UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law

3904 Woodbine St.
Chevy Chase MD 20815
Tel: (301) 951-4239
Fax: (301) 951-4271

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

Dear Chairman Conyers:

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

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

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

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

Let me treat my support under these headings:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cordially,

Charles Tiefer