MEMORANDUM

TO: **Members, Committee on the Judiciary**

FROM: **John Conyers, Jr.**
Chairman

DATE: **July 29, 2008**

RE: **Full Committee Markup**

The Committee on the Judiciary will meet to consider: A resolution and report finding Karl Rove in contempt for failure to appear pursuant to subpoena and recommending to the House of Representatives that Mr. Rove be cited for contempt of Congress. The markup will take place on Wednesday, July 30, 2008, at 10:15 a.m. in room 2141 of the Rayburn House Office Building.

I. A resolution and report finding Karl Rove in contempt for failure to appear pursuant to subpoena and recommending to the House of Representatives that Mr. Rove be cited for contempt of Congress

A. Overview

The Committee is scheduled to consider and vote on a report titled "Resolution Recommending That the House of Representatives Find Karl Rove in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Committee on the Judiciary." A draft of the report, which includes a resolution to be recommended to the House of Representatives providing that Mr. Rove be cited for contempt of Congress and that the House pursue other legal remedies to enforce the outstanding subpoena as appropriate, has been provided to all Members. This memorandum provides additional background to assist Committee Members in considering the report and resolution.

Despite extensive efforts to secure voluntary cooperation, and despite the issuance of a compulsory subpoena, Mr. Rove has refused to appear before and provide sworn testimony necessary for the Committee's continuing investigation into the apparent politicization of the Department of Justice, including the termination of U.S. Attorneys in 2006, allegations of selective prosecution, and related issues. Mr. Rove has refused even to appear before the Committee and assert whatever privileges that he believes may apply to his testimony, relying on excessively broad and legally insufficient claims of "absolute immunity" – never recognized by any court – in declining to appear. The "accommodations" or compromises that he has offered are almost entirely illusory, and would substantially compromise the Committee's ability to investigate these matters. Today's vote is thus necessary to preserve the prerogatives of this Committee and the House and to ensure that our process remains a meaningful investigative tool in the future.

B. Factual Background Regarding Mr. Rove's Alleged Role in the Politicization of the Department of Justice

Since January 2007, the Committee has investigated allegations regarding the politicization of the Department of Justice, including the firing of U.S. Attorneys, allegations of selective prosecution, and related matters. New evidence continually surfaces in this investigation, such as a report this week from the Department's Offices of the Inspector General and Professional Responsibility that, among other things, indicates that Mr. Rove and other Administration personnel worked to have a childhood friend of Mr. Rove appointed as an immigration judge.[1]

The harms of this alleged politicization are readily apparent. Respected former Deputy Attorney General Jim Comey testified before the Commercial and Administrative Law Subcommittee last year about the fragility of the Department's reservoir of credibility, and the difficulty of earning back the trust of the American people once the Department's reputation for honesty and impartial justice has been tarnished.[2] Just last week, Attorney General Mukasey testified before the full Committee that he was "well aware of the allegations that politics has played an inappropriate role at the Justice Department' and agreed that "[t]oo many of those allegations were borne out" in a recent Department watchdog report.[3] Prior to that, Mr. Mukasey had acknowledged that, if true, the allegations regarding selective prosecution in the Siegelman case "would be stunning."[4]

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[1] *Joint Report of the Office of Professional Responsibility and the Office of the Inspector General on Investigation of Allegations of Politicized Hiring By Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008).

[2] May 3, 2007, Testimony of former Deputy Attorney General James Comey before the Commercial and Administrative Law Subcommittee.

[3] July 23, 2008, Testimony of Attorney General Michael Mukasey before the Committee on the Judiciary.

[4] July 9, 2008, Testimony of Attorney General Michael Mukasey before the Senate Judiciary Committee.

The U.S. Attorney firings have raised particular alarm from commentators across the political spectrum. Republican former Attorney General Thornburgh testified before a joint hearing of the Commercial and Administrative Law and Crime, Terrorism, and Homeland Security Subcommittees that, in his view, the investigation had shown that the Department 'fired U.S. Attorneys not for performance-based reasons, but for political ones."[5] Similarly, the nonpartisan American Judicature Society wrote last year that "on the basis of the facts as we know them today, the dismissals are indefensible."[6] And, as noted above, two recent joint Inspector General/Office of Professional Responsibility reports describe pervasive politicization of Department functions that violated federal law, civil service rules, and the Department's own policies.[7]

As the investigation has continued, Mr. Rove has emerged as an important figure.

1. Forced Resignations of U.S. Attorneys

Last year, reports appeared in the news media that a group of U.S. Attorneys had been told to resign by the Justice Department.[8] Ultimately it was learned that seven U.S. Attorneys were forced to resign on December 7, 2006, an eighth U.S. Attorney had been asked to resign in June 2006, and a ninth U.S. Attorney had been asked to resign in January 2006.[9]

The plan appears to have emerged at the outset of President Bush's second term in response to questions by Karl Rove and then-White House Counsel Harriet Miers as to whether sitting U.S. Attorneys would be allowed to retain their positions. Mr. Rove himself appears to have asked if the Administration would consider replacing all 93 U.S. Attorneys or "selectively

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[5]Oct. 23, 2007, Testimony of former Attorney General Richard Thornburgh before the Commercial and Administrative Law and Crime, Terrorism, and Homeland Security Subcommittees.

[6]American Judicature Society, *Putting Justice Back in the Department*, June 23, 2007.

[7]*Joint Report of the Office of Professional Responsibility and the Office of the Inspector General on Investigation of Allegations of Politicized Hiring By Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008) and *Joint Report of the Office Professional Responsibility and the Office of the Inspector General on Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program* (June 24, 2008).

[8]*See, e.g.*, Johnston, *Dismissed U.S. Attorneys Received Strong Evaluations*, N.Y. TIMES, Feb. 25, 2007, at A19; Eggen, *Justice Department Fires 8th U.S. Attorney; Dispute Over Death Penalty Cited*, WASH. POST, Feb. 24, 2007, at A2; Eggen, *Fired Prosecutor Disputes Justice Dept. Allegation; He Calls Testimony 'Unfair'; Meanwhile, Senate Panel Votes to Limit Attorney General's Power*, WASH. POST, Feb. 9, 2007, at A6; Taylor & Gordon, *U.S. Attorneys' Selection Is Questioned*, SEATTLE TIMES, Jan. 28, 2007, at A8 (noting that the Attorney General "is transforming the ranks of the nation's top federal prosecutors by firing some and appointing conservative loyalists from the Bush Administration's inner circle who critics say are unlikely to buck Washington, D.C."); Soto & Thornton, *Lam to Resign Feb. 15 as Speculation Swirls; Some See Politics at Play in Ouster of U.S. Attorney*, SAN DIEGO UNION–TRIB., Jan. 17, 2007, at A1.

[9]The U.S. Attorneys asked to resign were Todd Graves (W.D. Mo.), Bud Cummins (E.D. Ark.), John McKay (W.D. Wa.), Carol Lam (S.D. Ca.), David Iglesias (D. N.M.), Paul Charlton (D.Az.), Daniel Bogden (D. Nev.), Kevin Ryan (N.D. Ca.), and Margaret Chiara (W.D. Mi.).

replace" at least some of them.[10] According to one report, Mr. Rove's desire to fire all 93 U.S. Attorneys "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."[11] This targeted list reportedly included U.S. Attorney Patrick Fitzgerald, who at the time was investigating Mr. Rove's role in the leaking of CIA agent Valerie Plame's covert identity. When Mr. Rove made the suggestion to fire all of the U.S. Attorneys, he had already been before the grand jury several times in the Plame case. In addition, recent reports indicate that, just weeks earlier, an Illinois Republican political operative had told an associate he was working with Karl Rove to have Mr. Fitzgerald replaced.[12]

Mr. Rove's request was presented to Kyle Sampson, then a deputy Chief of Staff to Attorney General Alberto Gonzales, 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.[13] "That said," Mr. Sampson wrote, "if Karl thinks there would be political will to do it, then so do I."[14] The idea for a wholesale replacement was thus rejected as too disruptive, and because it would have meant the replacement of some U.S. Attorneys who were good performers or who were "loyal Bushies."[15] Instead, a narrower plan under which a subset of the U.S. Attorneys were to be replaced was put in motion. Kyle Sampson ran the plan over a period of just under two years, during which he maintained and revised various lists of U.S. Attorneys to be fired or retained, and repeatedly circulated these drafts to the White House.[16]

While the Committee has interviewed Mr. Sampson in detail, and has spoken with most of the significant players inside the Justice Department, the reasons why most of the fired U.S. Attorneys were selected for removal, and who identified them as candidates for Mr. Sampson's list, remain unclear. However, in addition to his overall role, evidence suggests that Mr. Rove had a role in at least the following cases:

a. David Iglesias (D. N.M.)

A primary reason David 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 matter that they wanted pursued. New Mexico Republican party Chief Allen Weh reportedly pressed Karl Rove through an aide to have Mr. Iglesias

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[10]Eggen & Goldstein, *Justice Dept. Would Have Kept 'Loyal' Prosecutors*, WASH. POST, Mar, 16, 2007, at A2; OAG 180.
[11]Shapiro, *Documents Show Justice Ranking U.S. Attorneys*, NPR, Apr. 13, 2007, *available at* http://www.npr.org/templates/story/story.php?storyId=9575434.
[12]June 18, 2008, Letter from Principal Deputy Assistant Attorney General Keith Nelson to Chair Sánchez transmitting Supplemental Responses of U.S. Attorney Patrick Fitzgerald; Isikoff, *In the Rezko Trial, A New Name Surfaces: Karl Rove*, Newsweek, May 5, 2008.
[13]OAG 180.
[14]*Id.*
[15]*Id.*
[16]Eggen & Goldstein, *Justice Weighed Firing 1 in 4*, WASH. POST, May 17, 2007, at A1.

replaced in 2005 because he was dissatisfied by Mr. Iglesias' charging decisions in vote fraud matters.[17] 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."[18] Two other New Mexico Republicans, Mickey Barnett and Pat Rogers, came to Washington, D.C., in the Summer of 2006 and met with an aide to Karl Rove, Scott Jennings, as well as Monica Goodling and Counselor to the Attorney General Matthew Friedrich.[19] 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."[20] 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.[21]

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. The evidence indicates that Karl Rove monitored this issue and heard complaints about some U.S. Attorneys on the subject, again including David Iglesias.[22] 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.[23]

b. 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.[24] Kyle Sampson recalled only that Mr.

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[17]Talev & Taylor, *Rove was asked to fire U.S. Attorney*, MCCLATCHY NEWS, Mar. 10, 2007; Gisik, *Rove Played Role in Iglesias Dismissal*, ALBUQUERQUE TRIB., Mar. 12, 2007.
[18]*Id.*
[19]OAG 114, 572; Matthew Friedrich, May 4, 2007, Interview at 31-40.
[20]Matthew Friedrich, May 4, 2007, Interview at 34-35.
[21]Matthew 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.
[22]OAG 850-51; Sampson, Apr. 15, 2007, Interview at 26-27; Eggen & Goldstein, *Vote Fraud Complaints by GOP Drive Dismissal*s, WASH. 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").
[23]Karl Rove, Speech to Republican National Lawyers Association (Apr. 7, 2006), *available at* http://www.talkingpointsmemo.com/archives/013817.php.
[24]OAG 005 - OAG 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."

Biskupic was not a "prominent" U.S. Attorney.[25] 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."[26] 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.[27]

c. Bud Cummins (E.D. of Ark.)

Regarding Bud Cummins, the Administration has equivocated, sometimes suggesting that he was forced out for performance reasons and other times stating it was simply to make room for Karl Rove's former aide Tim Griffin to serve as U.S. Attorney.[28] 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,[29] 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.[30] Mr. Sampson had previously written that "getting [Mr. Griffin] appointed was important to Harriet, Karl, etc."[31] 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 Mr. Rove's awareness of the matter.[32]

2. Alleged Selective Prosecution of Former Alabama Governor Don Siegelman

Concerns that politics may have played a role in the investigation and prosecution of former Alabama Governor Don Siegelman have been widely aired in the press, culminating in a petition urging the Committee to open an inquiry that was signed by 44 former state Attorneys

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[25]Sampson, Apr. 18, 2007, Interview at 51-52.
[26]OAG 850-51.
[27]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 J. SENTINEL, Apr. 7, 2007; Stein, *82 Felons May Have Voted in State*, WIS. STATE J., Apr. 13, 2007.
[28]*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 - OAG 008 (listing Bud Cummins as one of the "weak U.S. Attorneys who have been ineffectual managers and prosecutors").
[29]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).
[30]OAG 127-29, 971-73, 978-85, 990-1002, 1130-34, 1781-82, 1841, 1850, 1853-59; OLA 03-04, 08-10.
[31]OAG 127-29.
[32]OAG 1753-55.

General, both Democrats and Republicans, and received by the Committee in July 2007.[33] Republican former Attorney General of Arizona Grant Woods recently stated that he believes Mr. Siegelman was selected for prosecution to further the political interests of the Alabama Republican party: "I personally believe that what happened here is that they targeted Don Siegelman because they could not beat him fair and square. This was a Republican state and he was the one Democrat they could never get rid of."[34]

a. Background

Don Siegelman was governor of Alabama from 1998 to 2002, and previously had held numerous state offices. Mr. Siegelman lost his bid for re-election in 2002 to Republican Bob Riley by just several thousand votes, and was expected to run again in 2006.[35] He was at the time a "major political force" in Alabama and early polls indicated that he would defeat Governor Riley in a rematch.[36]

In May 2004, Mr. Siegelman was indicted by the U. S. Attorney for the Northern District of Alabama, Alice Martin, on charges related to alleged bid rigging in state contracts.[37] Those charges were dismissed before trial, however, when the prosecution could not produce evidence connecting Mr. Siegelman to the alleged misconduct.[38]

Several months later, a new indictment based on entirely different charges was brought under seal against Mr. Siegelman by the U.S. Attorney for the Middle District of Alabama, Leura Canary. That indictment was made public in October 2005 and, after a June 2006 trial, Mr. Siegelman was acquitted of 25 of the 32 filed charges, and was convicted on 7 counts of corruption or obstruction of justice related charges. In June 2007, Mr. Siegelman was sentenced to 7 years, 4 months in prison (the prosecutors had requested 30 years).[39]

On March 27, 2008, the Eleventh Circuit Court of Appeals granted Mr. Siegelman's motion for release on bond pending appeal, finding that Mr. Siegelman had "met his burden of

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[33]Lipton, *Congressional Inquiry Urged in Prosecution of Ex-Governor*, N.Y. TIMES, July 17, 2007.
[34]*The Prosecution of Siegelman*, 60 MINUTES, CBS NEWS, aired Feb. 24, 2007, *available at* http://www.cbsnews.com/stories/2008/02/21/60minutes/main3859830.shtml.
[35]The election was marred by serious allegations of vote tampering, focused on the as-yet-unexplained shift of several thousands votes from Governor Siegelman to the challenger Bob Riley between vote counts in Baldwin County. Cason, *Riley claims win*, MONTGOMERY ADVERT., Nov. 7, 2002; Morgan, *Governor's Role Remembered For 'Fuzzy Numbers,'* BALDWIN COUNTY NOW, July 19, 2007.
[36]Jones, Oct. 23, 2007, Subcomms. on Crime, Terrorism and Homeland Security and on Commercial and Admin. Law, Testimony at 2; Cohen, *The Strange Case of an Imprisoned Alabama Governor*, N.Y. TIMES, Sept. 10, 2007; and Barrow, *Riley's Ratings are Low: Governor Would Trail Moore, Siegelman in 2006 Race*, MOBILE PRESS-REGISTER, Nov. 16, 2003.
[37]Rawls, *Judge Biased, Lawyers Contend*, MONTGOMERY ADVERT., Sept. 21, 2004.
[38]Davis & McGrew, *Rulings Displease Federal Attorney*, MONTGOMERY ADVERT., Oct. 6, 2004; and Hamburger & Savage, *Ex-Governor Says He Was Target of Republican Plot*, L.A. TIMES, June 26, 2007.
[39]Nossiter, *Former Alabama Governor Gets 7-Year Sentence in Bribery Case*, N.Y. TIMES, June 29, 2007.

showing that his appeal raises substantial questions of law or fact" that might ultimately lead to reversal of the conviction.[40]

b. Allegations Regarding Political Interference and Karl Rove

In May 2007, a Republican attorney from Northern Alabama named Jill Simpson wrote an affidavit stating that, in November 2002, she heard a prominent Alabama Republican operative named Bill Canary say that Karl Rove had contacted the Justice Department about bringing a prosecution of Don Siegelman.[41] Mr. Canary is married to the U.S. Attorney in the Middle District of Alabama, Leura Canary, and Ms. Simpson states in the affidavit that Mr. Canary also said that "my girls would take care of" Mr. Siegelman.[42] Ms. Simpson asked Mr. Canary who "his girls" were and Mr. Canary said they were his wife and Alice Martin, the U.S. Attorney for the Northern District of the state.[43]

On September 14, 2007, Committee staff conducted a sworn, on-the-record interview of Ms. Simpson in which she reaffirmed the statements in her affidavit and offered additional information. Most significantly, Ms. Simpson described a conversation in early 2005 in which Governor Riley's son Rob, a colleague and friend of Ms. Simpson, told her that his father and Mr. Canary had again spoken to Karl Rove who had in turn communicated with the head of the Department's Public Integrity Section about bringing a second indictment against Don Siegelman since the first case in Birmingham had been dismissed. According to Ms. Simpson, Mr. Riley also told her that Mr. Rove had asked the Department to mobilize additional resources to assist in the prosecution effort.[44] Mr. Riley also said that the case would be in the Middle District of Alabama and would be heard by Chief Judge Mark Fuller, a judge who Mr. Riley stated could be trusted to "hang Don Siegelman."[45] And Mr. Riley claimed that the prosecution would try Mr. Siegelman and Mr. Scrushy together, in the hopes that Mr. Scrushy's unpopularity in the state would affect the proceedings against Mr. Siegelman.

Ms. Simpson's statements have been denied by Bill Canary, Rob Riley, and the other figures involved.[46] Mr. Rove himself made a brief, and limited, comment on the matter in June 2007, stating "I know nothing about any phone call," but not addressing the underlying allegations.[47] (It has never been alleged that Mr. Rove was on the phone call described by Jill Simpson; the question is whether Mr. Rove directly or indirectly discussed the possibility of prosecuting Don Siegelman with either the Justice Department or Alabama Republicans.) More

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[40]Order of Eleventh Circuit in *United States v. Siegelman*, Case No. 07-13163-B at 4 (March 27, 2008).
[41]Dana Jill Simpson, May 21, 2007,Affidavit at ¶ 11-16.
[42]*Id.* ¶ 14.
[43]*Id.* ¶ 15.
[44]Dana Jill Simpson, Sept. 14, 2007, Interview at 25-27.
[45]*Id.* at 56-57.
[46]*See, e.g.*, Beyerle, *Siegelman, Scrushy Sentencing Will Go On This Week as Scheduled*, NORTHWEST ALA. TIMES DAILY, June 24, 2007; Zagorin, *Rove Named In Alabama Controversy*, TIME, June 1, 2007.
[47]McCarter, *Siegelman awaits sentencing Tuesday*, HUNTSVILLE TIMES, June 24, 2007.

recently, appearing on Fox News in February 2008, Mr. Rove denied knowing Jill Simpson and challenged ancillary assertions she had made, but again did not address the main charge that he had pressed the Justice Department to prosecute Mr. Siegelman.[48] More recently still, Mr. Rove has elaborated by asserting to a reporter for GQ Magazine that Ms. Simpson is a "complete lunatic" who cannot be trusted and by presenting a statement in some form to 60 Minutes (though it is not clear whether he spoke directly to 60 Minutes or used a spokesman as Mr. Rove does not appear on camera) declaring that he never "never talked to the Department of Justice" about Mr. Siegelman.[49] Finally, in recent answers provided by his lawyer to questions posed by Ranking Member Smith, Mr. Rove reiterated his denials that he attempted to influence the Siegelman prosecution.[50] Available evidence raises questions about these denials, however.

First, Mr. Rove's written answers to the questions posed by ranking Member Smith do not appear to resolve the questions about his possible role in the matter. For example, Mr. Rove was asked if he ever communicated with "any Department of Justice officials, State of Alabama officials, or any individual" about the investigation or prosecution of Governor Siegelman. He answered only that he had not communicated with "Justice Department or Alabama officials" about the matter. The failure to address whether he communicated with any other "individual" suggests that Mr. Rove may have communicated with political operatives such as Bill Canary, the Governor's son Rob Riley, non-Department of Justice Executive Branch officials such as his White House colleagues, or even members of the federal Judicial branch.[51]

While other aspects of the denial appear broader on their face, such as the assertion that Mr. Rove "never attempted either directly or indirectly, to influence these matters," it is impossible to fully evaluate Mr. Rove's statement without follow up questioning that would reveal exactly what he means by terms such as "influence" and "these matters" or whether there are any other ambiguities or gaps in his denials. Without such questioning the Committee cannot know, for example, whether Mr. Rove took steps related to the prosecution of Governor Siegelman that he does not believe rise to the level of "influencing" the case or whether members of his staff may have taken actions regarding this matter that Mr. Rove did not specifically direct them to take. In addition, Mr. Rove never denies having any relevant knowledge about the Siegelman prosecution; he only denies having taken certain actions himself. The Committee's subpoena demands that he testify as to any relevant knowledge that he may possess.

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[48] *See* Statements of Karl Rove, FOX NEWS, Feb. 25, 2008, *available at* http://tpmmuckraker.talkingpointsmemo.com/2008/02/rove_its_a_lie.php. Mr. Rove's denials largely concerned Ms. Simpson's assertion that he had asked her to attempt to obtain compromising photographs of Mr. Siegelman.

[49] DePaulo, *Karl Rove Likes What He Sees*, GQ MAG. BLOG, Apr. 2, 2008, *available at* http://men.style.com/gq/blogs/gqeditors/2008/04/karl-rove-likes.html; *Siegelman Future Hinges On Appeal*, 60 MINUTES, CBS NEWS, aired Apr. 6, 2008.

[50] Answers to House Judiciary Committee Ranking Member Lamar Smith from Karl C. Rove, July 22, 2008.

[51] Asked about this omission by the LA Times, Mr. Rove's counsel asserted that, regardless of their wording, the answers were intended to cover "any other human being on Earth." Hamburger, *Siegelman to Karl Rove: Not Buying Explanation*, LA Times, July 28, 2008. This confused back and forth only highlights the need for proper questioning of Mr. Rove and the flaws inherent in the device of written questions for these purposes.

As to the strong denials by Rob Riley and others that there was a phone call with Ms. Simpson on November 18, 2002, as she testified, Ms. Simpson provided cell phone records to the Committee that reflect an eleven minute call to Mr. Riley's number on that very morning.[52] Those denials thus appear to be in at least some sense inaccurate.

Further evidence on the question whether Karl Rove or other senior figures played some role in the Siegelman prosecution was revealed at a joint hearing of the Crime, Terrorism, and Homeland Securtiy Subcommittee and the Commercial and Administrative Law Subcommittee on October 23, 2007. At that hearing, former U.S. Attorney Doug Jones, who represented Mr. Siegelman from 2003 until early 2006, described a number of troubling facts regarding the Siegelman prosecution – for example, the statement by investigators that they "hoped" their work would implicate the Governor and that prosecutors engaged in discussions that Mr. Jones believes were not in good faith because the prosecutors had already obtained a sealed indictment against the Governor but did not disclose that key fact.[53] The heart of Mr. Jones' testimony, however, involved a series of events in late 2004 indicating that high-level Washington officials were driving the prosecution effort.

Mr. Jones testified that, by mid 2004, he and his team had been told by the federal prosecutors in Alabama that most of the issues under investigation had been "written off" and were not expected to lead to charges. While certain issues required some further investigation, including the donation to the lottery fund by Mr. Scrushy, the prosecutors acknowledged there were significant gaps in the relevant evidence.[54] Mr. Jones testified that, based on his discussions with the prosecutors at this time, he and his colleagues "felt like [the] case was coming to a close."[55] In late fall, however, the lead Alabama prosecutor substantially changed his message, telling Mr. Jones that "there had been a meeting in Washington and that the lawyers in Washington had asked him to go back and look at the case, review the case top to bottom."[56]

After this word came down from Washington, Mr. Jones explained that the case transformed into a much more focused and aggressive effort to find charges on which to indict Mr. Siegelman:

> "What we saw beginning in early 2005 was much more than simply a top to bottom review. Instead it was as if the investigation had new life from top to bottom and beyond. Whereas in the past it had appeared that the investigation was being driven by investigators in the [state] Attorney General's office, the FBI

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[52]Davis, Oct. 23, 2007, Subcomms. on Crime, Terrorism and Homeland Security and on Commercial and Admin. Law, Hearing at 32; Dana Jill Simpson, Sept. 14, 2007, Interview.
[53]Jones, Oct. 23, 2007, Subcomms. on Crime, Terrorism and Homeland Security and on Commercial and Admin. Law, Testimony at 3, 13.
[54]*Id*. at 8-9.
[55]Jones, Oct. 23, 2007, Subcomms. on Crime, Terrorism and Homeland Security and on Commercial and Admin. Law, Hearing at 39.
[56]*Id*.

> and the feds now seemed to be taking control and they were casting a wider net than ever before. The charges that we were told had been 'written off' were obviously now back on the table and for the first time it appeared that agents were not investigating any allegations of a crime, but were fishing around for anything they could find against an individual."[57]

This testimony is especially troubling when considered in light of Ms. Simpson's testimony regarding her conversations with Rob Riley. Ms. Simpson testified that Rob Riley told her that, in the latter part of 2004, Karl Rove had approached the head of the Public Integrity Section of the Department about bringing another case against Mr. Siegelman and giving more resources to the prosecution.[58] Thus, according to the sworn testimony of two different witnesses – who did not know each other and who were not aware of the other's testimony when they spoke[59] – at the same time that Karl Rove was allegedly pressing Justice Department leadership to indict Don Siegelman, Washington officials informed the line prosecutors working the case, who had just recently expressed real doubts about bringing charges, to go back over the entire matter. And as a result of that direction from Washington, the prosecution did in fact launch an aggressive new effort to find indictable charges against Mr. Siegelman.

Lead Siegelman prosecutor Steve Feaga has made press statements denying that he ever told Doug Jones that Washington officials had directed his team to go back over the case. Similarly, the Acting U.S. Attorney for this matter Louis Franklin has said that Mr. Jones' statements are "absolutely not true."[60] But other evidence strongly corroborates Mr. Jones' testimony on this point. For example, an Alabama attorney named Mark White, who represented several witnesses related to the Siegelman matter and is currently President-Elect of the Alabama State Bar, has stated that, like Mr. Jones, he had been advised by the prosecution in 2004 that the investigation was coming to a conclusion and that he was later told by Mr. Feaga that "'Washington' had asked that another look be taken at the entire investigation."[61] Art Leach, a former federal prosecutor and counsel to Mr. Scrushy in this matter, has informed the Committee that, in 2004, "for a variety of reasons it was my opinion that the matter was closed."[62] In mid-2005, however, "the case came back to life."[63]

C. Prior Efforts to Obtain Mr. Rove's testimony

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[57]Jones, Oct. 23, 2007, Subcomms. on Crime, Terrorism and Homeland Security and on Commercial and Admin. Law, Testimony at 12.
[58]Dana Jill Simpson, Sept. 14, 2007, Interview at 49-52.
[59]Although the transcript of Ms. Simpson's deposition had been publicly released by the time Mr. Jones testified before the Committee, he had described the same events well before that release.
[60]Blackledge & Orndorff, *Prosecutor Says Montgomery Led Siegelman Case*, BIRMINGHAM NEWS, Oct. 28, 2007; Editorial, *Congress Should Expand Prosecution Probe*, TUSCALOOSA NEWS, Oct. 25, 2007; Zagorin, *Rove Linked To Alabama Case*, TIME, Oct. 10, 2007.
[61]Letter from Mark White to H. Comm. on the Judiciary staff (Dec. 7, 2007).
[62]Letter from Art Leach to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (Apr. 14 , 2008).
[63]*Id*.

Because Mr. Rove is an important witness who could provide information that is unavailable through any other source, Chairman Conyers sought Mr. Rove's voluntary compliance with the Committee's investigation. In response, White House Counsel Fred Fielding explained that he was prepared to make Mr. Rove and other White House officials available for interviews with the House and Senate Judiciary Committees on a joint basis, but his offer was conditioned on unreasonably limiting preconditions and scope restrictions.[64]

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."[65] Questioning on internal White House discussions of any kind and by personnel at any level would not be allowed. 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."[66] In other words, no matter what was revealed, no other testimony or documents could be requested from the White House.

Given Mr. Fielding's unreasonably restrictive offer, on March 21, 2007, the Commercial and Administrative Law Subcommittee authorized Chairman Conyers to issue subpoenas to Karl Rove and other White House personnel with relevant knowledge or documents.[67] Both before and after March 21, letters were exchanged between the Committee and the White House to seek to resolve voluntarily the Committee's requests for information from the White House, but those efforts were not successful. Committee letters (some of which were sent by Chairman Conyers and Senate Judiciary Committee Chairman Leahy) included letters of March 9, March 22, March 28, and May 21, 2007.[68]

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[64]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).

[65]*Id.*

[66]*Id.*

[67]*Meeting to Consider Subpoena Authorization Concerning the Recent Termination of United States Attorneys and Related Subjects Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007). In addition, the Subcommittee authorized Chairman Conyers to issue a subpoena for D. Kyle Sampson, former Chief of Staff to the Attorney General. Mr. Sampson has thus far voluntarily cooperated with the Committee's investigation.

[68]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); 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); Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Patrick Leahy, Chairman, S. Comm. on the Judiciary, to Fred Fielding, Counsel to the President (Mar. 28, 2007); and 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). All of these letters are on file with the House Committee on the Judiciary.

On July 26, 2007, Senate Judiciary Committee Chairman Patrick Leahy issued a subpoena for Mr. Rove to testify on August 2 and produce documents related to the U.S. Attorneys investigation. Mr. Fielding sent an August 1 letter to Senators Leahy and Specter informing them that the President would invoke executive privilege to direct Mr. Rove not to produce responsive documents or testify about the firings.[69] In addition, the letter cited attached documents from the Department of Justice to assert that Mr. Rove was "immune from compelled congressional testimony" as an "immediate presidential advisor" and would not even appear in response to the Senate Judiciary Committee's subpoena.[70] On November 29, 2007, Senator Leahy issued a ruling that the White House's claims of executive privilege and immunity were not legally valid. On December 13, 2007, the Senate Judiciary Committee approved a contempt citation for Mr. Rove on a 12 to 7 vote,[71] rejecting the White House positions on executive privilege and immunity.

As the Committee's investigation proceeded and as additional allegations and information emerged regarding Mr. Rove, Chairman Conyers, Commercial and Administrative Law Subcommittee Chair Sánchez, and Committee members Artur Davis and Tammy Baldwin wrote directly to Mr. Rove, requesting that he voluntarily testify regarding the politicization of the Justice Department, including the termination of U.S. Attorneys, the Siegelman matter, and related issues.[72] On April 29, 2008, Robert Luskin, who represents Karl Rove, offered to make Mr. Rove available for an interview only regarding the Siegelman matter and that would be neither under oath nor transcribed.[73] Committee members responded on May 1 by rejecting Mr. Luskin's offer on the grounds that such an informal procedure would not generate a useable record and would only confuse matters further, and in particular pointing out that artificially limiting the inquiry to the Siegelman matter would frustrate the Committee's ability to get needed information on the entire subject of politicization.[74] On May 9, Mr. Luskin offered that Mr. Rove respond to written questions, but again only with respect to the Siegelman prosecution.[75] Committee members responded in a May 14 letter rejecting that offer as obviously unacceptable both because of the subject matter limitation and because a written exchange would not allow for the give and take and follow up questioning that is crucial to

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[69]Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, S. Comm. on the Judiciary, and Arlen Specter, Ranking Member, S. Comm. on the Judiciary (Aug. 1, 2007).
[70]*Id.*
[71]Two senior Republicans, Sens. Arlen Specter (Pa.) and Charles E. Grassley (Iowa), supported the contempt citation.
[72]Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Artur Davis, member, H. Comm. on the Judiciary, and Tammy Baldwin, member, H. Comm. on the Judiciary, to Karl Rove (Apr. 17, 2008).
[73]Letter from Robert Luskin, counsel to Karl Rove, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (Apr. 29, 2008).
[74]Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Artur Davis, member, H. Comm. on the Judiciary, and Tammy Baldwin, member, H. Comm. on the Judiciary, to Robert Luskin, counsel to Karl Rove (May 1, 2008).
[75]Letter from Robert Luskin, counsel to Karl Rove, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (May 9, 2008).

getting to the truth.[76] In an effort to avoid the need for a subpoena, Committee members did suggest further accommodations to Mr. Rove, such as offering to provide a written initial list of questions that would be posed to him at a hearing.[77] But on May 21, Mr. Luskin responded by merely restating his prior offers and declining to accept the offers accommodations.[78] Because of Mr. Rove's refusal to testify voluntarily, Chairman Conyers on May 22, 2008, issued a subpoena calling for Mr. Rove to appear before the Subcommittee on July 10.

Subsequently, Committee staff had several discussions with Mr. Luskin whereby Mr. Luskin offered to have Mr. Rove interviewed without a transcript or oath, but at least without prejudice to the Committee's right to pursue its subpoena for sworn testimony. However, Mr. Luskin again insisted that such an interview be limited only to questions concerning the Siegelman prosecution. Chairman Conyers and Subcommittee Chair Sánchez wrote to Mr. Luskin to express their encouragement about the offer to be interviewed without prejudice, but reiterated that Mr. Rove must answer questions about the entire subject of politicization, including the U.S. Attorney firings and the Siegelman case, and was expected to appear on July 10 to do so.[79] On July 1, Mr. Luskin indicated that Mr. Rove would decline to appear.[80] On July 3, Chairman Conyers and Subcommittee Chair Sánchez wrote to Mr. Luskin urging Mr. Rove to reconsider his position and to appear pursuant to his legal obligations.[81]

On July 9, Mr. Luskin again stated that Mr. Rove would not appear and attached a July 9 letter from White House Counsel Fred Fielding, and two Office of Legal Counsel letters - one regarding Mr. Rove dated August 1, 2007, and another regarding Ms. Miers dated July 10, 2007.[82] No more recent DOJ analysis of Mr. Rove's right to ignore the Committee subpoena was offered. Mr. Fielding asserted that Mr. Rove had "constitutional immunity . . . because Mr. Rove was an immediate presidential adviser and because the Committee seeks to question him regarding matters that arose during his tenure and relate to his official duties in that capacity."[83] Mr. Fielding did not explain what aspects of the U.S. Attorney firings or the Siegelman prosecution relate to Mr. Rove's official duties as a White House aide.

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[76]Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Artur Davis, member, H. Comm. on the Judiciary, and Tammy Baldwin, member, H. Comm. on the Judiciary, to Robert Luskin, counsel to Karl Rove (May 14, 2008).

[77]Id.

[78]Letter from Robert Luskin, counsel to Karl Rove, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (May 21, 2008).

[79]Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Robert Luskin, counsel to Karl Rove (June 16, 2008).

[80]Letter from Robert Luskin, counsel to Karl Rove, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (May 21, 2008).

[81]Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Robert Luskin, counsel to Karl Rove (July 3, 2008).

[82]Letter from Robert Luskin, counsel to Karl Rove, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (July 9, 2008).

[83]Letter from Fred Fielding, Counsel to the President, to Robert Luskin, counsel to Karl Rove (July 9, 2008).

On July 10, 2008, the Commercial and Administrative Law Subcommittee met as scheduled but Mr. Rove failed to appear. Ms. Sánchez ruled that Mr. Rove's claims of Executive Privilege-based immunity from Congressional subpoena were not valid. That ruling was upheld by a 7-1 vote of the Subcommittee.[84] A copy of the ruling was mailed to Mr. Rove's attorney on July 10, along with a warning about the possibility of contempt and a request for a response by July 16, 2008, as to whether Mr. Rove would comply with the subpoena.[85] No response was received until July 29, 2008, when Mr. Rove's attorney again indicated that Mr. Rove would not comply with the subpoena but urged the Committee not to recommend contempt against Mr. Rove.[86]

[84]*The Politicization of the Justice Department and Allegations of Selective Prosecution: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2008).
[85]Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Robert Luskin, counsel to Karl Rove (July 10, 2008).
[86]Letter from Robert Luskin, counsel to Karl Rove, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (July 29, 2008).

D. Testimony From Mr. Rove Is Essential For the Committee to Conduct Meaningful Oversight and to Consider Possible Legislation

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 laws" and to "expose corruption, inefficiency or waste," or similar problems in the Executive Branch.[87] The Committee also needs more complete information on the issue of the politicization of the Department of Justice to consider whether to modify or enact federal laws and to obtain support for any such necessary legislation within the Congress, the Executive, and the public at large. 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.[88]

E. Mr. Rove's Claim of Executive Privilege Based Immunity From Subpoena Is Not Legally Valid

According to the letters received from Mr. Rove's counsel, particularly his letters of July 1 and July 9, 2008, Mr. Rove's refusal to appear and testify before the Subcommittee on July 10 as required by subpoena was based on claims that "Executive Privilege confers upon him immunity" from even appearing to testify, and that "as a [former] close advisor to the President, whose testimony is sought in connection with his official duties in that capacity, he is immune from compelled Congressional testimony."[89]

These claim were rejected by Subcommittee Chair Sánchez in a ruling that was upheld by a 7-1 vote of the Subcommittee on July 10, 2008. For several reasons, as explained in Chair Sánchez' ruling and below, those claims are legally invalid.

First, the claims were not properly asserted. The Subcommittee did not receive a written statement directly from the President, let alone anyone at the White House on the President's behalf, asserting Executive Privilege, or claiming that Mr. Rove is immune in this instance from testifying before us. Nor did any member of the White House attend the July 10, 2008, hearing to raise those claims on behalf of the President. The most recent letter from Mr. Rove's lawyer simply relies on a July 9, 2008, letter to him from the current White House counsel directing that Mr. Rove should disobey the subpoena and refuse to appear at the Subcommittee hearing.

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[87] Watkins v. United States, 354 U.S. 178, 187 (1957).
[88] 273 U.S. 135, 174 (1927).
[89] Letter from Robert Luskin to Chairman Conyers (July 1, 2008) at 1; Letter from Robert Luskin to Chairman Conyers (July 9, 2008) at 1.

The July 9, 2008, letter from White House Counsel Fred Fielding claims that Mr. Rove "is constitutionally immune from compelled congressional testimony about matters that arose during his or her tenure as a presidential aide and that relate to his or her official duties."[90] As discussed in greater detail below, no general freestanding immunity exists for former presidential advisers and thus the proper course is to recognize claims of privilege only when properly asserted in response to specific questions during a particular hearing.

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 District Court of the District of Columbia made clear in the Shultz case 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."[91]

It should also be noted that even a formal claim of privilege, by itself, is not enough to prevent a private party from complying with a Congressional subpoena. In cases where a Congressional committee rules that asserted claims of Executive Privilege are invalid, the Executive Branch's only recourse beyond further negotiation is to seek a court order to prevent the private party from testifying (or producing documents). This is because neither the Constitution nor any federal statute confers authority upon the President to order private citizens not to comply with Congressional subpoenas.

The Executive Branch recognized this in United States v. AT&T, where the Ford Administration sued to enjoin AT&T, a private party, from complying with a subpoena from a House committee. AT&T recognized that despite the White House's adamant requests that it not comply with its subpoena, it nevertheless was "obligated to disregard those instructions and to comply with the subpoena."[92] The President had no freestanding authority to prevent AT&T from complying. The same is true here.

Second, there is no proper legal basis for Mr. Rove's refusal even to appear before the Subcommittee as required by subpoena. No court has ever held that presidential advisers are immune from compulsory process – in any setting. In fact, the Supreme Court has expressly recognized that presidential advisers, and even members of the President's cabinet, do not enjoy the same protections as the President himself.[93] Moreover, since 1974, when the Supreme Court rejected President Nixon's claim of absolute presidential privilege in United States v. Nixon, it has been clear that Executive Privilege is merely qualified, and not absolute.[94] Neither Mr. Rove's lawyer nor Mr. Fielding nor the Office of Legal Counsel (OLC) at the Justice Department has cited a single court decision to undermine these well-settled principles. Therefore, the proper

[90]Letter from Fred Fielding to Robert Luskin (July 9, 2008).
[91]Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973); see also United States v. Burr, 25 F. Cas. 30, 192 (C.C.Va.1807) (ruling by Chief Justice Marshall that President Jefferson had to personally identify the passages he deemed confidential and could not leave this determination to the U.S. Attorney).
[92]United States v. AT&T, 551 F.2d 384, 387 (D.C. Cir. 1976)
[93]Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982); Butz v. Economou, 438 U.S. 478, 505-506 (1978).
[94]United States v. Nixon, 418 U.S. 683, 706 (1974).

course of action for Mr. Rove is to attend the hearing pursuant to subpoena, at which time he may, if expressly authorized by the President, assert Executive Privilege in response to specific questions posed by the Subcommittee.

Assuming that Mr. Fielding's July 9, 2008 letter to Mr. Luskin – and its attached materials from the Justice Department's OLC – sets out the case for Mr. Rove's claim for immunity before this Subcommittee, the arguments presented therein are wholly without merit. Most notably, both the letter and its accompanying materials from OLC fail to cite a single court decision nor could they, in support of Mr. Rove's contention that a former White House employee or other witness under federal subpoena may simply refuse to show up to a congressional hearing.

To the contrary, the courts have made clear that no present or former government official is so above the law that he or she may completely disregard a legal directive such as the Committee's subpoena. As the Supreme Court explained more than a century ago, "[n]o man in this country is so high that he is above the law," and "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."[95]

Even beyond the case law, the reasoning utilized in the OLC materials, authored by Principal Deputy Assistant Attorney General Steven G. Bradbury, has no application to former presidential advisers. Each of the prior OLC opinions on which Mr. Bradbury relies, including the 1999 Opinion issued by Attorney General Janet Reno, covers only current White House advisers, not former advisers like Mr. Rove. This distinction is crucial, as all of the arguments purportedly supporting absolute immunity for current presidential advisers simply do not apply to former advisers. For example, the primary OLC memorandum from which all subsequent adviser-immunity opinions have been derived, authored by Chief Justice and then-OLC head William H. Rehnquist, reaches only the "tentative and sketchy" conclusion that current advisers are "absolutely immune from testimonial compulsion by congressional committee[s]" because they must be "presumptively available to the President 24 hours a day, and the necessity of [appearing before Congress or a court] could impair that ability."[96] The same rationale on its face does not apply to former advisers, and thus there is no support for Mr. Bradbury's claim that former advisers are immune from Congressional process. And even Mr. Rehnquist himself acknowledged that when White House advisers wish to assert executive privilege, they must first appear before Congress and then assert the privilege.[97]

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[95] United States v. Lee, 106 U.S. 196, 220 (1882). In addition to U.S. v. Nixon, supra, see also Clinton v. Jones, 520 U.S. 681, 691-2 (1997).

[96] Memorandum for the Honorable John D. Ehrlichman from William H. Rehnquist (Feb. 5, 1971) at 7. The 1999 OLC opinion referred to by Mr. Bradbury similarly covers only current advisers and acknowledges that a court might well not agree with its conclusions. See Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999)(Opinion of Attorney General Janet Reno).

[97] See U.S. Government Information Policies and Practices – The Pentagon Papers, Hearing Before the Subcomm. On Foreign Operations and Government Information of the House Committee on Government Operations, 92d Cong., 1st Sess. 385 (1971) (testimony of William H. Rehnquist)

The 1999 Reno Opinion also reflects doubt about the matter, expressly noting that a court might not agree with the arguments for immunity and suggesting that the matter might in fact be resolved through some sort of balancing.[98] Those doubts are most obviously demonstrated by the fact that, in the end, the Clinton White House did not stand upon the immunity argument made in this opinion but instead, on several occasions, allowed its current and former White House Counsel to testify.[99]

Moreover, the fact that OLC has opined that former advisers are absolutely immune from testimonial compulsion by Congress, is not entitled to any deference. Such an opinion, unlike that issued by a court, is not an authoritative formulation of the law. Rather, it is only the Executive Branch's view of the law, and is entitled only to the weight that its inherent merit warrants. In this instance, it is clear that Mr. Bradbury's memorandum was ill-conceived and its conclusions were properly rejected by the Subcommittee.

The White House's argument in favor of absolute immunity for Mr. Rove on these matters is remarkable for an additional reason. According to Mr. Fielding's July 9, 2008, letter, the White House believes that the matters covered by the subpoena relate to Mr. Rove's "official duties." If that assertion is to be credited, then apparently this Administration believes that Mr. Rove's official duties included the alleged pressuring of the Justice Department to criminally prosecute a political opponent of the President's party and also included ensuring the political loyalty of the U.S. Attorney corps and forcing politically unhelpful U.S. Attorneys to resign. While it is true that Mr. Rove denies at least some of these allegations, the White House claim that these alleged actions would fall within his "official duties" is disturbing. On the other hand, if the White House does not believe that such interference in the Department of Justice's prosecution function was an official duty of Mr. Rove, then either the claim of immunity fails on the Administration's own terms (because they claim the immunity applies only where official duties are involved) or they are actually asserting a total immunity from compelled testimony for Presidential aides on any subject and regardless of any nexus to the individual's White House responsibilities. That form of immunity, of course, would be even greater than that held by the President, as the Clinton v. Jones case makes clear, and should be rejected as legally unsupportable.

Third, the claims of absolute immunity directly contradict the conduct of this and past Administrations with respect to White House officials appearing before Congress. Only recently, current Vice-Presidential chief of staff David Addington appeared and testified before the House Judiciary Committee pursuant to subpoena, and former White House Press Secretary Scott McClellan appeared and testified without even receiving a subpoena. In 2007, former White House officials Sara Taylor and Scott Jennings testified concerning the U.S. Attorney firings before the Senate Judiciary Committee pursuant to subpoena. Prior to this Administration, both present and former White House officials have testified before Congress numerous times; a Congressional Research Service study documents some 74 instances where

[98] *Assertion of Executive Privilege With Respect To Clemency Decision*, Opinion of Attorney General Janet Reno, September 16, 1999.
[99] Fisher, *Congressional Access to Information*, 52 Duke LJ 323, 346-47 (2002).

White House advisers have testified before Congress since World War II, many of them pursuant to a subpoena.[100]

This White House's asserted right to secrecy goes beyond even the claims of 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.[101]

Fourth, the claims of absolute immunity and the refusal to appear pursuant to subpoena and to answer questions from the Subcommittee directly contradict the behavior of Mr. Rove and his attorney themselves. When Mr. Rove's attorney was asked earlier this year by a media representative whether Mr. Rove would testify before Congress in response to a subpoena on the Siegelman matter, he responded "sure" by e-mail.[102] In addition, unlike Harriet Miers, Mr. Rove has spoken extensively in the media on the very subject the Subcommittee seeks to question him about: allegations regarding his role in the alleged politicization of the Justice Department during this Administration, including the prosecution of prominent Democrats like former Governor Don Siegelman and the unprecedented forced resignations of nine U.S. Attorneys in 2006. In addition, if Mr. Rove and his attorney are willing to submit written answers to questions, as they have when asked by Representative Smith, Mr. Rove should also be willing to answer oral questions with a transcript. It is inappropriate for former White House personnel to speak publicly about matters and answer written questions as they choose but then to refuse to testify before Congress under oath and subject to cross-examination on the very same matters, relying on claims of alleged confidentiality.

Fifth, and finally, especially to the extent that Executive Privilege is the basis for the claim of immunity as to Mr. Rove, the White House has failed to demonstrate that the information the Committee seeks from him under the subpoena is covered by that privilege. There is no expectation that Mr. Rove would reveal any communications to or from the President himself, which is at the heart of the presidential communications privilege.

In fact, on June 28, 2007, a senior White House official at an authorized background briefing specifically stated that the President had "no personal involvement" in receiving advice about the forced resignations of the U.S. Attorneys or in approving or adjusting the list containing their names. The Committee seeks information from Mr. Rove about his own communications and his own involvement in the process of the forced resignations of U.S. Attorneys and related aspects of the politicization of the Justice Department.

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[100]Harold C. Relyea & Todd B. Tatelman, Presidential Advisers' Testimony Before Congressional Committees: An Overview, CRS Report for Congress, RL 31351 (Apr. 10, 2007).
[101]L. Fisher, The Politics of Executive Privilege, at 59-60 (2004).
[102]Transcript of Verdict with Dan Abrams, MSNBC, May 22, 2008, *available at* http://www.msnbc.msn.com/id/24792353/.

Mr. Rove nevertheless apparently claims that Executive Privilege applies or confers immunity upon him, asserting that the privilege also covers testimony by White House staff who advise the President, apparently based on the Espy decision.[103]

The Espy court, however, made clear that while the presidential communications privilege may cover "communications made by presidential advisers," such communications are only within the realm of Executive Privilege when they are undertaken "in the course of preparing advice for the President."[104] But the White House has maintained that the President never received any advice on, and was not himself involved in, the forced resignations of the U.S. Attorneys. And there has been no suggestion that the President was personally involved in the Siegelman matter. Thus, the presidential communications privilege would not seem to apply here.

Moreover, whether such communications would even fall under the presidential communications privilege in the context of a Congressional inquiry is far from certain.[105] The Supreme Court in Nixon and the Court of Appeals in Espy both expressly noted that different balancing considerations would apply when the communications at issue were sought by Congress on behalf of the American people. It seems odd that these courts would rule that a congressional investigation, authorized under the Constitution, carries less weight than a civil or criminal trial. More appropriately, such an investigation should be entitled to the greatest deference by the courts, as Congress is tasked specifically with overseeing and legislating on matters concerning the workings of the Executive Branch, and specifically the Justice Department.

For all the foregoing reasons, Mr. Rove's claims of immunity are not legally valid and his refusal to comply with the subpoena and appear at this hearing to answer questions cannot be properly justified.

[103] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).
[104] Id.
[105] Id. at 753.

F. Conclusion

The Committee should approve the Report on the refusal of Karl Rove to comply with a subpoena by the House Judiciary Committee, which includes a resolution to be recommended to the House of Representatives providing that Mr. Rove be cited for contempt of Congress and that the House pursue other legal remedies to enforce the outstanding subpoena as appropriate.