briefings*, Associated Press, July 24, 2007. The Office of Special Counsel recently concluded that GSA head Lurita Doan violated the Hatch Act in comments made at a briefing given to her agency by Scott Jennings, and that she made unsubstantiated and possibly witness-intimidating comments during the course of the OSC's investigation. See O'Harrow, Jr. & Higham, *GSA Chief Violated Hatch Act, Special Counsel's Report Alleges*, Washington Post, May 24, 2007.

<sup>144</sup> OAG 005.

<sup>145</sup> See OAG 180 (Kyle Sampson email describing favored U.S. Attorneys as "loyal Bushies"). Another example would be a memorandum from Kyle Sampson to Attorney General Ashcroft's Chief of Staff recommending a particular candidate be appointed to chair the Attorney General's Advisory Committee in part because that person was "loyal to the Attorney General." See OAG 147-48. Similarly, in June 2006, Monica Goodling sent an email asking U.S. Attorneys to recommend individuals who might wish to serve in Main Justice leadership positions, stating that she was seeking candidates "who [are] incredibly loyal." See OAG 567-68. And even after his firing, Kevin Ryan took pains to assure Department leadership that he remained a "company man." See OAG 896. Other documents show Department attention to Federalist Society membership as an apparent consideration in promotion. See OAG 203-04 (email from then U.S. Attorney Debra Yang describing a candidate for a federal position: "I think he's a comer. Got a great background, including military service and good looking family, federalist etc."); see also OAG 1152-54 (chart prepared by Monica Goodling listing U.S. Attorneys and noting membership in the Federalist Society).

<sup>146</sup> Bowermaster, *Charges may result from firings, say two former U.S. attorneys*, Seattle Times, May 9, 2007.

unlawful.”<sup>147</sup> Donald Ayer, who served as Deputy Attorney General under the first President Bush, sees the problem in a similar light with respect to the U.S. Attorney firings and other issues: “And the really terrible thing that’s gone on in the last few years is that Attorney General Gonzales apparently was sent to the department to continue to pursue a mission that for some reason President Bush wanted pursued, which was a mission to collapse the independence of the department.”<sup>148</sup>

It is against this backdrop that the Congress must consider the testimony of White House liaison Monica Goodling that she “crossed the line” in considering inappropriate political factors in hiring career prosecutors and immigration judges, and in selecting individuals to be “detailed” into Department leadership offices from other agencies or other positions within the Department.<sup>149</sup> That testimony was echoed by Bradley Schlozman’s acknowledgment to the Senate Judiciary Committee that he probably had boasted about hiring Republicans into the Department, statements that reinforced troubling allegations regarding Mr. Schlozman’s political activities that had surfaced in the press.<sup>150</sup>

Ms. Goodling acknowledged that her politically-based hiring activities had violated civil service requirements. And while she downplayed her responsibilities as White House Liaison in her testimony to the Committee,<sup>151</sup> it is clear that further access to information on these issues is critical to assessing and remedying the scope of such violations, including information regarding whether Ms. Goodling’s White House contacts had any knowledge of, or role in, her activities.

Committee efforts to obtain information regarding the U.S. Attorney investigation have also contributed to the exposure of some White House officials’ apparently widespread use of non-governmental email accounts to conduct government business, in possible violation of the White House’s own policies, and the White House’s failure to preserve some such emails as required by the Presidential Records Act.<sup>152</sup> A number of documents obtained in response to Committee document requests and its subpoena to the Department of Justice demonstrate such possible misuse of private email accounts in connection with the U.S. Attorney firings or related

<sup>147</sup> Koppel, *Bush justice is a national disgrace*, Denver Post, July 5, 2007.

<sup>148</sup> Inskeep, *Integrity Needed in DOJ Leadership*, NPR Morning Edition, Aug. 28, 2007.

<sup>149</sup> Goodling, May 23, 2007, H. Comm. on the Judiciary, Prepared Remarks at 6-7; Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 56-58, 73-74, 80-82.

<sup>150</sup> Schlozman June 5, 2007, S. Comm. on the Judiciary, Testimony at 17; Kiel, *DoJ Lawyer: Controversial Prosecutor Played Politics at Department*, TPM Muckraker, Apr. 24, 2007, available at <http://www.tpmuckraker.com/archives/003081.php>.

<sup>151</sup> Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 53-54.

<sup>152</sup> The Committee on Oversight and Government Reform has conducted a detailed investigation of this important issue and released an interim report documenting potential violations of law. *See Investigation of Possible Violations of the Presidential Records Act*, Interim Report by the Majority Staff of the House Committee on Oversight and Government Reform, 110th Cong. (June 2007).



matters.<sup>153</sup> Discovery from the White House is needed to establish the extent and impact of any such misuse of private email accounts and related violations of law.

#### **D. Serious Questions About the U.S. Attorney Firings Remain Unanswered**

Although the Committee has learned a great deal about the firings, the inability or unwillingness of Justice Department witnesses to testify about many key issues has materially hampered the Committee's factfinding effort. Accordingly, despite vigorous efforts, important questions about the firings remain unanswered, such as why this process was undertaken in the first place, who in the Administration selected most of these U.S. Attorneys for firing and why, and what role White House personnel played. Many of the Administration's initial statements on these issues have turned out to be inaccurate. With non-White House sources of information largely exhausted, only fair access to White House documents and testimony can shed further light on these unprecedented events.

##### **1. Why did the Administration Launch the Effort to Replace U.S. Attorneys?**

It is now well established that, in the opening days of President Bush's second term, then Senior Presidential Advisor Karl Rove raised the idea with officials in the White House Counsel's office of replacing some or all U.S. Attorneys.<sup>154</sup> At this point, however, it is not known why Mr. Rove was interested in this issue, although he was at that time under investigation by a sitting U.S. Attorney and had testified three times before a federal grand jury in the matter.<sup>155</sup>

Mr. Rove's request was forwarded to Kyle Sampson, then a deputy Chief of Staff to the Attorney General, who responded that most U.S. Attorneys "are doing a great job, are loyal Bushies, etc." and that even "piecemeal" replacement of U.S. Attorneys would cause political upheaval.<sup>156</sup> "That said," Mr. Sampson wrote, "if Karl thinks there would be political will to do it, then so do I."<sup>157</sup> Newly installed White House Counsel Harriet Miers apparently took up

<sup>153</sup> See, e.g., DAG 2458-59 (Karl Rove using a Republican National Committee email account to receive an email from Scott Jennings' White House account regarding the contacts between Senator Domenici and David Iglesias); OAG 1751 (Karl Rove using an RNC email account to receive recommendations for the New Mexico U.S. Attorney position, as well as unspecified "thanks for everything . . ." from Senator Domenici's Chief of Staff); OAG 572 (Scott Jennings using an RNC email account to arrange meetings between New Mexico Republican officials and Administration personnel regarding David Iglesias); OAG 1838 (Jennings using an RNC account to arrange a call with Monica Goodling and Kyle Sampson on the Griffin appointment); OAG 1812 (Sara Taylor using an RNC email account to discuss the Administration's response to Bud Cummins with Kyle Sampson); OAG 1814 (Sara Taylor using an RNC email account to discuss the Administration's response to Bud Cummins with Kyle Sampson).

<sup>154</sup> OAG 180; Greenburg, *E-Mails Show Rove's Role in U.S. Attorney Firings*, ABC News, Mar. 15, 2007; Shapiro, *Documents Show Justice Ranking US Attorneys*, NPR, Apr. 13, 2007 available at <http://www.npr.org/templates/story/story.php?storyId=9575434>.

<sup>155</sup> Novak, *Rove Testifies in Wilson Leak*, Time, Oct. 15, 2004; VandeHei, *Rove Testifies 5th Time On Leak*, Washington Post, Apr. 27, 2007.

<sup>156</sup> OAG 180.

<sup>157</sup> *Id.*

Mr. Rove's idea, and over the next two years received repeated drafts of the firing list from Mr. Sampson.<sup>158</sup> As with Mr. Rove, at this point the Committee has learned very little as to why Ms. Miers believed that an effort to replace sitting U.S. Attorneys should be launched.

The Justice Department has claimed that the purpose of this effort was to identify and replace weak-performing U.S. Attorneys, but the Committee's investigation has established that was clearly not the case. Most of the fired U.S. Attorneys had outstanding performance evaluations,<sup>159</sup> and witnesses in the investigation have vigorously praised many of them as top prosecutors.<sup>160</sup> The reaction to the firings in the U.S. Attorneys' home districts was generally one of surprise and dismay, with the comments of then Special Agent Dzwilewski described above being just one of many examples.<sup>161</sup> The Justice Department has sought to minimize the significance of its written performance evaluations but, with very few exceptions, the Department has offered virtually no other credible evidence suggesting that the fired U.S. Attorneys were such poor managers or weak prosecutors that removal was warranted on performance grounds, however flexibly the term "performance" is understood.

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<sup>158</sup> ASG 006; Mercer, Apr. 11, 2007, Interview at 85-87; OAG 005-008; OAG 20-22; OAG 34-35; DAG 14-17; OAG 45-48.

<sup>159</sup> See Final Evaluation Reports (EARS Reports) produced by the Department of Justice on Mar. 1, 2007. For example, John McKay's most recent EARS report states "United States Attorney McKay was an effective, well-regarded leader, and capable leader of the USAO and the District's law enforcement community." March 13-17, 2006 Final Evaluation Report, Western District of Washington. Bud Cummins was described as "very competent and highly regarded by the federal judiciary, law enforcement, and the civil client agencies." January 23-27, 2006, Final Evaluation Report, Eastern District of Arkansas. And the most recent evaluation of the District of Nevada stated "United States Attorney Bogden was highly regarded by the federal judiciary, the law enforcement and civil client agencies, and the staff of the USAO. He was a capable leader of the USAO . . . and had established an excellent management team and had established appropriate USAO priority programs that support Department initiatives." March 3-7, 2003, Final Evaluation Report, District of Nevada.

<sup>160</sup> For example, Mr. Comey stated "Paul Charlton was a very experienced -- still is -- very smart, very honest and able person. And I respected him a great deal." He also described Mr. Charlton as "one of the best." Mr. Comey stated that Dan Bogden was "straight as a Nevada highway, and a fired-up guy." former Deputy Attorney General Jim Comey Mr. Comey testified that David Iglesias was "a very effective U.S. attorney . . . very straight, very able." And Mr. Comey also offered strong praise of John McKay saying McKay was "one of [his] favorites" and a passionate, energetic advocate for important Department initiatives that both Mr. Comey and Mr. McKay supported, and that his overall view of Mr. McKay was "very favorable." See Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 20-22, 27-32. Other witnesses praised these U.S. Attorneys as well, with Mary Beth Buchanan, for example, stating that "I thought John McKay was a very good U.S. Attorney." Buchanan, June 15, 2007, Interview at 73.

<sup>161</sup> See, e.g., Werner, Associated Press *Ensign histers DOJ over Bogden firing*, San Diego Union-Tribune, Mar. 13, 2007 ("Everyone in Nevada thought Dan had done a superb job," Ensign said. "I believe a very good man was wronged and a process was flawed."); Senator Jon Kyl, Letter to the Editor of the Arizona Republic, Mar. 18, 2007 ("I was not 'fine' with the decision made by the attorney general to dismiss Charlton, despite the suggestion in an e-mail from a Justice Department staffer. In fact, when I was notified by the attorney general, I asked for a meeting to discuss his decision. At the conclusion of the meeting I asked that he reconsider his decision and allow Charlton to stay on. Charlton decided to leave the department before the attorney general acted on my request. Paul Charlton is an excellent lawyer and was a superb U.S. attorney. His reputation as such remains intact, which is more than I can say for officials at Justice."); Gomez, May 8, 2007, Interview at 12.

Other evidence strongly indicates that this was not a performance-based management review. One witness acknowledged that, if she had been asked to identify weak performers, she would have gathered information and made a responsible comparison of U.S. Attorney performance across the different federal districts.<sup>162</sup> But that was not done here. When information supposedly was identified that raised questions about U.S. Attorney performance, virtually no follow-up work was done, individuals with knowledge about the alleged performance issues were not consulted, and the fired U.S. Attorneys were not given any meaningful opportunity to respond to the alleged defects in their performance.<sup>163</sup> That informal and superficial approach stands in stark contrast to other cases during this Administration where U.S. Attorneys truly were asked to resign for poor performance or misconduct; in those cases, a careful and fully documented process was followed, and the U.S. Attorneys of concern were given ample notice of the issues and a fair opportunity to respond.<sup>164</sup>

Most tellingly, the Committee's investigation has established that Mr. Sampson essentially ignored the views of the two Deputy Attorneys General serving during the relevant time, Paul McNulty and Jim Comey, and also ignored the views of the Department's seniormost career official, David Margolis.<sup>165</sup> This is particularly significant because, as former Attorney General Gonzales acknowledged, it is the Deputy's office that directly supervises U.S. Attorneys and that would be in the best position to evaluate their work, and Kyle Sampson repeatedly claimed in his Senate testimony that Mr. Margolis had contributed to the process.<sup>166</sup>

For example, Mr. Comey testified that he identified a group of weak-performing U.S. Attorneys in response to a question from Kyle Sampson in February 2005.<sup>167</sup> However, of all the U.S. Attorneys Mr. Comey identified as problematic, only Kevin Ryan was ultimately replaced,<sup>168</sup> and Mr. Ryan was not added to the firing list until the very final days of the process, after a federal judge in California started raising substantial concerns.<sup>169</sup> In fact, just a few weeks after Mr. Comey identified Mr. Ryan as a weak performer, Mr. Sampson instead marked

<sup>162</sup> Buchanan, June 15, 2007, Interview at 60-61.

<sup>163</sup> Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony at 60-61.

<sup>164</sup> Margolis, May 1, 2007, Interview at 26-30; Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 35-37.

<sup>165</sup> A proposed amendment to the Contempt Report would have added a series of quotations from Department witnesses that they were not aware that any of the firings were intended to influence pending cases or of any suggestion that U.S. Attorneys should consider the political affiliation of a potential defendant in deciding whether or not to bring charges. See Proposed Amendment to the Report, Offered by Mr. Cannon of Utah, at 1-3 (containing quotations from David Margolis, Mary Beth Buchanan, and Kyle Sampson). Mr. Margolis and Ms. Buchanan made clear, however, that their involvement in the firings was limited, and their lack of knowledge is not probative. And the self-serving assurances of Kyle Sampson, who has already provided questionable testimony about many aspects of the process, do not dispel the concerns described above.

<sup>166</sup> Alberto Gonzales, May 15, 2007 Remarks at the National Press Club at 12, 14; Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony Part 1 at 5, Part 2 at 46, 47, 57, 60.

<sup>167</sup> Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 10.

<sup>168</sup> Comey, May 3, 2007, H. Comm. on the Judiciary, Testimony at 10.

<sup>169</sup> OAG 44.

Mr. Ryan as a “strong U.S. Attorney who [has] produced, managed well, and exhibited loyalty to the President and Attorney General” on a draft list he sent to Harriet Miers.<sup>170</sup> Obviously, Mr. Comey’s views were ignored.

Mr. Margolis, who Kyle Sampson repeatedly told the Senate Judiciary Committee provided input to this process, was similarly ignored. Mr. Margolis told Committee investigators that, when he was consulted by Kyle Sampson, he identified two individuals that he strongly believed should be replaced, and further identified a larger group of U.S. Attorneys that he felt less strongly about but that should also be considered for replacement.<sup>171</sup> One of the two worst performing U.S. Attorneys identified by Mr. Margolis was Kevin Ryan, who was nevertheless subsequently praised by Mr. Sampson as a strong U.S. Attorney and who was not added to the list until the last days of the process.<sup>172</sup> The other weak U.S. Attorney was apparently not considered for firing and serves to this day as a U.S. Attorney.<sup>173</sup> Of the other U.S. Attorneys identified as potential poor performers by Mr. Margolis, only one was ultimately replaced – Margaret Chiara.<sup>174</sup> Like that of Mr. Comey, Mr. Margolis’s advice was disregarded in this process. In addition, although some have suggested that Mr. Margolis blessed this process, his testimony shows that he did not – he was deeply troubled by what happened here, and blamed himself for being overly deferential to his political superiors.<sup>175</sup>

Finally, the evidence shows that then Deputy Attorney General Paul McNulty was also largely cut out of the process. Mr. McNulty testified that he was not consulted on or involved in the development of the firing list until the final days of the process, when he was presented with a near-complete set of U.S. Attorneys to be fired.<sup>176</sup> Although he was given an opportunity to raise objections to the names on this list, Mr. McNulty also understood that he was to defer to the political personnel and individuals running the process in the Attorney General’s office and the White House and, indeed, when Mr. McNulty twice raised concerns about the proposal to fire U.S. Attorney Dan Bogden, he was talked down and Mr. Bogden remained on the list.<sup>177</sup>

The two heads of the Executive Office of United States Attorneys during the relevant time also did not believe that most of these U.S. Attorneys were poor performers who deserved to be replaced. Former EOUSA head Mary Beth Buchanan testified that “certainly, based upon the information I had, I wouldn’t have suggested – I wouldn’t have fired any of these people.”<sup>178</sup> Her successor Mike Battle similarly told the Committee that Kevin Ryan and Carol Lam were the only two fired U.S. Attorneys that he was aware had any issues within the Department, and that

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<sup>170</sup> OAG 005-008.

<sup>171</sup> Margolis, May 1, 2007 Interview at 39-45, 47, 51, 59.

<sup>172</sup> *Id.* at 42-43.

<sup>173</sup> *Id.* at 45.

<sup>174</sup> *Id.* at 43-45.

<sup>175</sup> Margolis, May 1, 2007, Interview at 72-74.

<sup>176</sup> McNulty, Apr. 27, 2007, Interview at 14-16, 23-24, 200-02.

<sup>177</sup> McNulty, Apr. 27, 2007, Interview at 19-20, 42-47.

<sup>178</sup> Buchanan, June 15, 2007, Interview at 60.

his general reaction to the firing list was that “there were names on there that, if they had problems, I wasn’t aware of them.”<sup>179</sup>

Based on the information available at this time, the Administration’s assertion that this was an effort to identify and replace poorly performing U.S. Attorneys appears to be inaccurate.<sup>180</sup>

## 2. Who Recommended that these U.S. Attorneys Be Fired and Why?

The Judiciary Committee has made a vigorous effort to learn who recommended that these particular U.S. Attorneys be forced to resign their posts in 2006 and why. But what should have been a relatively simple question has proven surprisingly difficult to answer. In large part, this is because Kyle Sampson has been unable or unwilling to remember who suggested that virtually any of these U.S. Attorneys be placed on the firing list. Adding to the difficulty, the Administration has provided what appear to be inaccurate or misleading “reasons” for the placement of most of the U.S. Attorneys on the firing list, many of which apparently emerged after a “brainstorming” session conducted months after the firings occurred.<sup>181</sup> In January 2007, the Department’s efforts to obscure the reasons for the firings were already underway. Regarding a planned meeting with counsel to a United States Senator, a Department official wrote to Mr. Sampson: “Phone call easier and may be easier to get out of (i.e. not trapped up there) when she doesn’t get the info she wants (i.e. why they were fired).”<sup>182</sup> These comments raise similar concerns to ones made by the Department of Justice’s chief press officer writing to White House officials Dan Bartlett and Cathie Martin that “We are trying to muddy the coverage up a bit.”<sup>183</sup>

Many Department witnesses, including former Attorney General Gonzales himself, have described why they may have signed off on the firings or not objected to the presence of various of the fired U.S. Attorneys on the list, but those witnesses have not known whether their personal reasons actually influenced the decision to target the particular U.S. Attorneys for firing in the first place. At the core of the problem is this: as to most of the U.S. Attorneys forced to resign in 2006, no one at the Justice Department claims responsibility for suggesting that they be replaced.

For example, New Mexico U.S. Attorney David Iglesias was placed on the firing list sometime between October 17, 2006, and November 7, 2006. Kyle Sampson claims not to

<sup>179</sup> Battle, Apr. 12, 2007, Interview at 60, 64.

<sup>180</sup> This judgment is reinforced by what appears to have been a telling slip by former Attorney General Gonzales during his July 24, 2007, appearance before the Senate Judiciary Committee. While struggling to answer the question how many U.S. Attorneys he had fired, Mr. Gonzales acknowledged the nine fired U.S. Attorneys that have been the focus of this investigation and then stated: “I’m not aware, sitting here today, of any other U.S. attorney who was asked to leave, except there were some instances where people were asked to leave, quite frankly, because there was legitimate cause.” Gonzales, July 24, 2007, S. Comm. on the Judiciary, Hearing at 29 (emphasis added). Such testimony, whether intentional or not, indicates that Mr. Gonzales perceives a difference between the nine fired U.S. Attorneys and others who may have been asked to resign “because there was legitimate cause.”

<sup>181</sup> Margolis, May 1, 2007, Interview at 256-58.

<sup>182</sup> OAG 1121.

<sup>183</sup> OPA 42-44

remember who suggested that Mr. Iglesias be replaced.<sup>184</sup> When asked why Mr. Iglesias was fired, the Department first stated that he had delegated too much authority to his First Assistant and that he was an absentee landlord.<sup>185</sup> But David Margolis has explained that the issue of Mr. Iglesias being a so-called “absentee landlord” arose after Iglesias already had been fired when, during an interview to be considered to replace Iglesias, the First Assistant explained that he had been delegated substantial authority and so was well-prepared to succeed Mr. Iglesias.<sup>186</sup> Furthermore, the First Assistant told Committee investigators that Mr. Iglesias did not *overdelegate* and was an excellent U.S. Attorney.<sup>187</sup> David Iglesias was not fired for being an absentee landlord.

Eventually, after Mr. Iglesias came forward and stated that he had been contacted about a pending investigation by Senator Pete Domenici and Representative Heather Wilson, the Department offered a new story – that Mr. Gonzales and Mr. McNulty had received complaints about Mr. Iglesias’ performance on vote fraud, corruption, and other matters from Senator Domenici.<sup>188</sup> But, Department records and witness testimony strongly indicate that, despite the former Attorney General’s testimony to the contrary, the calls he received from the Senator – which occurred in late 2005 and early 2006 – do not appear to have involved complaints about Mr. Iglesias. Instead, those calls seem to have instead addressed concerns raised by Senator Domenici regarding the Department’s provision of resources to Mr. Iglesias’ district, and would not have contributed to Mr. Iglesias being placed on the firing list.<sup>189</sup> By contrast, an October 2006 call from the Senator to Mr. McNulty, which was closely contemporaneous with the Senator’s call to David Iglesias about a pending investigation, appears more likely to have relayed complaints about Mr. Iglesias, and may have had some bearing on the decision to fire him.<sup>190</sup> That call, however, was intentionally omitted from briefings and testimony to Congress explaining the firings.<sup>191</sup>

The case of John McKay is equally troubling. The Administration has now floated at least five different reasons for the placement of John McKay on the firing list. But those reasons appear pretextual. The Administration initially claimed that Mr. McKay was overly aggressive in a meeting on an information sharing program with then Deputy Attorney General McNulty, and that he arranged the sending of a letter advocating for that program that put the Deputy in an

<sup>184</sup> Sampson, Apr. 15, 2007, Interview at 143.

<sup>185</sup> DAG 222; Moschella, Mar. 6, 2007, S. Comm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8-9; Sampson, April 18, 2007, Interview at 29-30.

<sup>186</sup> Margolis, May 1, 2007, Interview at 127-28, 205.

<sup>187</sup> Gomez, June 8, 2007, Interview at 9-12.

<sup>188</sup> Gonzales, May 10, 2007, H. Comm. on the Judiciary, Testimony at 10, 73, 100-04; Gonzales, April 19, 2007, S. Comm. on the Judiciary, Testimony at 13.

<sup>189</sup> Moschella, Apr. 24, 2007, Interview at 127-143; *Remarks of Attorney General Gonzales Announcing the Addition of 25 Federal Prosecutors to U.S./Mexico Border Districts*, U.S. Newswire, July 31, 2006; DAG 2200-01, 2204-2207, 2370-74; OAG 65-103, 184-85, 196-98, 918-20, 940-42, 1817-18, 1226, 1228, 1230; ASG 009-1.

<sup>190</sup> DAG 2462; McNulty, Apr. 27, 2007, Interview at 53-54, 62.

<sup>191</sup> Goodling May 23, 2007, Written Statement; McNulty, June 21, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 39-40.

uncomfortable position.<sup>192</sup> Leaving aside the question whether a responsible Department of Justice would fire a well-performing U.S. Attorney for such apparently frivolous reasons, those events did not occur until late summer 2006, but John McKay was on Mr. Sampson's firing list as early as March 2005.<sup>193</sup> At one point, the Administration claimed that Mr. McKay's office was not sufficiently aggressive in appealing certain criminal sentences that were below the Guidelines range, but that was an issue based on a January 2005 Supreme Court decision and there would not have been time for follow up litigation and collection of sentencing data for that controversy to have contributed to the decision to target McKay for firing two months later.<sup>194</sup>

When further pressed for the reason why Mr. McKay might have been targeted for firing at that time, the Administration offered reasons that appear even more unlikely. One Department witness commented that Mr. McKay had asked some difficult questions of Attorney General Ashcroft in a public setting that may have put Administration officials "on the spot," which had occurred before McKay's name was placed on the March 2005 firing list.<sup>195</sup> Kyle Sampson testified that he may have heard complaints about Mr. McKay pressing too aggressively for Department action in the aftermath of the murder of one of McKay's assistant U.S. Attorneys in the time period before the March 2005 list.<sup>196</sup> These would not seem to be credible reasons for the firing of an effective U.S. Attorney such as John McKay. As suggested above, the available evidence suggests that improper political factors played an important role in his firing.

Reasons supplied as to a number of the other firings appear equally flawed. The only reason offered so far to support the Administration's firing of Todd Graves is that he was at one point under investigation by the Department's Inspector General; but Mr. Graves testified that he initiated that investigation himself, after an employee raised concerns about Mr. Graves' presence at a fundraiser with the Vice President, and further testified that he was cleared of any improper conduct.<sup>197</sup> It is hard to believe that Mr. Graves was fired for that reason. As to Bud Cummins, the Administration has not even been able to decide whether he was forced out for performance reasons or simply to make room for Karl Rove's former aide Tim Griffin to serve as U.S. Attorney.<sup>198</sup> At times, the Department has claimed that it was proper to bring in Mr. Griffin

<sup>192</sup> Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8; Sampson, Apr. 15, 2007, Interview at 144-45.

<sup>193</sup> OAG 005 - OAGN 008; DAG 126-27, 137-38, 144-45, 510-23, 2167-68.

<sup>194</sup> Sampson, Apr. 15, 2007, Interview at 145; *United States v. Booker*, 543 U.S. 220 (2005) (issued Jan. 12, 2005).

<sup>195</sup> The witness did not suggest that those questions actually contributed to the decision to fire Mr. McKay, but described them as the only negative information she had about Mr. McKay notwithstanding her overall high regard for him as a prosecutor. See Buchanan, June 15, 2007, Interview at 69-71.

<sup>196</sup> Sampson, Apr. 15, 2007, Interview at 145. Indeed, former Deputy Attorney General Comey testified that Mr. McKay's actions regarding that horrifying murder were perfectly appropriate. See Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 20-21.

<sup>197</sup> Graves, June 5, 2007, S. Comm. on the Judiciary, Hearing at 62-63; Mehaffey, *US Attorney Todd Graves Report Disputes Monica Goodling Testimony*, Kansas City Daily Record, May 28, 2007. Goodling, May 23, 2007, H. Comm. on the Judiciary, Hearing at 76; Graves, June 5, 2007, S. Comm. on the Judiciary, Hearing at 62-63.

<sup>198</sup> Compare McNulty, Feb. 6, 2007, S. Comm. on the Judiciary, Testimony at 22-23 (Cummins forced out merely so Griffin could serve) with OAG 005 - OAGN 008 (listing Bud Cummins as one of the "weak U.S. Attorneys who have been ineffectual managers and prosecutors").

because, before they did so, the press had already reported that Mr. Cummins planned to move on.<sup>199</sup> But Mr. Cummins explained to this Committee that those reports were based on comments he had made after he had been directed to resign in order to smooth his and Mr. Griffin's transition in an effort to be discreet about the circumstances.<sup>200</sup>

The Administration's suggestion that Paul Charlton, described by former Deputy Attorney General Jim Comey as "a very strong U.S. attorney, one of the best,"<sup>201</sup> was fired because he pressed too hard for reconsideration of a death penalty decision, or because he moved too quickly toward a policy for recording criminal interrogations, also appears implausible.<sup>202</sup> The taping policy was never in fact implemented by Mr. Charlton and had substantial support within the Justice Department.<sup>203</sup> And, as Mr. Comey explained, Mr. Charlton had previously had success seeking reconsideration of Main Justice decisions on death penalty matters.<sup>204</sup> Does the Department really believe that U.S. Attorneys should passively accept any and all determinations on a subject of such importance? Furthermore, the suggestion that Mr. Charlton was fired for this reason seems particularly difficult to square with the testimony on July 24, 2007, by then-Attorney General that he had no recollection of the case.<sup>205</sup> If the case was so insignificant that Mr. Gonzales has no recollection of it just one year later, it does not seem very likely that it contributed to the Department's decision to fire Mr. Charlton.

Furthermore, those issues regarding Mr. Charlton arose after he was first targeted as a potential candidate for removal. And other reasons offered by Department personnel for the firing of Mr. Charlton, such as the notion that Monica Goodling suggested he be removed

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<sup>199</sup> Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8. Ms. Taylor also reportedly testified that "To the best of my knowledge, Mr. Cummins had been considering leaving. Mr. Cummins had announced in the press that he was leaving." See Koppelman, *Cummins: My Professional Reputation Has Already Been Slandered*, July 11, 2007, available at [http://www.salon.com/politics/war\\_room/2007/07/11/cummins/index.html](http://www.salon.com/politics/war_room/2007/07/11/cummins/index.html).

<sup>200</sup> Cummins, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 27-28. In a recent interview with Salon, Mr. Cummins further discussed this subject, and noted that he had once mentioned to a local reporter that he might not remain in his position for President Bush's entire second term: "Sometime in 2005, Cummins did tell a reporter for the Arkansas Times, a local newswweekly, that he was not likely to stay through the entirety of Bush's second term. (Salon could not determine the exact date of that article, as it did not appear in searches on Google or Lexis-Nexis and no one answered the phone at the Arkansas Times.) But he thinks that article was not seriously considered by those who made the decision to replace him. 'If they're suggesting that, A) they monitor our free weekly tabloid in Arkansas to keep tabs on what their U.S. attorneys' plans are, and B) that they held on to that clipping for a year and a half and remembered it in June of 2006 without even picking up the phone and talking to me, it's kind of silly.'" Koppelman, *Cummins: My Professional Reputation Has Already Been Slandered*, July 11, 2007, available at [http://www.salon.com/politics/war\\_room/2007/07/11/cummins/index.html](http://www.salon.com/politics/war_room/2007/07/11/cummins/index.html).

<sup>201</sup> Comey, May 3, 2007 Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 27.

<sup>202</sup> Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10.

<sup>203</sup> DAG 1975.

<sup>204</sup> Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 27-28.

<sup>205</sup> Gonzales, July 24, 2007, S. Comm. on the Judiciary, Hearing at 17-18.



because he had not been sufficiently cooperative during a U.S. Attorneys conference held in his district, which required Ms. Goodling to take on extra work managing the conference,<sup>206</sup> appear non-credible on their face.

The Administration has hardly bothered to explain its decision to fire Dan Bogden, telling the Committee that “there was no particular deficiency. There was interest in seeing renewed energy and renewed vigor in that office.”<sup>207</sup> At other times the Administration has referenced a disagreement about an adult obscenity prosecution, but that assertion too has withered under scrutiny.<sup>208</sup>

During the course of this investigation, many possible justifications for these firings have been offered. Some are more persuasive than others; many are unreasonable on their face. Certainly, different U.S. Attorneys may have been suggested for firing by different people for different reasons at different times. In the end, however, the Administration’s inability to credibly explain to the Congress and the American people who suggested that these U.S. Attorneys be fired and why suggests that the true actors and their motives remain concealed.

### 3. What Role Did White House Personnel Play in the Firings and their Aftermath?

Although the Administration has now explicitly stated that the President had “no personal involvement”<sup>209</sup> in the U.S. Attorney firings, beyond that bald assertion it remains unclear exactly what role other White House staff played in identifying U.S. Attorneys to be replaced and in handling the aftermath of the firings. One reason for this uncertainty is the Administration’s strenuous effort to conceal or minimize the role played by White House personnel in the firings. As described above, both former Deputy Attorney General McNulty and his Principal Associate Will Moschella provided incomplete or misleading accounts of the role played by White House personnel in the firings in their early testimony to the House and Senate Judiciary Committees on this matter.

<sup>206</sup> Buchanan, June 15, 2007, Interview at 105-06, 189.

<sup>207</sup> Moschella Mar. 6, 1007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8-10.

<sup>208</sup> As to the obscenity case, the email records show that this issue arose and was being considered after Bogden appeared on draft firing lists, and press reports cast serious doubts on any assertion that Bogden’s hesitation about the case actually contributed to the decision to fire him. For example, according to a knowledgeable law enforcement source, the proposed prosecution “was ‘woefully deficient.’ ... ‘They [meaning Main Justice] didn’t have a target fully identified, they had no assets -- they didn’t even know where the guy was managing his server.’ Porn offenses are difficult to prosecute successfully, since prosecutors must show that the materials have violated local ‘community standards.’ And Bogden is based in Las Vegas. ... Nevertheless, Bogden[’s] office agreed to put together a proposal for pursuing the case, outlining the additional work and resources needed to build it, the official said. The implication that Bogden was refusing to take on a ‘good case’ in that instance, the official said, ‘is totally absurd.’” Follman, *Smearing the U.S. Attorneys*, Salon, Mar. 19, 2007.

<sup>209</sup> Press Background Briefing by [anonymous] Senior Administration Officials on Executive Privilege, June 28, 2007.

The effort to conceal the role played by White House personnel in the firings had other aspects. Monica Goodling testified that Mr. McNulty told her not to attend a confidential briefing for Senate Judiciary Committee members because, given her position as White House liaison, her presence might encourage Senators to ask questions about the White House.<sup>210</sup> Kyle Sampson testified that then Attorney General Gonzales was upset about the contents of that briefing because it brought aspects of the White House role “into the public sphere.”<sup>211</sup> He also described individuals in the White House being equally upset that “that the White House had sort of been brought, you know, in a public way, into this rising controversy.”<sup>212</sup> On February 23, 2007, the Justice Department sent a letter to several Senators on the Tim Griffin appointment, incorrectly stating that Karl Rove did not have any role in the decision to appoint Tim Griffin as interim U.S. Attorney for the Eastern District of Arkansas. That inaccurate letter, which the Department was subsequently forced to disavow,<sup>213</sup> was drafted by Kyle Sampson and apparently approved by Christopher Oprison in the White House Counsel’s office, despite the fact that each had extensive knowledge of the Tim Griffin situation at the time.<sup>214</sup> Mr. Sampson, of course, had previously written that “getting [Mr. Griffin] appointed was important to Harriet, Karl, etc.”<sup>215</sup> And just a week before he signed off on this letter, Mr. Oprison had received an email from Tim Griffin discussing the appointment controversy that also was addressed to Karl Rove, suggesting that Mr. Oprison may have knowingly played a role in giving incorrect information to Congress.<sup>216</sup>

Despite these efforts, the Committee does know that White House personnel played an important role in developing and approving the firing list. Department documents show that the very idea of replacing U.S. Attorneys originated with Karl Rove and was pressed by White House counsel Harriet Miers.<sup>217</sup> Justice Department documents show that multiple drafts of the firing list were presented to Ms. Miers and her deputies by Kyle Sampson over a two year period.<sup>218</sup> Kyle Sampson testified that he attended weekly Judicial Selection Committee meetings, also attended by Ms. Miers and Mr. Rove or one of his aides, where the U.S. Attorney replacement issue was sometimes discussed.<sup>219</sup> In September 2006, just as the firing process was entering its final stage, Kyle Sampson and Monica Goodling are reported to have attended a political briefing led by Karl Rove at the Eisenhower Executive Office Building.<sup>220</sup> White House documents subpoenaed by the Committee, the Administration has acknowledged, discuss “the

<sup>210</sup> Goodling, May 23, 2007, H. Comm. on the Judiciary, Prepared Remarks at 3.

<sup>211</sup> Sampson, Apr. 15, 2007, Interview at 162.

<sup>212</sup> Sampson, July 10, 2007, Interview at 59.

<sup>213</sup> Letter from Richard Hertling to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Subcomm. on Commercial and Admin. Law, Mar. 28, 2007.

<sup>214</sup> OAG 127-29, 971-73, 978-85, 990-1002, 1130-34, 1781-82, 1841, 1850, 1853-59; OLA 03-04, 08-10.

<sup>215</sup> OAG 127-29.

<sup>216</sup> OAG 1753-55.

<sup>217</sup> OAG 180; ASG 001-004.

<sup>218</sup> OAG 20-21; OAG 34-35; DAG 14-17; OAG 45-48.

<sup>219</sup> Sampson, Mar. 29, 2007, S. Comm. Judiciary, Testimony at 8; Sampson, Apr. 15, 2007, Interview at 62.

<sup>220</sup> Letter from Richard Hertling, Principal Deputy Assistant Attorney General, to Henry Waxman, Chairman, H. Comm. on Oversight and Government Reform, June 14, 2007, at 1, 3-4; Eggen & Kane, *Gonzales Now Says Top Aides Got Political Briefings*, Washington Post, Aug. 4, 2007.

wisdom of [the] proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals.”<sup>221</sup>

In addition, as the controversy was unfolding in early March 2007, Justice Department personnel were summoned to a White House meeting to go over the Administration’s position “on all aspects of the US Atty issue including what we are going to say about . . . why the US Attys were asked to resign.”<sup>222</sup> At that meeting, Karl Rove apparently spoke and told the Department officials they needed to “explain what it was that you did and why you did it,”<sup>223</sup> a curious statement from Mr. Rove given the involvement in the firing process of both White House and Department personnel, and one that could be construed as a direction to the Department to continue the effort to downplay the role of White House personnel.

Other information obtained by the Committee refutes Administration statements that the replacement plan was a Department effort that was merely given final approval in the White House. Just this month, Kyle Sampson testified that “in nearly every decision it was a collaborative back and forth” between White House personnel and the Justice Department.<sup>224</sup> One recently produced email shows White House official Sara Taylor explaining why “we” forced Bud Cummins to resign, apparently taking White House ownership of that decision.<sup>225</sup> David Margolis testified that one reason Kevin Ryan may not have been placed on the firing list at the outset of the process was that, despite his poor job performance, he was too politically powerful to be “sold” to the White House for removal.<sup>226</sup>

In the case of David Iglesias, the White House role is perhaps most apparent. The Committee’s investigation has established that several New Mexico Republican operatives had complained to Department personnel and White House officials, including Karl Rove, about Iglesias’ failure to bring a particular vote fraud case that they wanted pursued, and the White House has confirmed that Mr. Rove relayed complaints about Mr. Iglesias to the White House Counsel’s office and to the Justice Department.<sup>227</sup> And similar concerns of Mr. Rove or others may have influenced other aspects of the firing list. It appears, for example, that Mr. Rove viewed and printed information about vote fraud enforcement issues in Milwaukee just weeks before Milwaukee U.S. Attorney Steve Biskupic was placed on the firing list.<sup>228</sup> Harriet Miers was aware of vote fraud enforcement issues regarding the 2004 gubernatorial election in Washington state that may have led to the decision to fire John McKay, given that, in summer

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<sup>221</sup> Letter of Acting Attorney General Paul Clement to the President, June 27, 2007, at 2.

<sup>222</sup> DAG 1072.

<sup>223</sup> McNulty, Apr. 27, 2007, Interview at 129.

<sup>224</sup> Sampson, July 10, 2007, Interview at 145.

<sup>225</sup> OAG 1814.

<sup>226</sup> Margolis, May 1, 2007, Interview at 278.

<sup>227</sup> Hutcheson, *White House says Rove Relayed Complaints About Prosecutors*, McClatchy Newspapers, Mar. 11, 2007; Friedrich, May 4, 2007, Interview at 31-40; Sampson, Apr. 15, 2007, Interview at 26-27.

<sup>228</sup> OAG 850-51.

2006, she and her then deputy William Kelley had confronted Mr. McKay with Republican criticism of his decisions in that area.<sup>229</sup>

The investigation to date has thus ascertained that White House personnel played a significant role in the U.S. Attorney firings and the Administration's subsequent effort to manage the resulting controversy.<sup>230</sup> Indeed, as the American Judicature Society recently commented in a unsigned editorial: "the fingerprints of the White House are very visible in the case of the firings[.]"<sup>231</sup> Many important questions remain unanswered, however, regarding the particular decisions made by White House personnel and their motives, and their complicity in any improper conduct or violation of law. Fair access to White House information is needed to fully evaluate those issues.

## **II. White House Information Is Essential For the Committee to Conduct Meaningful Oversight and to Consider Possible Federal Legislation**

The Committee's investigation has accomplished a great deal. It has already raised substantial questions about politicization of the U.S. Attorney corps and possible abuse of power and improper or unlawful conduct within the Executive Branch. It has also already led to the enactment of one law, and several other legislative actions are under active consideration at this time. The Committee's continued efforts on both the oversight and legislative fronts, however, have become greatly constrained by lack of access to White House information. Without the full story regarding the U.S. Attorney firings and related matters, neither Committee purpose can be fully or adequately achieved.

### **A. White House Information is Needed to Conduct Meaningful Oversight**

The Committee clearly has authority under the Constitution, as reflected in Supreme Court decisions and Rules of the House of Representatives, to investigate and expose possible violations of law and abuses of executive power. As the Supreme Court ruled in the Watkins case fifty years ago, Congress has "broad" power to investigate "the administration of existing

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<sup>229</sup> John McKay's Response to Questions from Subcommittee Chair Linda Sánchez (on file with the H. Comm. on the Judiciary); Bowermaster, *McKay went from hero to zero with Justice Department*, Seattle Times, Mar. 21, 2007.

<sup>230</sup> At the Committee's hearing on the contempt report, one proposed amendment would have introduced Paul McNulty's statement that "I still see it as something the Department initiated when it went forward with putting together those names." Proposed Amendment to the Report, Offered by Mr. Cannon of Utah. However, Mr. McNulty's opinion as expressed in this statement is not consistent with the documents produced by the Department of Justice showing the substantial role of White House personnel which included pushing the project forward, nor with the testimony of other witnesses, which describe a "collaborative process" between the White House and the Department that began with an idea raised by Karl Rove and taken up by Harriet Miers, all as described in the text above. Furthermore, Mr. McNulty testified that he had only limited involvement in the process and that he did not even learn about it until the list was nearly complete. McNulty, Apr. 27, 2007, Interview at 15-16.

<sup>231</sup> American Judicature Society, *Putting Justice Back in the Department*, June 23, 2007.

laws” and to “expose corruption, inefficiency or waste,” or similar problems in the Executive Branch.<sup>232</sup>

As discussed above, the evidence obtained in the investigation 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 prohibiting political retaliation against federal employees, and laws prohibiting making false or materially incomplete statements to Congress or obstructing Congressional investigations. And regardless of whether laws were broken, it is clearly important for Congress and the American people to know whether executive power was abused by, for example, firing U.S. Attorneys who refused to bring vote fraud or other politically advantageous cases that the prosecutors had judged without merit, or because they pursued corruption or other cases against Republicans. Investigating such possible abuses by Executive Branch officials is an important and legitimate purpose of the Committee’s investigation.

**B. White House Information is Needed to Consider Modifying or Enacting Federal Laws**

Congress must also obtain more complete information on what happened in the U.S. Attorneys matter to consider whether to modify or enact federal laws. This is a well-recognized basis for authorizing Congress to conduct investigations and obtain Executive Branch information, as the Supreme Court stated in McGrain v. Daugherty.<sup>233</sup>

First, a variety of legislation is already under consideration regarding the manner of appointment of U.S. Attorneys in response to issues surfaced by our investigation, and one statute has already been enacted and signed by the President. Congress’s authority to legislate on this subject derives from Article II, Section 2, of the Constitution: “Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”<sup>234</sup> Under that provision, Congress may permit certain officials—the president, courts, or the heads of departments—to appoint “inferior officers” of the United States and may establish the rules governing such appointments, and federal courts have held that U.S. Attorneys are such “inferior officers.”<sup>235</sup> Congress acted pursuant to that constitutional authority when it created the existing statutory processes for the appointment, removal, and replacement of U.S. Attorneys.<sup>236</sup>

The process for filling U.S. Attorney vacancies has been amended three times since 1898.<sup>237</sup> Between 1898 and 1986, when a U.S. Attorney position became vacant, the district

<sup>232</sup> Watkins v. United States, 354 U.S. 178, 187 (1957).

<sup>233</sup> 273 U.S. 135, 174 (1927).

<sup>234</sup> U.S. Const. Art. II, § 2, cl. 2.

<sup>235</sup> U.S. v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000); U.S. v. Sotomayor Vazquez, 69 F.Supp.2d 286, 291 (D.P.R. 1999).

<sup>236</sup> 28 U.S.C. § 541.

<sup>237</sup> 28 U.S.C.A. § 546 (2007).

court in the district where the vacancy occurred named a temporary replacement.<sup>238</sup> The temporary U.S. Attorney would serve in that capacity until the President nominated and the Senate confirmed a replacement.<sup>239</sup> In 1986, Congress enacted 28 U.S.C. § 546(d), under which the Attorney General could appoint an interim U.S. Attorney for up to 120 days.<sup>240</sup> If the Senate had not confirmed a new U.S. Attorney by the end of the 120-day period, the district court could then appoint the same or a different interim U.S. Attorney to serve until a permanent replacement was confirmed.<sup>241</sup>

On March 9, 2006, section 502 of the USA PATRIOT Reauthorization Act amended the law to remove district court judges from the interim appointment process, and granted the Attorney General the sole power to appoint interim U.S. Attorneys.<sup>242</sup> The amended statute eliminated the 120-day limit on service of an interim U.S. Attorney appointed by the Attorney General.<sup>243</sup> Thus, not only did the amended statute eliminate judicial input in the interim appointment process, but it also had the significant effect of permitting interim appointments to serve indefinitely without Senate confirmation.

In recently passing S. 214,<sup>244</sup> the House acted to address that problem and remove the Attorney General's power to appoint interim U.S. Attorneys to successive 120-day terms, potentially circumventing the Senate confirmation process. This legislation returned the interim appointment process to the status quo that existed before the signing of the USA PATRIOT Act reauthorization.<sup>245</sup> As the investigation of Department of Justice actions and White House involvement has continued, other concerns have surfaced, and the Committee seeks additional information to help formulate and determine whether to enact additional legislation on this subject, or to further revise the interim appointment process.

Second, while U.S. Attorneys serve at the pleasure of the President, it is widely accepted that they should not be dismissed for improper purposes, such as to influence prosecutions or to retaliate for the exercise of prosecutorial judgment in a manner that was not beneficial to a particular political party. Based on the ongoing investigation, the Congress may wish to consider some limitation on removal of U.S. Attorneys, such as requiring that they may be replaced only for some cause, or imposing other procedural or substantive limits on the removal of U.S. Attorneys in the middle of a presidential term.

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<sup>238</sup> See *U.S. v. Sotomayor Vazquez*, 69 F.Supp.2d 286, 295 (D.P.R. 1999); Pub. L. No. 99-646, § 69, Nov. 10, 1986, 100 Stat. 3616.

<sup>239</sup> *U.S. v. Sotomayor Vazquez*, 69 F.Supp.2d 286, 295 (D.P.R. 1999).

<sup>240</sup> Pub. L. No. 99-646, § 69, Nov. 10, 1986, 100 Stat. 3616.

<sup>241</sup> 28 U.S.C. § 546(d) (2000), amended by 5 U.S.C. § 502 (2006).

<sup>242</sup> Pub. L. No. 109-177, Title V, § 502, Mar. 9, 2006, 120 STAT. 246 (2006).

<sup>243</sup> 28 U.S.C. § 546© (2006).

<sup>244</sup> S. 214 was passed by the House by a vote of 306 to 114. It was signed by the President on June 14, 2007, and became P.L. 110-34. 153 Cong. Rec. H3036 (daily ed. Mar. 26, 2007); Pub. L. No. 110-34, 121 Stat. 224 (2007).

<sup>245</sup> Compare 28 U.S.C. § 546 (2007) with Pub. L. No. 99-646, § 69, Nov. 10, 1986, 100 Stat. 3616.

Third, information concerning other aspects of U.S. Attorney appointment and replacement continues to come to light in the investigation, suggesting other possible legislation. The Committee has examined data illustrating how every appointment and temporary replacement of a U.S. Attorney was handled in the previous ten years. Review of this data showed frequent use by the Bush Administration of the Federal Vacancies Reform Act to temporarily fill U.S. Attorney vacancies. Temporary appointments made under the Vacancies Reform Act last for 210 days.<sup>246</sup> Despite Congress specifically having enacted a process for interim replacement of U.S. Attorneys, the Vacancies Reform Act has been used nearly 30 times during the Bush Administration for this purpose.<sup>247</sup> On at least ten occasions during the Bush Administration, the Vacancies Reform Act was used in conjunction with 28 U.S.C. § 546 to produce temporary/interim appointments that lasted for 330 days.<sup>248</sup> This too may be an area ripe for further legislative action.

Fourth, the Committee's investigation has revealed that the process of dual appointment under which sitting U.S. Attorneys also hold full time leadership positions at the Department of Justice has been widely used by the administration, and that traditional rules establishing U.S. Attorney residence requirements have been altered to facilitate that practice.<sup>249</sup> Indeed, Department officials have acknowledged that one specific change to the residency provision was made especially to allow Montana U.S. Attorney Bill Mercer to live in Washington, D.C., and continue to serve simultaneously as Principal Associate Deputy Attorney General and U.S. Attorney for Montana.<sup>250</sup> In order to specifically shield U.S. Attorney Mercer from the traditional

<sup>246</sup> 5 U.S.C. § 3346.

<sup>247</sup> USA Appointments by date range, 01/01/1990 to Present," Document from the Department of Justice, Feb. 27, 2007 (on file with the House Committee on the Judiciary).

<sup>248</sup> Id. When the Committee considered H.R. 580, Congresswoman Linda Sánchez offered an amendment making clear that 28 U.S.C. § 546 was intended to be the exclusive means for appointing an individual to temporarily perform the functions of a United States Attorney. Interim Appointment of United States Attorneys, House Rpt. 110-58, Comm. on the Judiciary, 110th Cong. 2 (2007). This amendment was meant to close the gap that the Administration perceives to have been created by the Federal Vacancies Reform Act. The Sánchez amendment was adopted by the Committee and was part of H.R. 580 when it was approved overwhelmingly in the House. H.R. 580 passed the House of Representatives on March 26, 2007, by a vote of 329 to 78. See 153 CONG. REC. H3036 (daily ed. Mar. 26, 2007). However, this language was not included in P.L. 110-34. Just hours before President Bush signed S. 214 into law cutting off the indefinite interim appointment power of the Attorney General, Attorney General Gonzales made one last interim appointment. He appointed George Cardona to serve as Interim U.S. Attorney for the Central District of California. Wheeler, *Cardona's Appointment Extended Using PATRIOT*, The Next Hurrah, June 14, 2007, available online at [http://thenexthurrah.typepad.com/the\\_next\\_hurrah/contributoremptywheel/index.html](http://thenexthurrah.typepad.com/the_next_hurrah/contributoremptywheel/index.html). Cardona was 206 days into a 210-day appointment under the Federal Vacancies Reform Act. Id. The Committee and House may wish to consider whether to safeguard against future use of the Vacancies Reform Act as a way to circumvent the limitations set out on 28 U.S.C. § 546.

<sup>249</sup> Pub. L. No. 109-177, Title V, § 501(a), Mar. 9, 2006, 120 Stat. 246 (2006).

<sup>250</sup> The Washington Post reported that "Mercer spent an average of three days a month in Billings." "Montana's chief federal judge often criticized Mercer's absences and asked Gonzales to replace him. The attorney general refused and assured the judge in a November 2005 letter that Mercer's appointment was lawful. On the same day that letter was written, however, Mercer instructed a GOP staff member to insert language into a USA PATRIOT Act reauthorization bill allowing federal prosecutors to live outside their districts to serve in other jobs, according to documents and interviews." Eggen, *Third-in-Command at Justice Dept. Resigns*, Washington Post, June 23, 2007, A4.

residency rules, that change was made retroactive, so as to cover the entire period when Mr. Mercer started work in Washington, D.C.<sup>251</sup> Mr. Mercer subsequently assumed the position of Acting Associate Attorney General, the number three position at the Department of Justice.<sup>252</sup> Though he recently resigned that position, Mr. Mercer maintains his position as U.S. Attorney in Montana.<sup>253</sup> Given the widespread use of this practice by the current Administration,<sup>254</sup> the Committee may wish to consider whether the changes to the residency rules best serve the American people, whether the traditional requirement that U.S. Attorneys reside in the district in which they are appointed to serve should be restored, or whether safeguards should be added to the statutes in this area so that the practice of dual appointment is not abused.

Fifth, the Congress may wish to consider legislation to address the difficult issues that arise when elected or appointed political officials or members of the public lobby Administration officials for action on particular criminal investigations or for replacement of particular U.S. Attorneys. Such contacts were made regarding a number of the fired U.S. Attorneys.<sup>255</sup> To help prevent improper political influence in such prosecutions, the Committee and the House may wish to consider requiring disclosure of such contacts, as under the Tunney Act,<sup>256</sup> or limiting the number of White House officials who can contact Department employees about prosecutions, as has previously occurred by administrative practice.<sup>257</sup> Again, obtaining information from the White House about the prevalence and impact of such contacts would be vital in fashioning and considering such legislation.

Sixth, information from the pending investigation may well lead the Committee and the House to consider legislation in the area of improper politicization of the Department of Justice. For example, Monica Goodling, the former White House Liaison at the Department of Justice, testified that she “crossed the line” of at least civil service rules when she took partisan political leanings of candidates for career Department positions into consideration, and the Committee

<sup>251</sup> Pub. L. No. 109-177, Title V, § 501(b), Mar. 9, 2006, 120 Stat. 246 (2006).

<sup>252</sup> See Eggen, *Third-in-Command at Justice Dept. Resigns*, Washington Post, June 23, 2007, A4.

<sup>253</sup> See id.

<sup>254</sup> For example, Kevin O’Connor, U.S. Attorney for Connecticut, also serves as an Associate Deputy Attorney General; Mary Beth Buchanan, U.S. Attorney for Pittsburgh, also serves as acting director in the Office of Violence against Women; and Michael Sullivan, U.S. Attorney for Boston, also serves as acting director of the Bureau of Alcohol, Tobacco, and Firearms. 153 Cong. Rec. S6061 (daily ed. May 14, 2007) (statement of Senator Feinstein).

<sup>255</sup> For example, testimony and other information has already revealed that White House advisor Karl Rove contacted the Department about vote fraud prosecutions and that several elected federal officials contacted U.S. Attorney David Iglesias about a public corruption case shortly before he was fired. See generally Hutcheson, Taylor & Talev, *White House says Rove Relayed Complaints About Prosecutors*, McClatchy Newspapers, Mar. 12, 2007; *Political interference is alleged in the sacking of a U.S. attorney*, McClatchy Newspapers, Feb. 28, 2007; Matthew Daly, *McKay says Hastings staffer contacted him about 2004 WA election*, Associated Press, Mar. 7, 2007; *Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys*: Hearing before the Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, 110<sup>th</sup> Cong. (2007).

<sup>256</sup> 15 U.S.C. § 16.

<sup>257</sup> Bills are currently pending in the House and Senate to provide for a reporting requirement concerning communications between the White House and the Justice Department relating to civil and criminal investigations. See H.R. 3848, 110<sup>th</sup> Cong. (2007); S. 1845, 110<sup>th</sup> Cong. (2007).



may wish to consider whether the legal rules defining the appropriate role of political factors in agency hiring decisions should be clarified or modified.<sup>258</sup> Given Ms. Goodling's status as White House liaison, the subpoenaed information is crucial to understanding and assessing the appropriate relationship between Agency personnel and the president's political and other advisors on agency hiring matters.

Also, current law provides for civil penalties, including removal, debarment from federal employment for up to 5 years, or a civil penalty up to \$1,000, if a federal employee commits a prohibited personnel practice, including basing personnel decisions on a candidate's religion or political affiliation.<sup>259</sup> However, personnel decisions by federal officials in confidential, policy-making, policy-determining, or policy-advocating positions appointed by the president are not subject to review by the independent Merit Systems Protection Board. Instead, their cases are referred to the president himself.<sup>260</sup> Based on the results of the ongoing investigation, Congress may well consider whether it is appropriate to leave to the sole review of the president punishment of high-level employees who have committed prohibited personnel practices, particularly basing employment decisions on political affiliation. Similarly, under existing law, coercing a federal employee to engage in political activity, including but not limited to voting or refusing to vote for any candidate, is punishable by fine or imprisonment for not more than three years, or both.<sup>261</sup> Based on the results of the ongoing investigation, the Congress may well consider whether criminal penalties are appropriate to prohibit the conditioning of federal employment on political affiliation or previous political activity on behalf of a particular candidate or party.

Seventh, the Committee and the House may similarly consider whether current provisions prohibiting coercion of political activity are adequate to address circumstances in which the decision to hire or terminate a U.S. Attorney is made for political purposes, or whether legislation providing criminal penalties for obstruction of justice should be strengthened. Similarly, whether existing law appropriately prevents misuse of prosecutorial power to serve partisan goals is also under evaluation. Understanding the facts concerning the relationship and contacts between political officials in the White House and Justice Department prosecutors is critical to assessing whether the reach of current law is sufficient.

Eighth, the Committee and the House may similarly determine, based on the ongoing investigation, that laws prohibiting the misleading of Congress or obstruction of justice should be strengthened as well.

Ninth, the Committee and the House may consider laws strengthening the penalties for violating the Presidential Records Act and clarifying the rules regarding use of non-government email or similar communication methods. Information from the White House personnel who are

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<sup>258</sup> *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters*: Hearing before the H. Comm. On the Judiciary, 110<sup>th</sup> Cong. 57 (2007).

<sup>259</sup> 5 U.S.C. § 1215(a)(3); 5 U.S.C. § 2302(b).

<sup>260</sup> 5 U.S.C. § 1215(b).

<sup>261</sup> 18 U.S.C. § 610.

most directly affected by that statute's requirements is critical to understanding the scope and nature of compliance issues raised by the existing statutory regime, and to fashioning appropriate remedies and a workable legislative approach that addresses national priorities regarding the preservation of Executive Branch documents and that keeps pace with rapid technological change.

Finally, information gathered during or as a result of the pending investigation may well affect Congressional decisions regarding the appropriation of funds for Department of Justice or other executive activities.<sup>262</sup>

### **III. The Committee Has Made Extensive Efforts to Secure Documents and Testimony From the White House and Harriet Miers on a Cooperative Basis**

The Committee has proceeded with great caution and has followed a thorough, careful and deliberative process at each stage of its investigation. It has made repeated and extensive efforts to obtain needed information from White House sources on a voluntary or cooperative basis. Those efforts, however, have been rebuffed again and again. Even after the July 25 contempt vote, Chairman Conyers wrote again to White House Counsel Fred Fielding seeking to resolve the matter, but has received absolutely no response to date.<sup>263</sup> The White House simply has not engaged in constructive dialog with the Committee regarding finding a workable compromise and, instead, has only escalated its rhetoric and hardened its position as the matter has carried on. Although the Committee continues to hope that White House cooperation will be forthcoming, it now has little choice but to proceed to enforce its outstanding subpoenas.

#### **A. Efforts to Negotiate a Cooperative Solution With the White House**

From the outset of the controversy, it has been clear that White House personnel played a material role in the U.S. Attorney firings. The documents produced by the Department of Justice, including some internal White House communications, and witness testimony at congressional hearings and interviews, make this general fact clear. In an effort to uncover the truth about the firings and the possible politicization of the U.S. Attorney corps and related matters, and to understand the nature and scope of the role played by White House personnel, the Committee has attempted for months to obtain relevant information from the White House.

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<sup>262</sup> This was explicitly referenced as justifying the Congressional request for information considered in *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927):

“Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.”

<sup>263</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, July 25, 2007.

Following testimony during a March 6, 2007, hearing before the Judiciary Committee's Subcommittee on Commercial and Administrative Law regarding the U.S. Attorney matter, Chairman Conyers and Subcommittee Chair Linda Sánchez wrote to White House Counsel Fred Fielding requesting information pertaining to the U.S. Attorney firings and related matters.<sup>264</sup> For example, the letter mentioned fired U.S. Attorney John McKay's testimony that he was asked during an interview for appointment to the federal bench with then-White House Counsel Harriet Miers to explain why he had allegedly "mishandled" a criminal vote fraud investigation, a charge that apparently was based on complaints from Washington state Republicans.<sup>265</sup> The letter asked for specified documents and interviews with particular White House officials and requested that Mr. Fielding provide the requested information by March 16, 2007.<sup>266</sup>

Instead of providing the requested documents, however, Mr. Fielding responded with a March 20, 2007, letter claiming that he believed that the *Justice Department's* production of documents effectively satisfied the *White House's* obligation to Congress.<sup>267</sup> Mr. Fielding explained that he was prepared to make some White House officials available for interviews with the Senate and House Judiciary Committees on a joint basis, but his offer was conditioned on unreasonably limiting preconditions and scope restrictions.<sup>268</sup>

Mr. Fielding's offer required that the interviews be confined 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."<sup>269</sup> Questioning on internal White House discussions of any kind and by personnel at any level would not be allowed. Regarding the Judiciary Committees' request for documents, Mr. Fielding stated that the White House would only provide documents in the same two categories. Once again, Mr. Fielding's offer excluded all *internal* White House communications regarding the firings of the U.S. Attorneys, even though some documents reflecting such internal communications had already been provided by the Justice Department. In addition, Mr. Fielding required that the interviews "be private and conducted without the need for an oath, transcript, subsequent testimony, or the subsequent issuance of subpoenas."<sup>270</sup> In other words, no matter what was revealed, no other testimony or documents could be requested from the White House.

In light of Mr. Fielding's unreasonably restrictive offer, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law voted on March 21, 2007, to authorize Chairman Conyers to issue subpoenas for the testimony of former White House Counsel Harriet

<sup>264</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, Mar. 9, 2007.

<sup>265</sup> Id.

<sup>266</sup> Id.

<sup>267</sup> Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, S. Comm. on the Judiciary, John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Lamar Smith, Ranking Member, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Mar. 20, 2007.

<sup>268</sup> Id.

<sup>269</sup> Id.

<sup>270</sup> Id.

Miers, former Deputy Chief of Staff and Senior Advisor to the President Karl Rove, and other specified White House officials.<sup>271</sup> Furthermore, the Subcommittee authorized Chairman Conyers to issue subpoenas for documents in the custody or control of these officials and White House Chief of Staff Joshua Bolten.<sup>272</sup> Chairman Conyers and Subcommittee Chair Sánchez explained that the White House offer of interviews on limited subjects, without a transcript, and without the possibility for subsequent public testimony was unacceptable and that the White House had failed to respond to letters and proposals to discuss or negotiate other options.

Chairman Conyers and Subcommittee Chair Sánchez again wrote to Mr. Fielding on March 22, 2007.<sup>273</sup> That response explained the futility of conducting interviews on a matter of this gravity without transcripts because, as they noted, it would be “an invitation to confusion and will not permit [the relevant Committees] to obtain a straightforward and clear record.”<sup>274</sup> Additionally, the letter noted that “limiting the questioning (and document production) to discussions by and between outside parties will further prevent our Members from learning the full picture . . . .” Nonetheless, 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.<sup>275</sup>

In a further effort to work with the White House to move beyond its “take it or leave it” offer, Chairman Conyers along with Senate Judiciary Committee Chairman Patrick Leahy, wrote to Mr. Fielding on March 28, 2007, explaining the importance of acquiring not only communications between White House personnel and outside parties, but also communications reflecting internal discussions. For example, a hypothetical communication from Karl Rove to Harriet Miers suggesting that a particular U.S. Attorney be considered for removal would be highly material to the investigation, but would not be produced or identified during questioning under Mr. Fielding’s restrictive proposal.<sup>276</sup> The letter also referenced the newly discovered evidence that White House officials had been using Republican National Committee email accounts for official White House business, and therefore requested documents on that issue as well.<sup>277</sup> Chairmen Conyers and Leahy suggested that a useful initial step would be for the White House to produce the documents that it had already indicated a willingness to produce, such as communications between White House personnel and outsiders. On April 12, 2007, Mr. Fielding responded to these outstanding letters by rejecting the Committees’ proposals and instead repeating the initial “take it or leave it” offer.

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<sup>271</sup> *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*, 110<sup>th</sup> Cong. (2007).

<sup>272</sup> *Id.*

<sup>273</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, Mar. 22, 2007.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Letter from Patrick Leahy, Chairman, S. Comm. on the Judiciary, and John Conyers, Jr., H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, Mar. 28, 2007.

<sup>277</sup> *Id.*

In yet another attempt to obtain voluntary cooperation from the White House, Chairman Conyers and Subcommittee Chair Sánchez sent another letter to Mr. Fielding on May 21, 2007. Explaining that it would be “constitutionally irresponsible” to accept the White House’s unreasonably restrictive “offer,” they once again repeated the Committee’s willingness to “work out a voluntary resolution of our requests for information from the White House.” They explained that, if the White House persisted in holding to its unsatisfactory initial March 20 offer, the Committee would have no other alternative but to begin resort to compulsory process.<sup>278</sup> On June 7, 2007, Mr. Fielding rejected this overture as well.<sup>279</sup>

After repeated White House rejection of efforts to negotiate, and after numerous Justice Department interviews had been conducted and thousands of Justice Department documents had been reviewed – which only continued to heighten concern about the role played by White House personnel in the firings – the Committee was placed in a position in which it had little choice but to subpoena the necessary documents and information. To that end, on June 13, 2007, Chairman Conyers and Leahy issued three previously authorized subpoenas to current and former White House personnel. The subpoenas issued by Chairman Conyers were to Joshua Bolten, White House Chief of Staff, or the appropriate custodian of records, for documents and electronic information, with a due date of June 28, 2007,<sup>280</sup> and to former White House Counsel Harriet Miers for both production of documents and appearance before the Committee for testimony, with a due date of July 12, 2007.<sup>281</sup>

Mr. Fielding responded on June 28, 2007, by refusing to produce any documents on asserted executive privilege grounds.<sup>282</sup> The next day, Chairman Conyers and Chairman Leahy wrote to Mr. Fielding concerning the “unprecedented” nature of the Administration’s legal assertions and reiterating that the documents should be provided.<sup>283</sup> If not, the letter directed, the White House should at a minimum provide a privilege log, and a signed statement from the

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<sup>278</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, May 21, 2007.

<sup>279</sup> Letter from Fred Fielding, Counsel to the President, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, June 7, 2007.

<sup>280</sup> Cover Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, Transmitting Subpoena, June 13, 2007. Chairman Leahy also issued a similar subpoena for relevant documents to Mr. Bolten and another for testimony and documents to former White House Political Director Sara Taylor for a hearing scheduled on July 11, 2007.

<sup>281</sup> Cover Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Harriet Miers, Transmitting Subpoena, June 13, 2007.

<sup>282</sup> Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, S. Comm. on the Judiciary, John Conyers, Jr., Chairman, H. Comm. on the Judiciary, June 28, 2007. Mr. Fielding’s letter included a supplemental letter from Acting Attorney General Paul Clement to the President in support of his privilege claims, but which acknowledged that internal White House documents actually contained information directly responsive to the Committee’s subpoena. According to Mr. Clement, those documents specifically discussed “the possible dismissal and replacement of U.S. Attorneys,” the “wisdom of such a proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals.”

<sup>283</sup> Letter from Patrick Leahy, Chairman, S. Comm. on the Judiciary, and John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, June 29, 2007.

President *himself* asserting executive privilege, by July 9, 2007, “before [the Committee] move[s] to proceedings to rule on [the White House’s] claims and consider whether the White House is in contempt of Congress.”<sup>284</sup> On July 9, Mr. Fielding refused to provide documents, a privilege log, or a signed statement of the president.<sup>285</sup>

Chairman Conyers and Subcommittee Chair Sánchez accordingly informed Mr. Fielding that the Judiciary Committee’s Subcommittee on Commercial and Administrative Law would be meeting on July 19, 2007, to consider the executive privilege claims that he had asserted in response to the June 13 document subpoena.<sup>286</sup> The letter further advised that if Subcommittee Chair Sánchez overruled the privilege claims, Mr. Bolten could be subject to contempt proceedings.<sup>287</sup> Chairman Conyers and Subcommittee Chair Sánchez urged Mr. Fielding to “reconsider, and [to] produce the documents called for by the subpoena.”<sup>288</sup> To date, there has been no response. The Subcommittee met on July 19 and upheld a ruling made by Chair Sánchez rejecting the White House privilege claims by a 7-3 vote. Chairman Conyers wrote to Mr. Fielding on that date, enclosing a copy of the ruling, urging compliance, warning again of the possibility of contempt, and stating that the Committee would assume that Mr. Bolten would not comply unless Mr. Fielding stated otherwise by Monday morning, July 23. On July 23, 2007, Mr. Fielding informed the Committee that the White House’s position “remains unchanged.”<sup>289</sup>

#### **B. Efforts to Negotiate a Cooperative Solution Concerning Harriet Miers**

Harriet Miers served as White House Counsel from 2004 until she resigned on January 31, 2007.<sup>290</sup> Emails provided by the Justice Department show that Ms. Miers played a significant role in the plans to remove U.S. Attorneys during President Bush’s second term; for example, the Department official who compiled the lists of U.S. Attorneys to be fired, Kyle Sampson, was in regular contact with her on the subject.<sup>291</sup> Accordingly, Chairman Conyers and Chair Sánchez wrote to Ms. Miers on March 9, 2007, and requested to interview her on a voluntary basis about her knowledge and activities concerning the U.S. Attorney firings and related matters, a letter to which no response was received.<sup>292</sup> Chairman Conyers then attempted to engage the White House regarding the terms and conditions of interviews involving White House witnesses, including Ms. Miers, as discussed above. Once it became clear that the White House would not depart from its “take it or leave it” offer, and after numerous attempts to negotiate a satisfactory

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<sup>284</sup> *Id.*

<sup>285</sup> Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, S. Comm. on the Judiciary, John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 9, 2007.

<sup>286</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, July 17, 2007.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> Letter from Fred Fielding, Counsel to the President, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 23, 2007.

<sup>290</sup> Leinwand, *Congress subpoenas two former Bush administration figures*, USA Today, June 14, 2007.

<sup>291</sup> OAG 005 - OAGN 008, OAG 20-21, OAG 22, OAG 34-35, DAG 14-17, OAG 45-48.

<sup>292</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Harriet Miers, Mar. 9, 2007.

route to acquire necessary information on a cooperative basis, the Committee was forced to subpoena documents from the White House as discussed above, and testimony and documents from Ms. Miers.<sup>293</sup> Ms. Miers was directed to appear for testimony and with documents before the House Judiciary Subcommittee on Commercial and Administrative Law on July 12, 2007.

Notwithstanding the Committee's pending subpoenas, Mr. Fielding wrote to Ms. Miers' attorney, Mr. George Manning, on June 28, 2007, and "directed" Ms. Miers not to produce any documents to the Committee.<sup>294</sup> In addition, Mr. Fielding in a July 9, 2007, letter also "directed" Ms. Miers not to provide testimony to the Committee concerning "White House consideration, deliberations, or communications, whether internal or external, relating to the possible dismissal or appointment of United States Attorneys."<sup>295</sup> On July 9, Mr. Manning informed that Committee that Ms. Miers intended to comply with the White House "direction."<sup>296</sup> In response, Chairman Conyers and Subcommittee Chair Sánchez wrote to Mr. Manning the next day emphasizing that it was incumbent on Ms. Miers to appear so that the Subcommittee could consider claims of privilege concerning specific documents or in response to particular questions posed at the hearing.<sup>297</sup>

Mr. Manning wrote back stating that Ms. Miers would in fact *not* appear at the July 12 hearing, citing and enclosing a letter, dated that very day, from the White House "directing" Ms. Miers not to appear at the July 12, 2007, hearing based on a new theory of "absolute immunity."<sup>298</sup> Chairman Conyers and Subcommittee Chair Sánchez immediately responded to Mr. Manning, explaining the long-established legal principle that a "congressional subpoena, such as the one issued to Ms. Miers, carries with it two obligations: the obligation to appear, and the obligation to testify and/or produce documents."<sup>299</sup> They further explained that the Committee had not found any 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."<sup>300</sup>

<sup>293</sup> Cover Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Harriet Miers, Transmitting Subpoena, June 13, 2007.

<sup>294</sup> Letter from Fred Fielding, Counsel to the President, to George Manning, Attorney for Harriet Miers, June 28, 2007.

<sup>295</sup> Letter from Fred Fielding, Counsel to the President, to George Manning, Attorney for Harriet Miers, July 9, 2007.

<sup>296</sup> Letter from George Manning to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, July 9, 2007.

<sup>297</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law to George Manning, Attorney for Harriet Miers, July 10, 2007. In subsequent correspondence, Mr. Manning has claimed that, contrary to the understanding of Chairman Conyers and Chair Sánchez in the July 10<sup>th</sup> letter, he had not previously indicated that Ms. Miers intended to attend the July 12<sup>th</sup> hearing as required by the subpoena. This factual dispute is irrelevant to the validity of Ms. Miers' refusal to appear before the Subcommittee, was not considered by Ms. Sánchez in her July 12 ruling, and neither the Subcommittee nor the Committee has sought to resolve it.

<sup>298</sup> Letter from George Manning to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, July 10, 2007, with enclosed Letter from Fred Fielding, Counsel to the President, to George Manning, Attorney for Harriet Miers, July 10, 2007.

<sup>299</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to George Manning, Attorney for Harriet Miers, July 11, 2007.

<sup>300</sup> Id.

They also observed that sitting and former White House officials have testified before Congress numerous times. In fact, as the letter explained, former White House Counsel Beth Nolan had described in testimony to the Judiciary Committee's Subcommittee on Commercial and Administrative Law that she had testified before Congressional committees four times on matters directly related to her official duties, "three times while serving as White House counsel and once as former White House counsel."<sup>301</sup> Moreover, a Congressional Research Service study had documented approximately 74 instances where serving White House advisers had testified before Congress since World War II.<sup>302</sup>

Chairman Conyers' and Chair Sánchez's letter further cautioned that a refusal to appear in response to the Committee's subpoena could subject Ms. Miers to contempt proceedings and urged Mr. Manning and his client, Ms. Miers, to reconsider their position.<sup>303</sup> Later that day, Mr. Manning responded to Chairman Conyers and Subcommittee Chair Sánchez's letter by reaffirming that his client, Ms. Miers, would not appear.<sup>304</sup>

On July 12, 2007, Ms. Miers failed to appear for the House Judiciary Subcommittee hearing, in notable contrast to former White House Political Director Sara Taylor's appearance and testimony before the Senate Judiciary Committee the previous day.<sup>305</sup> At the July 12 hearing, Chair Sánchez considered and rejected Ms. Miers' executive privilege and immunity claims and, after discussion, the Subcommittee sustained her ruling by a 7 to 5 vote.<sup>306</sup>

On the following day, Chairman Conyers sent a letter to Mr. Manning expressing his disappointment regarding his client's noncompliance with the subpoena, enclosing a copy of the July 12 ruling and explaining again Ms. Miers' legal obligation to appear. The letter notified Mr. Manning that Ms. Miers' failure to mitigate her noncompliance with the subpoena could subject her to contempt proceedings and asked Mr. Manning to indicate by July 17, 2007, whether she would seek to comply.<sup>307</sup> Mr. Manning informed Chairman Conyers on July 17, 2007, that his client intended to remain noncompliant with the subpoena.<sup>308</sup>

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<sup>301</sup> *Id.*

<sup>302</sup> Harold C. Relyea & Todd B. Tatelman, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, CRS Report for Congress, RL 31351, April 10, 2007.

<sup>303</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcommittee on Commercial and Admin. Law, to George Manning, Attorney for Harriet Miers, July 11, 2007.

<sup>304</sup> Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, July 11, 2007.

<sup>305</sup> Although Ms. Taylor appeared and testified pursuant to the subpoena issued by Senator Leahy on June 13, she did refuse to answer some questions.

<sup>306</sup> *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters*: Hearing before the Subcomm. on Commercial and Admin. Law of the H. Comm. On the Judiciary, 110<sup>th</sup> Cong. (2007) (Ruling of Subcommittee Chair Linda Sánchez on Related Executive Privilege and Immunity Claims).

<sup>307</sup> Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to George Manning, Attorney for Harriet Miers, July 13, 2007.

<sup>308</sup> Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007.



#### IV. Legal Analysis of the Executive Privilege, Immunity, and Related Claims Raised by the White House and Ms. Miers

In refusing to comply with the June 13 subpoenas, the White House and Ms. Miers have sought to raise related executive privilege and immunity claims. All these claims were thoroughly considered and rejected by Commercial and Administrative Law Subcommittee Chair Linda Sánchez, and her rulings were upheld by votes of the Subcommittee on July 12 and July 19, 2007. Those rulings are enclosed with these additional views and are incorporated by reference herein. Because of the extraordinary nature of several of these claims and additional arguments raised by Ms. Miers' attorney in his letter of July 17, 2007, and others, however, the serious legal and factual fallacies of these claims are discussed below.

In addition, four legal experts have independently concluded that the Committee was correct to reject the legal claims of the White House and Ms. Miers. Their letters are also included with these additional views. For example, Professor Erwin Chemerinsky of Duke Law School explained that "it is difficult to imagine a more compelling case on behalf of Congress." Washington attorney Beth Nolan, herself a former White House Counsel, states that the White House's claims are "inconsistent with the obligations of the Executive Branch in the constitutional accommodation process." Professor Charles Tiefer, former House Solicitor and General Counsel, writes that the executive privilege claims are "patently without merit." And former House counsel Stanley M. Brand concludes that the Committee's right to the information requested is "unassailable" and that it is "hard to envision a stronger claim."<sup>309</sup>

##### A. Claims of Immunity as to Harriet Miers

Even more extraordinary than the executive privilege claims in this matter is the assertion that Ms. Miers, a former White House official not currently employed by the federal government, is absolutely immune from even appearing before the Subcommittee as directed by subpoena. The Supreme Court has specifically held that even a President, while serving in that capacity, can be subpoenaed by a court and can be required to participate in a civil lawsuit for damages by a private party.<sup>310</sup> The Court's holding in *Jones* flies in the face of the claim that a former White House official is somehow immune from even appearing in response to a Congressional subpoena. As with Sara Taylor, who received a subpoena similar to Ms. Miers' but chose to appear and answer some questions before the Senate Judiciary Committee, no one can doubt that

<sup>309</sup> Even Attorney-General nominee Michael Mukasey expressed some guarded skepticism about the breadth of the Administration's privilege claim under questioning, during his October 17, 2007, confirmation hearing. Asked to comment on the notion that communications between private parties outside the White House and lower-level Administration officials were covered by executive privilege, Judge Mukasey noted that he would have to know more about the facts but further stated "I will admit to you that my first reaction to that section of the [Administration's] letter was, 'Huh?'" Mukasey, Oct. 17, 2007, S. Comm. on the Judiciary, Hearing at 65.

<sup>310</sup> See *Clinton v. Jones*, 520 U.S. 681, 703-06 (1997). As the Court noted in *United States v. Bryan*, 339 U.S. 323, 331 (1950), "persons summoned as witnesses have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. ... We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned."

Ms. Miers would have been asked some questions that would not have fallen within even the broadest assertion of executive privilege, but Ms. Miers simply refused to attend her hearing altogether. The ruling upheld by the Subcommittee on July 12 further explains the basis for rejecting this remarkable claim by the White House and Ms. Miers.<sup>311</sup> The first count of the contempt resolution specifically concerns Ms. Miers' refusal even to appear before the Subcommittee as required by subpoena.

### B. Claims of Executive Privilege

Common to the refusal of both Harriet Miers and Joshua Bolten to comply with the June 13 subpoenas are claims of executive privilege. These claims were rejected for four reasons.

First, the claim of executive privilege is not properly asserted because, despite Chairman Conyers' request in his letter of June 29, there has been no signed or personal statement from the President himself asserting the privilege. Not only have the courts stated that a personal assertion of executive privilege by the President is legally required, but this principle has also been recognized in House contempt proceedings. In rejecting a "protective" privilege claim in the course of finding several present and former Clinton White House officials in contempt, the House Committee on Oversight and Government Reform noted in 1996 that there had been no "official presidential invocation of executive privilege" via "signed claims" of privilege by the President pursuant to "procedures established by President Reagan" in 1982.<sup>312</sup> In fact, on the previous occasion on which the President asserted executive privilege in this Administration, President Bush personally signed a memorandum doing so, in accordance with the Reagan procedure.<sup>313</sup>

Ms. Miers' attorney asserts that this principle should not apply because the D.C. Circuit recognized the assertion of executive privilege through White House Counsel in In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997). But Ms. Miers' attorney neglects to point out that in that case, the party contesting privilege did not raise this issue on appeal, and the court specifically

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<sup>311</sup> Part of the basis for the absolute immunity claims by the White House and Ms. Miers was a July 10, 2007, memorandum by the Department of Justice's Office of Legal Counsel. While the July 12 ruling explains why this memorandum has no proper legal basis, several Senators have also recently written to Attorney General Gonzales raising a "serious question about whether this OLC opinion was properly issued." Letter from Senators Durbin, Leahy, Kennedy, and Feingold to Attorney General Alberto Gonzales, July 19, 2007.

<sup>312</sup> Proceedings against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194), House Rpt. 104-598, H. Comm. on Government Reform and Oversight, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at 38, May 29, 1996.

<sup>313</sup> See Memorandum for the Attorney General re Congressional Subpoena for Executive Branch Documents, December 12, 2001 (signed memorandum asserting privilege by President Bush). See also "Procedures Governing Responses to Congressional Requests for Information," issued on November 4, 1982; "Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files," 6 Op. Off. of Legal Counsel 31 (1982).

acknowledged, in the very footnote cited by Ms. Miers' attorney, that applicable case law suggested that the President must "personally" assert executive privilege.<sup>314</sup>

Second, the courts have required that a party raising a claim of executive privilege in refusing to produce subpoenaed documents provide a privilege log describing specifically each document being withheld, as directed by the subpoenas in this matter. Neither Mr. Bolten nor Ms. Miers complied with that provision in the subpoena. In fact, Chairman Conyers specifically requested such an itemization in a June 29 letter to White House Counsel Fred Fielding, but the White House refused.<sup>315</sup>

Third, neither the White House nor Ms. Miers has demonstrated that the presidential communications executive privilege even applies in this case. The Committee has made clear that it was not expecting at this point to learn the content of any communications to or from the President himself, but instead communications involving Ms. Miers, Karl Rove, and other White House staff. While the Supreme Court has not spoken to the issue, one court of appeals has extended executive privilege to some White House staff in some circumstances, but only with respect to communications to or from such staff "in the course of preparing advice for the President" for a decision to be made by the President.<sup>316</sup> In this case, however, the White House itself has maintained that the President never received any advice on, and was not himself

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<sup>314</sup> In re Sealed Case, 121 F.3d 729, 745 n. 16 (D.C. Cir. 1997). Ms. Miers' attorney also claims that the case cited by the D.C. Circuit, Ctr. on Corporate Responsibility, Inc. v. Shultz, 368 F.Supp. 863 (D.D.C. 1973), is "inapposite" because there "the President did not himself assert the privilege." Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007 at 3. In fact, the assertion of executive privilege in Shultz, where White House Counsel stated in an affidavit that he was "authorized to advise the Court that the White House is claiming executive privilege," is similar to the assertion of executive privilege here. Shultz, 368 F.Supp. at 871. If anything, the executive privilege claim in Shultz was stronger, as it was asserted in an affidavit, rather than just a letter, from White House Counsel. The point of Shultz was that "[t]he President, as head of the 'agency,' the White House, must make the formal claim." Shultz, 368 F.Supp. at 873. In reaching this conclusion, the Shultz court pointed to cases where privilege was properly asserted: Nixon v. Sirica and Cox, 487 F.2d 700, 704 (D.C. Cir. 1973), where President Nixon personally asserted executive privilege in a letter to the District Court, and United States v. Reynolds, 345 U.S. 1, 7-8 (1954), where the Secretary of the Air Force, as head of the agency whose documents were sought, claimed a military secrets privilege in a letter. Here, as in Shultz, these proper procedures have not been followed; White House Counsel cannot properly "activate a formal claim of executive privilege" on behalf of the President. Shultz, 368 F.Supp. at 873.

<sup>315</sup> In addition to the cases cited in the ruling in the Subcommittee on this matter, see, e.g., Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000); In re Sealed Case, 121 F.3d 729, 735 (D.C. Cir. 1997).

<sup>316</sup> In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

involved in, the U.S. Attorney firings.<sup>317</sup> The presidential communications executive privilege simply does not apply.<sup>318</sup>

Fourth, even assuming that the documents and other information subpoenaed fell within the scope of a properly asserted executive privilege, any such privilege is outweighed by the compelling need for the House to have access to this information. In addition to the specific arguments contained in the rulings enclosed with this memorandum, the important reasons why the House seeks this information, both to consider possible legislation and to uncover possible wrongdoing, are discussed above. As the Supreme Court made clear in United States v. Nixon, 418 U.S. 683 (1974), executive privilege is not absolute and can be overcome by a sufficient showing of necessity.<sup>319</sup> In this case, the relevant information does not concern national security and is necessary to enable the Committee to investigate potentially serious wrongdoing and consider the enactment of corrective legislation. This is not a situation in which the Committee seeks access to information because of generalized fears or speculative concerns; instead, specific evidence amply supports the need for this information.

It is particularly troubling that the Administration is apparently asserting executive privilege despite the fact that, among its other purposes, Congress is investigating wrongdoing by government officials. Previous Administrations have themselves acknowledged that in

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<sup>317</sup> In addition to the White House statement referred to in Subcommittee Chair Sánchez's ruling, for example, in response to a question about any conversations in which the President participated about the U.S. Attorneys before they were fired, a White House spokeswoman stated on March 27, 2007, that "I have said on the record for several weeks now that there is no indication that the President knew about any of the ongoing discussions over the two years, nor did he see a list or a plan before it was carried out." See Transcript of White House Press Briefing by Dana Perino, March 27, 2007, available online at <http://www.whitehouse.gov/news/releases/2007/03/20070327-4.html>.

<sup>318</sup> Although the letters from the White House and the Department of Justice in this matter suggest that it is the presidential communications privilege that is being claimed, to the extent that it is the deliberative process privilege that is being asserted, that claim fails because the courts have clearly stated that any deliberative process privilege "disappears altogether when there is any reason to believe government misconduct has occurred." In re Sealed Case, 121 F.3d 729, 746 (D.C. Cir. 1997). The reason for this is that "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *Id.* at 737-38 (internal quotations and citations omitted). As already discussed, the Committee is clearly involved in an investigation of "government misconduct" and therefore the deliberative process privilege is not properly asserted by the Administration.

<sup>319</sup> Accord, e.g., In re Sealed Case, 121 F.3d 729, 745, 746 (D.C. Cir. 1997) (explaining that the presidential communications privilege "can be overcome by an adequate showing of need" based on a "balance [of] the public interests at stake"). Although the Department of Justice has sought to rely on an earlier, pre-Nixon D.C. Circuit decision to suggest that the Committee must show that the subpoenaed material is "demonstrably critical to the responsible fulfillment of the Committee's functions," Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974), the Congressional Research Service has noted that this standard is "not reflected in any of the subsequent Supreme Court or appellate court rulings establishing a balancing test for overcoming the qualified presidential privilege" and neglects the "unique and limiting nature of the case's factual and historical context" and "arguably misreads" its "carefully circumscribed holding." Morton Rosenberg, *Presidential Claims of Executive Privilege*, CRS Report for Congress, RL30319, July 5, 2007, at 5-6, 4. Regardless of how the appropriate legal test is phrased, however, it is clear that the Committee's compelling need for the information outweighs any privilege claimed.

circumstances involving communications “relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either, in judicial proceedings or in congressional investigations and hearings.”<sup>320</sup> The Department of Justice itself has stated that “the privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers.”<sup>321</sup> President Reagan himself proclaimed that “[w]e will never invoke executive privilege to cover up wrongdoing.”<sup>322</sup> Accordingly, even based on previous Executive Branch practice, the White House should not have asserted privilege here, and the need for the information clearly outweighs the Administration’s desire to conceal possible evidence of “wrongdoing by government officials.”<sup>323</sup>

Finally, there is an additional reason that Ms. Miers’ claims concerning executive privilege were and should be rejected. When a private party like Ms. Miers is subject to a subpoena, it is improper for the subpoenaed person simply to refuse to produce subpoenaed documents in its possession or testify based on an assertion of privilege by a third party – in this case, the White House. In 1976, for example, when AT&T received a House Subcommittee subpoena for documents to which the White House objected, the White House instructed AT&T to refuse to comply with the subpoena.<sup>324</sup> However, AT&T “felt obligated to disregard these instructions and to comply with the subpoena,” resulting in a lawsuit by the Administration to seek to enjoin such compliance.<sup>325</sup> To the extent that the White House objected to the subpoena to Ms. Miers as a private citizen, therefore, its proper recourse – which would have been more than adequate to protect its own asserted rights – would have been to seek a court order, rather than unilaterally “directing” Ms. Miers to disobey a lawful subpoena herself.

In fact, the courts have ruled in several cases that private parties like Ms. Miers do not have standing to assert governmental privileges like executive privilege. As one court noted in a different case involving AT&T, “defendants, which are private parties, lack standing to assert” executive privilege.<sup>326</sup>

<sup>320</sup> *Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President, Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege* at 1, Sept. 28, 1994, available in Frederick M. Kaiser et al., *Congressional Oversight Manual*, CRS Report for Congress, RL 30240 at Appx. C, May 1, 2007.

<sup>321</sup> *Congressional Subpoenas of Department of Justice Investigative Files*, 8 U.S. Op. Off. Legal Counsel 252 at 41 (1984).

<sup>322</sup> Public Papers of the Presidents (1983) I at 239, cited in L. Fisher, *The Politics of Executive Privilege* 51 (2004). For additional examples of such statements during the Reagan and Eisenhower administrations, see *id.* at 50.

<sup>323</sup> In addition to the cases previously cited, see, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 453 (1977) (explaining that there is a “substantial public interest[.]” in preserving President Nixon’s records so that Congress, pursuant to its “broad investigative power,” could examine them to understand that events that led to President Nixon’s resignation “in order to gauge the necessity for remedial legislation.”); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).

<sup>324</sup> *U.S. v. American Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976).

<sup>325</sup> *Id.* at 387.

<sup>326</sup> *U.S. v. American Tel. & Tel. Co.*, 524 F.Supp. 1331, 1332 (D.D.C. 1981). See also *Reynolds v. U.S.*, 345 U.S. 1, 7 (1953) (“The [military and state secrets] privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party.”). Cf. *Snierston v. Chemical Bank*, 108 F.R.D. 159, 161 (D.Del. 1985) (noting that a civil litigant could not assert his wife’s right to privacy in seeking to prevent

### C. Defenses to Criminal Contempt Raised by Harriet Miers

In his letter of July 17, 2007, Ms. Miers' attorney makes several arguments claiming that she should not be liable for criminal contempt for her conduct. These arguments are legally invalid.

Initially, Ms. Miers' attorney notes that "the contempt statute does not apply where a witness has an 'adequate excuse'" and then baldly asserts that the White House's directives to Ms. Miers "constitute a manifest 'adequate excuse' in these circumstances."<sup>327</sup> He cites no case law, however, for the proposition that the White House has authority to "direct" a former employee to ignore a Congressional subpoena, and makes no argument as to why this constitutes an "adequate excuse."<sup>328</sup> Indeed, the analysis discussed above demonstrates precisely the opposite.

Ms. Miers' attorney also claims that the White House's "invocation of Executive privileges and immunities" forecloses a finding that Miers acted "willfully" as required by the contempt statute, 2 U.S.C. § 192.<sup>329</sup> Again, this argument lacks merit.

Initially, if this claim were true, the contempt statute would be toothless vis-a-vis the Executive Branch. Under this reasoning, current and former Executive Branch officials would *never* have to comply with congressional subpoenas; they could always avoid a contempt citation by merely pointing to an executive privilege assertion, regardless of its validity. Congress, in enacting the statute, clearly did not intend such a result. Indeed, this is clear from the legislative history of the law, during which the House expressly rejected an amendment that would have prevented application of the statute to the Executive Branch.<sup>330</sup> Moreover, this statute has already been applied to members of the Executive Branch, including those invoking executive privilege: since 1975, congressional committees or subcommittees or a full house of Congress have cited ten Executive Branch officials with contempt.<sup>331</sup>

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enforcement of a subpoena for bank records because the litigant "has standing to challenge ... discovery of [the bank] only because *he* claims a privilege. He has no standing to assert the privilege of another non-party.")

<sup>327</sup> Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007 at 1.

<sup>328</sup> While Ms. Miers' attorney does cite one Reagan-era Office of Legal Counsel opinion asserting that the contempt statute "does not apply to executive officials who assert claims of executive privilege at the direction of the President," even this refers only to current, and not former, Executive Branch officials. See "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 U.S. Op. Off. of Legal Counsel 101 (1984). As discussed in the ruling upheld by the Subcommittee, moreover, OLC opinions have no legal force whatsoever and are simply Executive Branch views as to what it wishes the law to be.

<sup>329</sup> Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007 at 2.

<sup>330</sup> See Cong. Globe, 34th Cong., 3d Sess. at 429 (Jan. 22, 1857) (statement of Mr. Marshall of Maryland) (stating that "[t]he bill proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House").

<sup>331</sup> See Frederick M. Kaiser et al., *Congressional Oversight Manual*, CRS Report for Congress, RL 30240 at 37, May 1, 2007. According to a recent CRS report, House Committees alone found Administration officials in contempt on seven occasions since 1975 in which executive privilege was claimed, and "in each instance there was

In addition, the cases cited by Ms. Miers' attorney to support the assertion that her refusal to comply with the subpoena is not "willful" are inapposite. The cited cases involve a defendant pleading that s/he acted in good faith in reasonable reliance on an undisputed official governmental representation that his/her actions were legal.<sup>332</sup> That is certainly not the situation here. Unlike the defendants in these cases, Ms. Miers was faced, at best, with a competing official representation by a different government entity of what the law requires. Thus, Ms. Miers was not being misled by a government entity into thinking she was acting lawfully, but instead she *chose*, with full knowledge of the possible consequences, to follow the White House's flawed "directive." As the entity which issued the subpoena to Ms. Miers, only the Committee was in a position to give her "reasonable reliance" that she could lawfully refuse to comply, but in fact the Committee did precisely the opposite and made clear that she was required to obey her subpoena.

The inaptness of the attempted analogy to the cited "reasonable reliance" cases is most powerfully demonstrated by Ms. Miers' attorney's reliance on Raley v. Ohio, 360 U.S. 423 (1959). In that case, the Ohio Commission whose questions the defendant witnesses refused to answer had advised the witnesses they were entitled to invoke their privilege against self-incrimination and later sought to charge the witnesses with contempt.<sup>333</sup> Thus, the court held that the defendants could not, consistent with due process, be held in contempt of that body, even though the Court found that Ohio law did not actually allow invocation of the privilege against self-incrimination in that situation.<sup>334</sup> By contrast, here the House Judiciary Committee has unequivocally informed Ms. Miers of the opposite, that she is *not* entitled to invoke executive privilege.

Finally, precedent establishes that a mistaken belief that the law permits refusing to answer a congressional subpoena is not a defense under the criminal contempt law.<sup>335</sup> Indeed, finding a "willful" violation of the contempt statute does not require showing "a bad purpose or

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either full or substantial compliance with the demands of the Committee that had issued the subpoena" after the contempt vote. Rosenberg, et al., *Congress' Contempt Power: Law, History, Practice and Procedure*, CRS Report for Congress RL 340967 ("CRS Contempt Report") at 33, July 24, 2007.

<sup>332</sup> See United States v. Laub, 385 U.S. 475, 487 (1967); Raley v. Ohio, 360 U.S. 423, 438 (1959); United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674-75 (1973); Cox v. Louisiana, 379 U.S. 559, 571 (1965); United States v. Levin, 973 F.2d 463, 468-69 (6th Cir. 1992); United States v. Barker, 546 F.2d 940, 947-48 (D.C. Cir. 1976). The only case Ms. Miers' attorney cited that does not fall into this category, Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938), involved a defendant claiming he did not act "willfully" under the contempt statute because he acted in good faith reliance on the advice of counsel that refusal to answer a committee's questions was lawful. But the court rejected the defendant's claim, did not reach the question of whether the contempt statute would ever permit such a defense, and further cautioned that "[a] witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense...." Id.

<sup>333</sup> Raley v. Ohio, 360 U.S. 423, 425 (1959).

<sup>334</sup> Raley v. Ohio, 360 U.S. 423, 437-38 (1959).

<sup>335</sup> See Braden v. U.S., 272 F.2d 653, 662 (5th Cir. 1959), *affirmed* 365 U.S. 431 (1961) ("The mistaken belief that the law justifies a refusal to answer is not a defense, whether the belief is induced by the misreading of a judicial opinion, by the advice of counsel or otherwise.").

civil motive”<sup>336</sup> or “specific criminal intent.”<sup>337</sup> Rather, “willfulness” is established where “the refusal was deliberate and intentional and was not a mere inadvertence or an accident.”<sup>338</sup> In fact, in a 1996 memorandum used in a House Committee contempt proceeding, the American Law Division of the Library of Congress specifically indicated that this would establish willfulness even in a case where an Administration official refused to comply with a subpoena on the basis of a presidential invocation of privilege.<sup>339</sup> There is no valid legal basis for Ms. Miers’ attorney’s attempted defenses to a contempt charge against her.

#### D. Recent Administration Claims Concerning Criminal Contempt

On the eve of the Committee contempt vote, Principal Deputy Assistant Attorney General Brian Benzckowski wrote to Chairman Conyers asserting that the criminal contempt of Congress law does not apply when Administration officials refuse to respond to Congressional subpoenas on the grounds of executive privilege. This letter largely relied on a 1984 Office of Legal Counsel (“OLC”) opinion by Theodore Olson.<sup>340</sup> One expert on executive privilege described this assertion as “astounding” and “almost Nixonian in its scope and breadth,” since it would provide that the Executive Branch alone would “define the scope and limits of its own powers.”

<sup>341</sup> For several reasons, this latest claim has no proper basis in this matter.

Initially, the 1984 OLC opinion being relied on does not apply here. In its very first sentence, the 1984 OLC opinion stated that it concerned a situation in which a current Executive Branch official was asserting a claim of executive privilege “in response to written instructions from the President of the United States.”<sup>342</sup> As discussed above, however, executive privilege has not been properly invoked in this matter, because there has been no signed statement or similar invocation of executive privilege by the President himself, which both the courts and Congress have required in such cases.

<sup>336</sup> *Dennis v. United States*, 171 F.2d 986, 990 (D.C. Cir. 1948), *affirmed* 339 U.S. 162 (1950).

<sup>337</sup> *Barsky v. United States*, 167 F.2d 241, 251 (D.C. Cir. 1948).

<sup>338</sup> *Field v. United States*, 164 F.2d 97, 100 (D.C. Cir. 1947).

<sup>339</sup> See *Constitutional Necessity for Appearance Before a Committee of a Custodian of Subpoenaed Documents Prior to a Vote to Hold the Custodian in Contempt of Congress*, Memorandum from American Law Division to the Honorable Bill Clinger, Chairman, H. Comm. on Government Reform and Oversight, *printed in Business Meeting in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore as part of the Committee Investigation into the White House Travel Office Matter*, H. Comm. on Government Reform and Oversight, 104th Cong., 2nd Sess., Transcript at 36, June 1996.

<sup>340</sup> Letter from Brian A. Benzckowski, Principal Assistant Deputy Attorney General, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 24, 2007. The letter followed on the heels of a July 20, 2007, Washington Post article in which unnamed Administration officials “unveiled a bold new assertion of executive authority” and claimed that “the Justice Department will never be allowed to pursue contempt charges initiated by Congress against White House officials once the president has invoked executive privilege.” Eggen and Goldstein, *Broader Privilege Claimed in Firings*, Washington Post, July 20, 2007.

<sup>341</sup> Dan Eggen and Amy Goldstein, *Broader Privilege Claimed in Firings*, Washington Post, July 20, 2007 (quoting Mark Rozell, professor of public policy at George Mason University).

<sup>342</sup> “Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege,” 8 Op. O.L.C. 101 (May 31, 1984). See also *id.* at 16 (noting that “the President implemented this decision in a memorandum dated November 30, 1982, to the EPA Administrator, which instructed her to withhold” documents based on executive privilege).



In addition, the 1984 OLC opinion specifically concerned a current Executive Branch official who was withholding documents based on executive privilege. The opinion makes clear that it applied only to the specific situation before it.<sup>343</sup> There is not the slightest indication that it would apply to a situation where a former Executive Branch official like Ms. Miers refuses even to appear in response to a valid congressional subpoena. As discussed above, that complete refusal clearly constitutes contempt under federal law, and there is not the slightest indication in the 1984 OLC opinion that it cannot or should not be prosecuted under the federal criminal contempt statute.

Although the Department of Justice's July 24 letter to the Committee baldly asserts that its "position" against prosecution under the criminal contempt law should apply to Ms. Miers' refusal to appear, it refers to absolutely no supporting precedent or even practice from any previous Administration, Republican or Democratic, for this remarkable claim. The notion that political officials at the White House or Department would thus interfere with a U.S. Attorney's performance of his/her duty under law, in order to forestall a congressional investigation into alleged political interference with U.S. Attorneys performing their duty under law, is truly astonishing.

The 1984 OLC opinion's analysis of the criminal contempt law and related factors, moreover, contains serious flaws. As discussed above, the legislative history of the contempt statute makes clear that it was intended to apply to Executive Branch officials, and a number of such officials attempting to invoke executive privilege to withhold documents have been cited for contempt by Congress or its committees, notwithstanding Executive Branch claims to the contrary.<sup>344</sup>

And as for the OLC's audacious claim that the statutory language mandating that the U.S. Attorney "shall" refer a Congressional contempt citation to a grand jury can effectively be ignored because of asserted separation of powers issues, the highly specific description of the duty to refer, as well as the overarching implications in this particular context for a well-functioning democracy, make this a dangerous argument to entertain seriously. The concerns under investigation here, regarding evidence of possible politicization of prosecutorial power by high-level Executive Branch officials, possible obstruction of justice, and other possible criminal and civil violations, in addition to abuse of executive power, make those dangers particularly acute. Generalized notions of prosecutorial discretion are simply not enough to convince the Committee that the Framers of the Constitution intended, or that the courts would find, such a

<sup>343</sup> *Id.* at 5.

<sup>344</sup> *See* discussion of liability of Ms. Miers for criminal contempt above. In addition, the legislative history of the criminal contempt law indicates that Congress recognized that under the statute, as under the practice in the British Parliament, governmental and other witnesses would not be excused from providing information to Congress based on recognized common law and other governmental privileges. *See* 42 Cong. Globe 431 (statement of bill sponsor Rep. Orr) (explaining that Congress would continue to follow Parliamentary practice which "does not exempt a witness from testifying upon any such [privilege] ground"). In fact, a proposed amendment to expressly recognize the attorney-client privilege in the statute was specifically defeated. *Id.* at 441-43 (rejecting proposed privilege amendment). For further discussion of the legislative history of the criminal contempt law, and of other problems with the OLC Opinion's analysis, *see* CRS Contempt Report at 30-33.

fundamental weakness in the checks and balances that the Framers so carefully constructed to prevent the Nation from falling into despotism.

In fact, numerous federal statutes require that Executive Branch officials “shall” take specified actions. Some of these statutes, for example, require that the President “shall” act as Congress has provided.<sup>345</sup> Other laws require that U.S. Attorneys “shall” bring specified types of prosecutions or take other particular actions.<sup>346</sup> With respect to each of these statutes, as with the criminal contempt law, Congress passed the provisions and the President had the opportunity to sign or veto. Carrying out such laws is clearly consistent with, and indeed required by, separation of powers principles and the Constitution.

As discussed in the Subcommittee’s ruling on the privilege and immunity claims concerning Ms. Miers, moreover, OLC opinions are not law, but represent simply the Executive Branch’s views. In the very dispute referred to in the 1984 OLC opinion, the Executive Branch made effectively the same arguments in a lawsuit claiming that Congress should not have held an EPA Administrator in contempt for refusing to turn over documents on executive privilege grounds. The court declined to so rule, and commented specifically that the criminal contempt provisions “constitute ‘an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation,’” and that after the contempt citation is delivered to the U.S. Attorney, he “is then required to bring the matter before the grand jury.”<sup>347</sup> Indeed, the court had explained years earlier that when a contempt charge is so delivered, Congress “left no discretion” and the U.S. Attorney is “required, under the language of the statute, to submit the facts to the grand jury.”<sup>348</sup> As the D.C. Circuit pointedly noted in another case in which OLC claimed that a statute would be unconstitutional if not interpreted in accord with its views, “[t]he

<sup>345</sup> See, e.g., Military Commissions Act, § 6(a)(3), Pub. L. No. 109-366, Oct. 17, 2006, 120 Stat. 2632, Note to 18 U.S.C. § 2441 (providing that, as occurred this past week, the “President shall issue” interpretations of Geneva Convention provisions by executive order to be published in the Federal Register); 5 U.S.C. § 903(b) (mandating that the “President shall also submit” background or other information “as the Congress may require” for its consideration of agency reorganization plans). Cf. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2531 (2007) (holding that “the statutory language” of the Clean Water Act – which states that the EPA “shall approve” states’ applications for pollution permitting authority under certain circumstances – “is mandatory”).

<sup>346</sup> See, e.g., 2 U.S.C. § 190l (stating that when a Congressional committee asks a U.S. attorney to participate in a proceeding concerning a private claim against the U.S., it “shall be his duty to attend in person” or through an assistant to do so); 33 U.S.C. § 413 (providing that it “shall be the duty of United States attorneys to vigorously prosecute” offenses concerning the protection of navigable waters when so requested by the Secretary of the Army and other designated officials). As a court explained concerning 33 U.S.C. § 413, this section imposes mandatory requirements and “no discretion is to be exercised in these respects.” *State of South Carolina ex rel. Maybank v. South Carolina Elec. & Gas Co.*, 41 F.Supp. 111, 118 (D.S.C. 1941).

<sup>347</sup> *U.S. v. House of Representatives*, 556 F.Supp. 150, 151-52 (D.D.C. 1983). The court in that case dismissed the action and urged the parties to resolve the dispute, which did in fact occur when the Executive Branch agreed to provide access to the requested documents. See L. Fisher, *The Politics of Executive Privilege* 128-29 (2004). It is hoped that the Executive Branch will reach such an agreement with the Committee in this case.

<sup>348</sup> *Ex parte Frankfeld*, 32 F.Supp. 915, 916 (D.D.C. 1940). Cf. *Wilson v. United States*, 369 F.2d 198, 203-04 (D.C. Cir. 1966) (stating that the Speaker of the House is required to exercise discretion on referring a House contempt citation to the U.S. Attorney when the House is not in session).

federal judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution.<sup>349</sup> The same is true for Congress as well.

On July 22, the *New York Times* commented that the "stance" that the Justice Department simply will not pursue criminal contempt charges in this matter "tears at the fabric of the Constitution and upends the rule of law."<sup>350</sup> As the newspaper explained:

There is no legal basis for this obstructionism. The Supreme Court has made clear that executive privilege is not simply what the president claims it to be. It must be evaluated case by case by a court, balancing the need for the information against the president's interest in keeping his decision-making process private. Mark Rozell, an expert on executive privilege at George Mason University, calls the administration's stance "almost Nixonian in breadth," because of its assertion that "the mere utterance of the phrase executive privilege" means that "no other branch has recourse."...This showdown between a Democratic Congress and a Republican president may look partisan, but it should not. In a year and a half, there could be a Democratic president, and such extreme claims of executive power would be just as disturbing if that chief executive made them. Congress should use all of the tools at its disposal to pursue its investigations. It is not only a matter of getting to the bottom of some possibly serious government misconduct. It is about preserving the checks and balances that are a vital part of American democracy.<sup>351</sup>

### CONCLUSION

The refusals of Joshua Bolten and Harriet Miers to comply with the authorized subpoenas directing them to produce documents, and the refusal of Ms. Miers to testify or even appear pursuant to subpoena, have no proper legal basis. Such complete refusal to comply with lawful subpoenas, or even to negotiate to seek to resolve disputes over documents and testimony, significantly threatens the ability of this Committee, and every House Committee, to carry out its legislative and oversight functions. The House cannot accept a process where our subpoenas can be readily ignored, where a private individual witness under a duly authorized subpoena does not even bother to show up, and where executive privilege can be asserted on the thinnest of bases and in the broadest possible manner. This serious problem compels the Committee to seek action by the full House in this matter.

JOHN CONYERS, JR.  
LINDA T. SÁNCHEZ.

<sup>349</sup> *Public Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988).

<sup>350</sup> Editorial, *Power Without Limits*, *New York Times*, July 22, 2007, at A9.

<sup>351</sup> *Id.*

## — ATTACHMENTS —

**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.<sup>1</sup>

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."<sup>2</sup> 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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<sup>1</sup> Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973).

<sup>2</sup> 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.”<sup>3</sup> 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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<sup>3</sup> In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

**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."<sup>1</sup>

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<sup>1</sup> 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.<sup>2</sup>

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 advisers. 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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<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.”<sup>5</sup>

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.”<sup>6</sup> But the White House has maintained that the President never received any advice on, and was not

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<sup>3</sup> L. Fisher, *The Politics of Executive Privilege* 59-60 (2004).

<sup>4</sup> In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

<sup>5</sup> *Id.* at 753.

<sup>6</sup> *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.<sup>7</sup>

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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<sup>7</sup> 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.”<sup>8</sup>

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.<sup>9</sup>

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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<sup>8</sup> In re Sealed Case, 121 F.3d at 746.

<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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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<sup>10</sup> 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).

<sup>11</sup> Watkins v. United States, 354 U.S. 178, 187 (1957).



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September 20, 2007

Hon. John Conyers  
Chairman,  
House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515

Dear Representative Conyers,

I am writing because I have been asked to evaluate the strength of the executive privilege claims concerning the subpoenas of former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten as part of the investigation of the firing of United States attorneys. My conclusion is that it is very important for Congress to act to enforce these subpoenas and that it is difficult to envision a more compelling case on behalf of Congress. From a constitutional perspective, the claims of executive privilege are not sufficient to overcome Congress's constitutional responsibility to conduct meaningful oversight and to consider possible federal legislation. Simply put, this is a situation where the claim of executive privilege is weak and the need for congressional access to the information is strong.

The leading Supreme Court decision on executive privilege is *United States v. Nixon*, 418 U.S. 683 (1974). The Court recognized that there is executive privilege for conversations with and memoranda to the President, but that executive privilege is not absolute. The Court declared that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."

The Court stressed that executive privilege must yield if there is an overriding need for information. The Court explained that executive privilege cannot be used to keep another branch of government from performing its duties under the Constitution.

Under the reasoning of *United States v. Nixon*, Congress has a compelling case for enforcing its subpoenas in connection with its continuing investigation of the U.S. Attorney firings and related matters. It is not even clear that executive privilege applies in this situation. *United States v. Nixon* ruled that executive privilege applies to communications with the President. None of the information requested from Ms. Miers or Mr. Bolton involved communications with President Bush.

Although the Supreme Court has not considered whether executive privilege protects communications with other than the President, the United States Court of Appeals for the District of Columbia Circuit has ruled that executive privilege extends to communications to and from staff “in the course of preparing advice for the President” for a decision to be made by the President.” *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). However, no one has claimed that President Bush was in any way involved in communications concerning the United States Attorneys or the decisions to fire them. The President and his advisors have said that he was not involved.

Nor is Congress seeking sensitive information, concerning foreign policy decision-making where *United States v. Nixon* recognizes a special need for executive privilege. In fact, the Bush administration has said that it would allow its officials to testify, but only in non-public sessions and not under oath. This undercuts any claim that its motivation is keeping information secret to protect national interests.

It also must be noted that the prerequisites for invoking executive privilege have not been met. Ms. Miers did not appear in response to subpoenas. “Privilege logs” have not been provided, even though courts are clear that an individual raising a claim of privilege must provide a “descriptive, full, and specific itemization of the various documents claimed as privileged” and “precise and certain reasons for preserving their confidentiality.” *Smith v. Federal Trade Commission*, 403 F.Supp. 1000, 1018 (D.Del. 1975); *Black v. Sheraton Corp.*, 371 F.Supp. 97, 101 (D.D.C. 1974).

While the justifications for executive privilege in this situation are weak or non-existent, there is a great need for Congress to have access to this information. Congress is investigating whether there was a serious abuse of power, including the possibility of obstruction of justice, in firing United States Attorneys to stop pending investigations for political reasons or for their failure to initiate prosecutions sought for partisan reasons.

The United States Court of Appeals for the District of Columbia has held that executive privilege is overcome when there is “any reason to believe government misconduct occurs.” *In re Sealed Case*, 121 F.3d at 746. Although there is a privilege for deliberations of those in the executive branch, the court made clear that the need to protect the deliberative process “disappears altogether” when there are allegations of serious misconduct.

As explained above, *United States v. Nixon* holds that executive privilege does not allow the withholding of information that would interfere with ability of another branch of government to perform its constitutionally assigned duties. That is exactly the situation here. The Supreme Court long has recognized that Congress has the responsibility to investigate conduct by the executive branch. *McGrain v. Dougherty*, 273 U.S. 135, 174 (1926). Your memo, dated July 24, 2007, to members of the House Judiciary Committee, details the serious allegations of impropriety that may constitute obstruction of justice. Additionally, as you explain, congressional investigations here could lead to new legislation concerning the process for removing United States Attorneys. Congress cannot perform these tasks without full access to information.

Finally, it must be noted that the broad assertion of privilege in these instances is unprecedented. If President Nixon had taken this position, the Senate Select Committee on Watergate never would have been able to investigate that matter. Initially, President Nixon sought to prevent White House Counsel John Dean from testifying, but then relented and allowed this testimony. As with Watergate, there is the need for Congress to investigate whether there were serious abuses of power. Under the Constitution, in these circumstances, executive privilege cannot be used to frustrate Congress in fulfilling its constitutional duty.

Please do not hesitate to let me know if I can be of assistance in any way.

Sincerely,

Erwin Chemerinsky



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September 21, 2007

The Honorable John Conyers  
Chairman, House Committee on the Judiciary  
By fax: 202 225-3951

Dear Chairman Conyers:

Now that the Judiciary Committee is reporting on contempt for the White House staff in the investigation of the U.S. Attorney firings, I write in support of the contempt report and accompanying memo.

I was General Counsel (Acting), Solicitor, and Deputy General Counsel of the House of Representatives in 1984-1995. In the post I worked actively, including major testimony, on executive privilege and contempt battles during the Reagan and Bush I administrations. In particular, there was a relatively less-known, but highly successful, House Foreign Affairs investigation of Ferdinand Marcos's hidden wealth, chaired by Rep. Stephen Solarz (D-N.Y.), for which I basically did all the counsel's work, soup to nuts, including the whole drafting of the successful contempt report that passed the House – the last contempt report to do so. And, even Chairman Dan Burton (R-Ind.), no political soulmate of mine, brought me in as lead witness in his successful 2003 hearings that broke the formal executive privilege claim made by the Bush Administration as to the Boston FBI memos.

Since 1995, I have been a professor of law with a long list of books and articles on related subjects. So I know Congressional contempt and executive privilege, with about as much hands-on experience as anyone can have. To put it differently, three successful Speakers – Tip O'Neil, Jim Wright, and Tom Foley – put their trust in me, personally, on issues of Congressional investigations, and, in one tough battle after another, I never let them down. Ask Rep. Henry Waxman, whom I have loyally served for two decades now. I have closely followed the current House Judiciary investigation and the executive privilege claim – in fact, numerous media, from the Washington Post to Legal Times, have sought and reported my commentary on it.

**I consider the contempt report from the House Judiciary Committee to be thoroughly meritorious, and I unequivocally and without reservation support it – and support bringing it to a House floor vote.**

Let me treat my support under these headings:

- (1) The merit and soundness in the Judiciary Committee’s inquiry, at the technical as well as the larger-context level, and the lack of merit in the Administration’s sweepingly overbroad executive privilege claim.
- (2) The need to bring this to a House vote, lest this Administration reach its end successfully treating House oversight as feckless and toothless.

**First I address: the merit and soundness in the Judiciary Committee’s inquiry, and the lack of merit in the Administration’s sweepingly overbroad executive privilege claim.**

The investigation by the Judiciary Committee of the U.S. Attorney firings will go down in history as one of the House’s best. It took on a subject – this Administration’s politicization of the administration of justice – sorely needing oversight but hidden behind the high walls of the Department of Justice. The Judiciary Committee proceeded systematically, step by step, exactly as I would have preached doing “by the book” – building a case on the evidence, extracting DOJ documents and e-mails, extracting testimony from lesser functionaries like the Attorney General’s chief of staff, exposing (former) Attorney General Gonzalez as having a serious problem of selective amnesia, and finally helping to clarify the reasons an extended tenure for Karl Rove and Gonzalez would be inadvisable.

Although many evaluate these matters at the larger-context level, my own experience and expertise perhaps makes my comments of moment as to the merit and soundness of the Judiciary Committee’s inquiry at the technical level. The contempt report and memo are excellent. The memo documents, as it should, at full length, the legislative purpose of the inquiry – that there is a great deal of legislation all around the subject of appointment of U.S. Attorneys, and that there may well be a need for additional revision besides what the inquiry has already sparked. This is very important. And, it unveils, as it should, at full length, the fatally flawed nature, on technical as well as larger-context grounds, of the executive privilege claim.

As for the executive privilege claim, I would note that I gave the lead testimony that led to the dropping of the one formal executive privilege claim by the Bush Administration, in 2003, so I have been deeply immersed in the issue of its executive privilege claims as to scandals emanating from the Justice Department. The privilege claim that has been sweepingly made for all the White House staff at any level, and all the White House documents and e-mails at any level, is patently without merit. These have been probed many, many times in the past, in every Administration since Watergate. The subject of tampering with the administration of justice is one that has proved, again and again, to warrant the probing of White House staff, documents, and e-mails (or similar older media



of communications like calls and letters). It is nonsense to contend that the President's nomination power is so absolute that it is a total shield for every staffer and document in the White House, particularly on a matter, such as this one, where President Bush has said he was not himself personally involved and informed about what was going on. Since literally nothing of what is being asked about, involves communication to or from the President himself, the confidentiality interest supporting the claim of executive privilege is so diminished as not to give it even a small part of what the grossly sweeping claim being made here by the White House would require.

Moreover, at the technical level, there are multiple fatal issues undermining the executive privilege claim. The President did not himself provide the formal signed claim required by the 1982 Memo that this Administration has confirmed, as its predecessors did, sets the rules for valid executive privilege claims. Mere heresay about Presidential verbiage just does not measure up. And, the White House never indexed or logged, even at the most general level, the documents claimed to be privileged. That is fatal under the Supreme Court case law about Congressional documentary subpoenas – case law which encompasses how constitutional privilege claims, as well as any other privilege claims, must be justified in detailed ways. Overall, the case against executive privilege made in this instance compares very favorably to the case made in 1982-83 concerning the EPA, Superfund, and Anne Gorsuch-Burford – the classic contempt case against executive privilege that established the “gold standard” of Congressional oversight overcoming Executive recalcitrance by the proper process of acting via contempt resolution.

**Second I address: The need to bring this to a House vote, lest this Administration reach its end successfully treating House oversight as feckless and toothless.**

For a long list of reasons, it is vital to bring this to a House vote. First, unlike many previous executive privilege confrontations, on this one, the White House has shown zero willingness to negotiate in good faith. I personally took part in several such past confrontations, and I know the difference between negotiation – however tough the White House stance – and mere stalling. Here there has just been stalling. Second, if the matter is not brought to a House vote, the stalling will be a success. The White House will describe itself as having triumphed, and many who are not hardened about such descriptions will buy into the claim of triumph. With the Administration now most of the way through 2007, and with 2008 an election year, there may not be time for the Administration's stonewalling on other issues to ripen to the point that it could be brought in this way to a House vote. The White House has demonstrated a full bag of stalling methods. So if this matter does not come to such a vote, it is quite possible that none will.

Third, this is a uniquely suitable subject for such a confrontation. Unlike matters such as illegal surveillance, other abuses justified as part of national or homeland security, or the scandals of the Iraq war, this issue is free from Presidential claims of national security powers. Even in previous administrations, such claims of national security powers were used to frustrate Congressional inquiry, and in this one, overblown security claims have

been epidemic. It is vital that when a subject, like the politicization of the administration of justice, is presented that is free from such claims, the occasion not be skipped.

I know that a question to be considered is raised by the Presidential rhetoric for press consumption that contempt under 2 U.S.C. 192 cannot go forward because the U.S. Attorney for the District of Columbia is ordered not to do what the law obliges him to do. There are many different answers to this, which have different appeal to different observers. I will answer just for myself. The job of the House is to bring appropriate contempts to a floor vote, and what happens after that, although important, is not the job of the House to concern itself about unduly. The vote itself puts the House on record that contempt occurred. Whether a successful prosecution ensues is dependent on others – prosecutor, grand jury, judge, jury – and the House cannot consume itself with worry that they will fail to do their proper job. Wrongful “nullification” of a proper contempt report can occur, whether it is jury nullification (as occurred when one jury in the early 1980s accepted the witness’s contention she did not come to the hearing because she had a sore throat that day) or some other kind of nullification. The House cannot worry unduly about the possibility of such nullification. Since it would be wrongful, the House works on the assumption that either it will not occur, or, in the end, it being wrongful, it would be a negative mark against those who engage in the wrongful act, not against the House.

Moreover, Presidential rhetoric of this kind does not match reality. For example, since this investigation started, Attorney General Gonzalez resigned. He will be replaced, presumably by the nominee, Judge Mukasey. The single biggest question all will ask about the new Attorney General: is he independent enough in his commitment to clean up the politicization of the administration of justice? – which can only happen if the sunlight of Congressional inquiry, the best disinfectant, is allowed to shine into the dark corners of this sordid episode. Far from withholding from the Justice Department the chance to purge itself by responding appropriately to a House vote on this contempt report, the House should give it precisely such an opportunity.

For these reasons, I consider the contempt report from the House Judiciary Committee to be thoroughly meritorious, and I unequivocally and without reservation support it – and support bringing it to a House floor vote.

Cordially,

Charles Tiefer



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October 1, 2007

Honorable John Conyers  
Chair  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

As a follow-up to my March 29, 2007 testimony before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, you have requested brief additional views on the claims of executive privilege in the U.S. Attorney investigation.

Since my testimony, the Committee has issued subpoenas to the White House and former Counsel to the President Harriet Miers. The White House and Ms. Miers have refused to comply with those subpoenas, citing executive privilege and an absolute immunity from compelled testimony for Ms. Miers. The Committee has referred to the full House of Representatives a report and resolution citing Ms. Miers for contempt of Congress for refusing to appear, testify, or produce documents, and White House Chief of Staff Joshua Bolten for refusing to produce documents, as required by the subpoenas.

A House Resolution finding presidential advisers—either current or former—in contempt of Congress is a profoundly serious matter. As a former White House Counsel, I understand the value and importance to the presidency of protecting internal deliberations from inappropriate scrutiny and, indeed, of protecting close presidential advisers from being compelled to appear before Congress whenever a congressional committee decides to issue a subpoena. I therefore believe that Congress should make every effort to respect the legitimate constitutional interests of the Executive—a coordinate branch of government—consistent with its own constitutional responsibilities. Similarly, while we should expect the President to defend his constitutional prerogatives vigorously, the President also has a responsibility to acknowledge and respect the legitimate constitutional interests of the Legislature.

*United States v. Nixon* and *Senate Select Committee on Presidential Campaign Activities v. Nixon* instruct that the President's constitutional authority to assert executive privilege is not absolute, but is instead to be

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balanced against the legitimate needs of the coordinate branches of government in undertaking their constitutionally assigned responsibilities. The accommodation process requires each branch to negotiate in good faith as part of that constitutional process.

In this matter, the balance of interests supports the Committee's view that, under all the circumstances present here, it is entitled to at least some information and some testimony from White House officials. Certainly, specific documents or portions of them, as well as responses to particular questions during testimony, could still be subject to claims of executive privilege that would have to be addressed and resolved by the two branches. The Committee might well respect certain of those claims and therefore might not receive all information in which it is interested. But, the White House refusal to provide any documents (or portions of them) at all, and Ms. Miers' refusal even to appear before the Committee and answer those questions that would not implicate the privilege, are inconsistent with the obligations of the Executive Branch in the constitutional accommodation process.

Even if Congress were seeking presidential communications—those communications to and from White House staff "in the course of preparing advice for the President," *see In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)—the privilege would still be a qualified one. In this matter, however, it appears that the communications were not made for the purpose of assisting presidential decisionmaking. In my view, this diminishes the strength of the White House claim.

The Committee has met the strict standard set forth by the district court in *Senate Select Committee* that a Congressional Committee must show that the privileged information is "demonstrably critical to the responsible fulfillment of the Committee's function." It has identified specific and substantial legislative interests in receiving documentary and testimonial evidence. It has moved incrementally, and has sought first to obtain the information it needs from other sources before moving to compel the White House and Ms. Miers. To that end, it sought White House information on a voluntary basis, a process that failed when Fred Fielding, Counsel to the President, agreed only to make a limited amount of information available through controlled interviews and document reviews, with conditions (such as requiring that the Committee agree there would be no subsequent subpoenas, apparently no matter what it learned in these initial interviews) that could well impede Congress's ability to exercise its constitutional authorities. Moreover, the Committee obtained information and testimony from numerous Department of Justice officials before issuing the subpoenas to the White House and Ms. Miers. The information and evidence developed

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in that process included contradictory and incomplete accounts that the Committee believes can be resolved only by seeking information directly from the White House.

The actions of the Committee show that it has sought in good faith to accommodate the constitutional interests of the Executive Branch, and taken the step of issuing subpoenas only upon determining that substantial legislative needs could not be met without information from the White House.

With respect to the testimony of Ms. Miers, the Department of Justice has opined that she is entitled to absolute immunity from compelled testimony before Congress, citing to, among other authorities, a 1971 opinion from Assistant Attorney General Rehnquist, and a 1999 opinion from Attorney General Reno (which addressed a subpoena directed to me, as Counsel to the President). Changes in the law and practices since 1971 appear to have prompted the Attorney General in 1999 to rely not only on that long-standing Executive Branch view, but also to balance Executive and Legislative interests in the particular matter, before concluding that my testimony was protected from Congressional compulsion. For the reasons discussed above, I believe the balance of interests—even applying a strong presumption against compelling such testimony—favors the Committee's position that it is entitled to the testimony of Ms. Miers.

This is especially true because there is one significant difference between the prior opinions and the current situation: Ms. Miers is a former presidential aide, whose duties to the President no longer require her full-time attention. Were she to appear before the Committee, she would likely be precluded from answering certain—perhaps many—questions because of executive privilege, at least as a preliminary matter. The Committee, and ultimately Congress, would then have to address and consider those privilege assertions. But her refusal to appear at all, in the face of a subpoena to do so, is not supported by the law.

Very truly yours,



Beth Nolan

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October 1, 2007

**VIA ELECTRONIC MAIL**

The Honorable John Conyers  
Chairman of the House Committee on the Judiciary  
2426 Rayburn Building  
Washington, DC 20515

**Re: House Judiciary Committee's Claim for Documents and Testimony  
from DOJ and White House**

Dear Mr. Chairman:

You have asked for my views concerning the House Judiciary Committee's claim for documents and testimony from the Department of Justice and White House relating to the firing and replacement of United States Attorneys. The President has asserted executive privilege over these documents.

The Committee has oversight jurisdiction over both the Department of Justice and the administration of the statutes and programs which Congress has consigned to the Department. Supreme Court precedent explicates the investigative power of the Congress inherent in its Article I legislative power and the Committee has established a foundation that the evidence sought is "pertinent"<sup>1</sup> to its investigation of Department of Justice and White House misfeasance. See Memorandum from John Conyers, Jr., Chairman, to Members of the Committee on the Judiciary, "Full Committee Consideration of a Report on the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolton to Comply With Subpoenas by the House Judiciary Committee" (July 24, 2007). The Committee's right to these materials is unassailable against an Executive branch assertion of a presumptive privilege which the

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<sup>1</sup> 2 U.S.C. § 192

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courts have found can be overcome by, among other things, the needs of a prosecutor in a criminal case, *United States v. Nixon*, 418 U.S. 683 (1974), and a civil litigant pursuing a breach of contract against an agency and claiming White House interference in agency decision making. *Sun Oil Company v. United States*, 514 F.2d 1020, 1026 (Ct Cl. 1975).

In short, it is hard to envision a stronger claim for evidence than the one advanced by your Committee. Indeed, the history of legislative oversight of law enforcement provides a case directly on point. In *McGrain v. Daugherty*, 273 U.S. 135 (1926), a Senate Committee investigated charges that the Department of Justice had failed to prosecute public corruption, antitrust violations and other directly applicable matters. In validating congressional authority to examine and inquire into specific enforcement decisions by the Justice Department, the Supreme Court stated:

The subject to be investigated was the administration of the Department of Justice – whether its functions were being properly discharged or were being neglected or misdirected and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings ... the subject would be materially aided by the information [sought] ... the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation and ... the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

*McGrain*, 273 U.S. at 177-78 (emphasis added)

*McGrain's* holding is directly applicable to this Committee's inquiry into the decisions to replace United States Attorneys and White House staff involvement in such decisions. As already cited, even civil litigants have overcome the President's presumptive privilege upon a proper showing and have even obtained, for purposes of discovery, documents constituting communications to the President from his advisors and among his closest White House advisers. *Dellums v. Powell*, 561 F.2d 242, 245-46 (D.C. Cir. 1977). Surely, Congress's Article I power to investigate both the due and proper functioning of the Department of Justice and the White House's interference in

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that function is at least as strong, if not stronger than the claims of a civil litigant in a contract dispute with the federal government.

Sincerely,

Stanley M. Brand

SMB:ils