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July 9, 2008

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VIA FACSIMILE

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515

Re: Karl C. Rove

Dear Chairman Conyers:

In response to your letter of July 3, 2008, concerning the subpoena to my client, Karl C. Rove, I am writing to confirm that Mr. Rove will respectfully decline to appear on July 10 on the grounds that as a 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.

As I have indicated to you in each of my letters, Mr. Rove does not assert any personal privileges in response to the subpoena. However, and although I know you would prefer otherwise, Mr. Rove is simply not free to take a position inconsistent with that asserted by the President. Most recently, by letter of July 9, 2008 (a copy of which is attached), the White House has reaffirmed the Executive Branch position that immediate Presidential advisors have immunity in this situation and has directed Mr. Rove not to appear.

Your letter of July 3, 2008, repeats the Committee's threat that Mr. Rove's refusal to appear may subject him to statutory contempt under federal law and the inherent contempt authority of the House of Representatives. As you well know, the precise legal issue presented here is already before the United States District Court for the District of Columbia. Threatening Mr. Rove with sanctions will not in any way expedite the resolution of this issue on the merits.

Mr. Rove remains prepared to explore alternatives, including an informal interview or written responses to questions concerning the Siegelman allegations, that would furnish the Committee the information it seeks while respecting Executive Branch confidentiality interests. As I reiterated in my last letter to you, and as I have explained to Mr. Mincberg in our conversations,

our offers carry no conditions whatsoever: The Committee would remain free to seek to enforce the subpoena if it were dissatisfied with the form or substance of the information it obtained through the alternatives we have proposed. I am at a loss, therefore, to understand why the Committee is unwilling to explore the Siegelman accusations unless Mr. Rove is also prepared to discuss a broad range of other factually distinct matters. There is no loss of face or sacrifice of principle in pursuing constructive alternatives, even if they do not address all of the Committee's concerns.

I hope that we will continue to explore ways to resolve this matter while the larger legal issues, over which Mr. Rove has no control, are pending in court.

Yours sincerely,

Robert D. Luskin

Attachment

Copy: The Honorable Lamar S. Smith
The Honorable Chris Cannon
Elliot M. Mincberg

THE WHITE HOUSE

WASHINGTON

July 9, 2008

Dear Mr. Luskin:

As you are aware, on May 22, 2008, the House Judiciary Committee, Subcommittee on Commercial and Administrative Law (the "Committee"), issued a subpoena to your client, former Assistant to the President, Deputy Chief of Staff and Senior Advisor Karl Rove, seeking his appearance for testimony on July 10, 2008, "on the politicization of the Department of Justice, including allegations regarding the prosecution of former Governor Don Siegelman." *May 22, 2008 Letter from Chairman John Conyers, Jr. and Representative Linda T. Sanchez to Robert D. Luskin, Esq.*

We have been advised by the Department of Justice (the "Department") that a present or former immediate adviser to the President is constitutionally immune from compelled congressional testimony about matters that arose during his or her tenure as a presidential aide and relate to his or her official duties. *See* Attachment A (*August 1, 2007 Letter from Steven G. Bradbury to Fred F. Fielding*); *see also* Attachment B (*Memorandum for the Counsel to the President re: Immunity of Former Counsel to the President from Compelled Congressional Testimony*, dated July 10, 2007). As the Committee understands, this constitutional immunity exists to protect the institution of the Presidency, and numerous Administrations - Republican and Democratic - have shared this position. We have been further advised that 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, Mr. Rove is not required to appear in response to the Committee's subpoena. Accordingly, the President has directed him not to do so. I respectfully request that you communicate this information to Mr. Rove.

Please contact me if you have any questions or would like to discuss these issues.

Sincerely,

Fred F. Fielding
Counsel to the President

Attachments

Robert D. Luskin, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037-1350

ATTACHMENT A

U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

August 1, 2007

Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Fielding:

You have asked whether Karl Rove is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the United States Senate. For the reasons discussed below, we believe he is not.

Mr. Rove serves as an Assistant to the President, Deputy White House Chief of Staff, and Senior Advisor to the President. The Committee, we understand, seeks testimony and documents from Mr. Rove about matters arising during his tenure in these positions and relating to his official duties. Specifically, the Committee wishes to ask Mr. Rove about the removal and replacement of several United States Attorneys in 2006. *See* Letter for Karl Rove, Deputy Chief of Staff, from the Hon. Patrick Leahy, Chairman, Senate Committee on the Judiciary (July 26, 2007).

As we explained in our opinion to you dated July 10, 2007, regarding a subpoena to former Counsel to the President Harriet Miers, immediate presidential advisers are constitutionally immune from compelled congressional testimony about matters that arise during their tenure as presidential aides and relate to their official duties. *See* 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* at 2 (July 10, 2007). In our July 10 opinion, we noted that Assistant Attorney General William Rehnquist defined immediate presidential advisers as "'those who customarily meet with the President on a regular or frequent basis.'" *Id.* at 1 (quoting Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("*Rehnquist Memo*")).

Based on the information provided to us, Mr. Rove satisfies the Rehnquist definition of immediate presidential adviser. We understand that Mr. Rove is one of the President's closest advisers. He meets with the President quite frequently and advises him on a wide range of policy issues. Mr. Rove's responsibilities and interactions make him a presidential adviser "who customarily meet[s] with the President on a regular or frequent basis." *Rehnquist Memo* at 7. Accordingly, we conclude that Mr. Rove is immune from compelled congressional testimony

about matters (such as the U.S. Attorney resignations) that arose during his tenure as an immediate presidential adviser and that relate to his official duties in that capacity. Therefore, he is not required to appear in response to the Judiciary Committee subpoena to testify about such matters.

Please let me know if we may be of further assistance.

Sincerely,

Steven G. Bradbury
Principal Deputy Assistant Attorney General

ATTACHMENT B

U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

July 10, 2007

MEMORANDUM FOR THE COUNSEL TO THE PRESIDENT

Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony

You have asked whether Harriet Miers, the former Counsel to the President, is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the House of Representatives. The Committee, we understand, seeks testimony from Ms. Miers about matters arising during her tenure as Counsel to the President and relating to her official duties in that capacity. Specifically, the Committee wishes to ask Ms. Miers about the decision of the Justice Department to request the resignations of several United States Attorneys in 2006. *See* Letter for Harriet E. Miers from the Hon. John Conyers, Jr., Chairman, House Committee on the Judiciary (June 13, 2007). For the reasons discussed below, we believe that Ms. Miers is immune from compulsion to testify before the Committee on this matter and, therefore, is not required to appear to testify about this subject.

Since at least the 1940s, Administrations of both political parties have taken the position that "'the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.'" *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno) (quoting Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977)). This immunity "is absolute and may not be overborne by competing congressional interests." *Id.*

Assistant Attorney General William Rehnquist succinctly explained this position in a 1971 memorandum:

> The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.

Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("*Rehnquist Memo*"). In a 1999 opinion for President Clinton, Attorney General Reno concluded that the Counsel to the President "serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony." *Assertion of Executive Privilege*, 23, Op. O.L.C. at 4.

The rationale for the immunity is plain. The President is the head of one of the independent Branches of the federal Government. If a congressional committee could force the President's appearance, fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened. As the Office of Legal Counsel has explained, "The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, at 2 (July 29, 1982) ("*Olson Memorandum*").

The same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers. Given the numerous demands of his office, the President must rely upon senior advisers. As Attorney General Reno explained, "in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.[1] Thus, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned functions." *Id.*; *see also Olson Memorandum* at 2 ("The President's close advisors are an extension of the President.").[2]

The fact that Ms. Miers is a former Counsel to the President does not alter the analysis. Separation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers. Former President Truman explained the need for continuing immunity in November 1953, when he refused to comply with a subpoena directing him to appear before the House Committee on Un-American Activities. In a letter to that committee, he warned that "if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President." *Texts of Truman Letter and Velde Reply*, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 12, 1953 letter by President Truman). "The doctrine

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[1] In an analogous context, the Supreme Court held that the immunity provided by the Speech or Debate Clause of the Constitution to Members of Congress also applies to congressional aides, even though the Clause refers only to "Senators and Representatives." U.S. Const. art I, § 6, cl. 1. In justifying expanding the immunity, the Supreme Court reasoned that "the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Any other approach, the Court warned, would cause the constitutional immunity to be "inevitably . . . diminished and frustrated." *Id.* at 617.

[2] *See also History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 771-72 (1982) (documenting how President Truman directed Assistant to the President John Steelman not to respond to a congressional subpoena seeking information about confidential communications between the President and one of his "principal aides").

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." *Id.* In a radio speech to the Nation, former President Truman further stressed that it "is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President." *Text of Address by Truman Explaining to Nation His Actions in the White Cave*, N.Y. Times, Nov. 17, 1953, at 26.

Because a presidential adviser's immunity is derivative of the President's, former President Truman's rationale directly applies to former presidential advisers. We have previously opined that because an "immediate assistant to the President may be said to serve as his alter ego . . . . the same considerations that were persuasive to former President Truman would apply to justify a refusal to appear [before a congressional committee] by . . . a former [senior presidential adviser], if the scope of his testimony is to be limited to his activities while serving in that capacity." Memorandum for the Counsel to the President from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972).

Accordingly, we conclude that Ms. Miers is immune from compelled congressional testimony about matters, such as the U.S. Attorney resignations, that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity, and therefore she is not required to appear in response to a subpoena to testify about such matters.

Please let me know if we may be of further assistance.

Steven G. Bradbury
Principal Deputy Assistant Attorney General