US attorneys firing probe

White House invokes broad executive privilege claims to block congressional testimony

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Former White House Counsel Harriet Miers refused on Thursday to appear before the House Judiciary Committee to answer questions about the Bush administration's decision to fire a group of US attorneys last year. In justifying her decision to ignore a congressional subpoena, Miers cited a Justice Department opinion released this week that asserts broad and unprecedented claims of executive privilege.

Miers' decision comes a day after confused and contradictory testimony from former White House political director Sara Taylor before the Senate Judiciary Committee. In an apparent attempt to avoid a contempt charge, Taylor elected to present herself to the committee, but she refused to answer most questions related to White House discussions that led to the firing of the attorneys.

Over the past several months, evidence has emerged showing that the principal purpose of the firings was to influence the 2006 elections by packing the US attorney system with individuals who would pursue claims of "vote fraud" against Democrats. The attempt to block Congressional testimony is a part of the effort to cover up these actions and stonewall any investigation into them.

In a vote along party lines on Thursday, a House subcommittee found that the claims of executive privilege cited by Miers and the White House are not legally valid. Subcommittee Chairman Linda Sanchez, a Democrat, said, "Ms. Miers is required pursuant to the subpoena to be here now and to produce documents and answer questions."

The full judiciary committee, and eventually the full House of Representatives, may move to find Miers in contempt of Congress. This would likely send the dispute over the subpoenas between Congress and the White House into the courts.

Miers, a longtime Bush loyalist, announced her decision not even to appear before Congress after the release of a Justice Department legal opinion earlier this week. According to a report in the *Los Angeles Times*, the Justice Department has concluded that top White House officials "can ignore subpoenas from Congress to testify about the firings of US attorneys."

Miers was closely involved in the firing of the nine federal prosecutors. The process of firing the prosecutors began when Miers proposed that all 93 US Attorneys be dismissed. This proposal was ultimately rejected in favor of a more selective approach.

In a letter to Miers' lawyer, current White House Counsel Fred Fielding said, "Ms. Miers has absolute immunity from compelled congressional testimony as to matters occurring while she was a senior adviser to the president." For this reason, "The president has directed her not to appear at the House Judiciary Committee hearing on Thursday, July 12, 2007."

The assertion of the "absolute immunity" of top White House officials to respond to Congressional subpoenas is unprecedented and unconstitutional. Stephen Gillers, a law professor at New York University, noted to the *Los Angeles Times* that executive privilege "does not entitle you to refuse to appear. The privilege entitles you to refuse to answer questions when you appear if those questions call for privileged information. No one can claim the privilege entitles you to ignore the body that subpoenas you."

In essence, the White House is asserting that Congress has no ability to compel testimony from current or former White House aids on any issue discussed while they served in the administration. This implies a repudiation of the separation of powers doctrine and is part of the White House's attempts to assert quasi-dictatorial powers for the executive branch.

The concept of executive privilege is not included in the US Constitution, but presidents have long argued for the right to keep certain communications private. In 1974, the Supreme Court recognized this principle, but applied it only to communications involving the president. The Court ruled, moreover, that this privilege was outweighed by the need for evidence in the criminal trial that included investigations into President Richard Nixon's role in the Watergate scandal.

According to the Bush administration, the scope of privileged communications covers discussions between executive branch officials that do not include the president, as well as discussions that involve individuals outside the executive branch altogether.

The administration's position is full of contradictions. It asserts, for example, that the testimony of Miers, Taylor and other aids is covered by executive privilege because their emails and documents were part of a decision-making process that included

the president. At the same time, however, the White House has asserted that Bush was not involved in the final decision to fire the prosecutors.

Also, the White House has said that Miers and Taylor should not testify because it is necessary to keep internal deliberations secret. In a letter to the Senate Judiciary Committee, Fielding asserted that that the privilege was invoked to protect the ability of the president to "receive candid advice from his advisors." However, the Bush administration has repeatedly offered to allow informal interviews with White House aids, including Karl Rove, so long as they are not under oath and there is no transcript. On its face, the White House is not insisting on keeping information secret, but rather insisting that this information not be delivered under oath.

What the administration wants to preserve, in fact, is the right of executive branch officials to lie to Congress and not be placed in any situation where they would be forced to tell the truth or face consequences for not doing so.

The decision to have the Justice Department issue a legal opinion defending the administration's position could make it difficult for Congress to pursue a contempt case against Miers, Taylor or the White House for refusing its subpoenas. The decision to pursue such a case is ultimately made by the US attorney for the District of Columbia, who may consider himself bound by the findings of the Justice Department.

In her testimony before the Senate Judiciary Committee on Wednesday, Sara Taylor repeatedly refused to answer questions relating to discussions on the attorney firings, referring to a letter she had received from Fielding.

Taylor's attempt to distinguish between "fact based" questions and questions relating to the content of deliberations was confused, however. On several occasions, she was asked whether she had had discussions with Bush on the attorney firings. After repeatedly refusing to answer, she later backtracked and said that she had had no such discussions. She also said that to the best of her knowledge, Bush was not involved at all in these discussions.

Democratic Senator Benjamin Cardin pointed to some of the contradictions in her testimony. "You seem to be selective in the use of the presidential privilege," he said. "It seems like you're saying that, 'Yes, I'm giving you all the information I can,' when it is self-serving to the White House, but not allowing us to have the information and make independent judgments."

Taylor was involved in the firing of Arkansas US Attorney Bud Cummins, who was replaced by Tim Griffin a long-time associate of Karl Rove and former official with the Republican National Committee. Before replacing Cummins, Griffin worked as an assistant for Taylor. Cummins provoked the ire of the Bush administration for resisting pressure to prosecute vote fraud cases against Democrats.

In her testimony on Wednesday, Taylor said that Cummins had been planning on leaving before he was fired, which she said was "unfortunately handled." In an interview with Salon responding to the testimony, however, Cummins said that he had decided to stay on in late 2005 and that reports of his intention to leave his post voluntarily had been "way overblown."

Taylor refused to answer questions on who was involved in the decision on the attorney firings and what criteria were used to make these decisions.

In addition to arguing that Taylor and Miers are immune from Congressional subpoenas, the White House has also refused to turn over large numbers of documents relating to the investigation. In a letter to Senators on Monday, Fielding not only refused to turn over the documents, but also refused to explain the rationale for the administration's assertion of executive privilege.

The Democratic Party has thus far attempted to avoid a direct conflict with the White House on the attorney firing issue. There was a delay of several months between the opening of Congressional investigations and the issuing of the subpoenas, and the Democrats have thus far refrained from issuing a subpoena to Rove, who still works for the White House. At the same time, they have largely avoided discussing the underlying political issue—the attempt to use the US attorney system to manipulate elections.

If the Democrats were serious about opposing the White House on this issue, they would open some form of criminal investigation, including charges of impeachment. Not only were the underlying actions of a criminal character, the refusal to respond to subpoenas is itself a criminal offense. Moreover, the Supreme Court precedent in the Watergate investigations has clearly established that the interests of a criminal investigation override claims of executive privilege.

In spite of Democratic efforts to reach a compromise, the position of the White House that it is immune from any congressional oversight has set the stage for a potential constitutional crisis. For its part, the Bush administration is clearly prepared to defend its position of broad executive privilege all the way to the Supreme Court.