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GEORGE T. MANNING
PARTNER-IN-CHARGE

404-581-8400

July 17, 2007

The Honorable John Conyers, Jr.
Chairman
U.S. House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Congressional Inquiry Into U.S. Attorneys Matters

Dear Chairman Conyers:

I am responding to your letter of July 13, 2007. Ms. Miers has received a subpoena from the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, to appear before the Subcommittee, produce documents, and give testimony. While Ms. Miers of course respects the authority and prerogatives of the Subcommittee, the Committee, and the U.S. House of Representatives, she is the former Counsel to the President of the United States and has been specifically directed by him not to appear, not to produce documents in response to the subpoena, and not to provide testimony. The correspondence communicating these unequivocal directives has been provided previously to the Committee. The Subcommittee has demanded that Ms. Miers do precisely what the President has prohibited her from doing. In these circumstances, it cannot reasonably be asserted that "Ms. Miers . . . made her own decision to disregard" the Committee's subpoena. Letter from Chairman Conyers to George T. Manning (July 13, 2007). The Committee's dispute is not with Ms. Miers, but with the Executive Branch.

In fact, the cases cited in your letter confirm that the contempt statute is inapplicable to Ms. Miers. None of these cases involves an assertion of the Executive privileges and immunities at issue here. More importantly, as your letter acknowledges, these cases hold that the contempt statute does not apply where a witness has an "adequate excuse." *United States v. Josephson*, 165 F.2d 82, 85 (2d Cir. 1947); *see also Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938). The directives received by Ms. Miers from the President constitute a manifest "adequate excuse" in these circumstances. The cases cited in your letter confirm what the Department of Justice has long held: "the criminal contempt of Congress statute does not apply to executive officials who assert claims of executive privilege at the direction of the President." *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, 129 (1984)) (citing 1956 testimony of then Deputy Attorney General (subsequently Attorney General) William P. Rogers, *Hearings Before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 2d Sess. 2933 (1956)).

Supreme Court cases foreclose any justifiable basis to support a determination that Ms. Miers is in contempt of the Congress. The contempt statute requires that Ms. Miers act "willfully." 2 U.S.C. § 192. The invocation of Executive privileges and immunities by the President in response to the subpoena to Ms. Miers forecloses such intent. *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) (Wilkey, J., concurring); *id.* at 955 (Mehrige, J., concurring); *Townsend*, 95 F.2d at 359-60. The Supreme Court has explained that sanctioning "a citizen for exercising a privilege which the State clearly told him was available" would be "the most indefensible sort of entrapment by the State." *Raley*, 362 U.S. at 438.

I would also like to respond to Chairwoman Sanchez's assertion that the Executive privileges and immunities at issue here are inapplicable to former presidential advisers. *See* Ruling of Chairwoman Linda Sanchez on Related Executive Privilege and Immunity Claims ("Ruling"), at 2. The subpoena is directed exclusively to Ms. Miers' official duties as a senior adviser to the President, not as a private citizen. Therefore, like this entire dispute, this issue is between the Executive and Legislative branches. Regardless of who is correct, "*the President has directed*" Ms. Miers "not to produce any documents in response to the subpoena," Letter from Fred F. Fielding to George T. Manning (June 28, 2007) (emphasis added), "not to provide ... testimony" "relating to the possible dismissal or appointment of United States Attorneys," Letter from Fred F. Fielding to George T. Manning (July 9, 2007), and "not to appear" at the Committee hearing, Letter from Fred F. Fielding to George T. Manning (July 10, 2007). Surely the Committee would not force any citizen to disobey such a directive in order to avoid a contempt of Congress sanction.

In addition, as explained in the Department of Justice's opinion on this matter, Chairwoman Sanchez's position is inconsistent with the positions taken by presidents of both political parties for many decades. *See* Office of Legal Counsel Memorandum (July 10, 2007). As then-former President Truman explained when refusing to comply with a congressional subpoena from the House Committee on Un-American Activities: "The doctrine [of separation of powers] would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes." *Texts of Truman Letter and Velde Reply*, N.Y. Times, Nov. 13, 1953, at 14; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (holding that a current or former President may invoke executive privilege). Based on this, Attorney General Janet Reno noted in her opinion to President Clinton that "since '[a]n immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . . . a former staff member.'" *Assertion of Executive Privilege with Respect to Clemency Decision*,

23 Op. O.L.C. 1, n.2 (Sept. 16, 1999) (quoting *Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters*, at 6 (Office of Legal Counsel, Dec. 21, 1972)) (alterations in original); *see also Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308, n.2 (Sept. 3, 1996) (same).

Chairwoman Sanchez's assertion that the President has not properly invoked Executive Privilege because he has acted through Counsel to the President is mistaken. *See* Ruling at 1. In *In re Sealed Case*, 121 F.3d 729 (1997), the D.C. Circuit held that President Clinton properly invoked the privilege where the "affidavit [of] former White House Counsel Abner J. Mikva stated 'the President . . . has specifically directed me to invoke formally the applicable privileges over those documents.'" *Id.* at 744 n.16. In any event, even if the 1973 district court decision upon which Chairwoman Sanchez relies were viable authority, it is inapposite. In that case the President did not himself assert the privilege. *See Ctr. on Corporate Responsibility, Inc. v. Schultz*, 368 F. Supp. 863, 870-73 (D.D.C. 1973).

As to the other bases of Chairwoman Sanchez's statement that there is no basis for the Executive Branch's directives to Ms. Miers, *see* Ruling at 2-5 (asserting that there is no legal basis for the directive not to appear at the hearing, that the information sought is not covered by Executive Privilege, that the White House has not provided a privilege log, and that Congress has a "compelling need" for the information), I respectfully refer the Committee to the reasoned opinions of the Department of Justice. More importantly, however, Chairwoman Sanchez's statement again underscores that this dispute has little to do with Ms. Miers, and much to do with our system of separated powers. It reaffirms that this dispute is between the Executive and Legislative branches.

I would like to clarify one other matter in the record. During the July 12 hearing, you stated that Ms. Miers "told [you] she was originally [coming to the hearing], and then somehow or someone changed her mind." As I explained in my letter to you of July 10, 2007, that is not accurate. As we are all aware, Ms. Miers' communications with the Committee about these matters appropriately have been through counsel. And, during my conversation with your staff member, Elliot Mincberg, I did not confirm that Ms. Miers would appear before the Committee at the July 12, 2007 hearing. Rather, at your staff member's request, I discussed some logistical arrangements should Ms. Miers appear. *See* Letter from George T. Manning to Chairman Conyers and Chairwoman Sanchez (July 10, 2007). Any representations made to you to the contrary are erroneous. I therefore respectfully request that you amend the record accordingly.

In light of the continuing directives to Ms. Miers and as previously indicated to your Committee, I must respectfully inform you that, directed as she has been to honor the Executive

privileges and immunities asserted in this matter, Ms. Miers will not appear before the Committee or otherwise produce documents or provide testimony as set forth in the Committee's subpoena.

Kind regards,

George T. Manning /ngf

George T. Manning

cc: The Honorable Lamar S. Smith
The Honorable Linda T. Sanchez
The Honorable Chris Cannon
Fred F. Fielding, Esq.