U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

July 24, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand that the Judiciary Committee is voting tomorrow on resolutions calling for the House of Representatives to refer contempt of Congress citations against Josh Bolton, the Chief of Staff to the President, and Harriet Miers, the former Counsel to the President, to the United States Attorney for the District of Columbia for prosecution pursuant to the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194 (2000).

As you know, the President has asserted executive privilege and directed that certain documents and related testimony not be provided in response to subpoenas issued by the Judiciary Committee in connection with its inquiry into the decision of the Department of Justice to request the resignations of several United States Attorneys in 2006. The President also directed Ms. Miers to invoke her immunity from compelled congressional testimony and decline to appear in response to a subpoena from the Judiciary Committee. These directives were based on legal opinions from the Department advising that the assertion of privilege and immunity were legally proper. *See* Letter for the President from Paul D. Clement, Solicitor General and Acting Attorney General (June 27, 2007) (addressing assertion of executive privilege); Memorandum for the Counsel to the President from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony* (July 10, 2007).

As it considers the contempt resolutions, we think it is important that the Committee appreciate fully the longstanding Department of Justice position, articulated during Administrations of both parties, that "the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege." *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995). As expressed by Office of Legal Counsel Assistant Attorney General Theodore B. Olson more than twenty years ago, when an Executive Branch official complies in good faith with the President's assertion of executive privilege, "a United States Attorney is not required to refer a contempt citation . . . to a grand jury or otherwise to prosecute [the] Executive Branch official who is carrying out the President's instruction . . . ." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101,

102 (1984) ("*Prosecution for Contempt of Congress*"). Two legal conclusions support the longstanding Department position:

> First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.

Id.

The position Mr. Olson articulated was based on prior Department positions and has been consistently followed ever since, including in an explicit statement in a published OLC opinion by Assistant Attorney General Walter Dellinger during the Clinton Administration, recognizing that "the criminal contempt of Congress statute does not apply" in this context, because "application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress." *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. at 356.

It is the Department's view that the same position necessarily also applies to Ms. Miers's lawful invocation of her immunity from compelled congressional testimony. The principles that protect an Executive Branch official from prosecution for declining to comply with a congressional subpoena based on a directive from the President asserting executive privilege similarly shield a current or former immediate adviser to the President from prosecution for invoking his or her immunity from compelled congressional testimony—especially when, as here, the President instructs the official to do so.

Please do not hesitate to contact us if you would like further information concerning the Department's position on the pending contempt of Congress resolutions. We would be pleased to provide a fuller explanation of our views on this important matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar Smith