ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 18, 2014

Mr. W. Neil Eggleston
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Eggleston:

I write in response to your letter dated July 15, 2014, in which you claimed that David Simas, Director of the White House Office of Political Strategy and Outreach ("OPSO"), "is immune from congressional compulsion to testify on matters relating to his official duties and will not appear at the July 16, 2014, hearing."[1] Mr. Simas' failure to appear at the Committee's hearing regarding OPSO denied the American people and our Members an opportunity to hear from the head of an office that has—under several Administrations—misused government resources for political purposes. The decision not to make him available was apparently based on the premise that this White House is above congressional scrutiny.

The question of whether Mr. Simas is immune from being compelled to testify before Congress, while certainly an "issue[] of extraordinary constitutional significance,"[2] already has been resolved by the federal judiciary: He is not immune. In *Committee on the Judiciary, U.S. House of Representatives v. Miers*, the United States District Court for the District of Columbia issued a 93-page opinion that emphatically rejected the legal arguments of the George W. Bush White House—identical to the argument put forth by the White House with respect to Mr. Simas—that senior White House aides are immune from congressional subpoenas.[3] In that case, the House Judiciary Committee, chaired by Congressman John Conyers, sued to compel former Counsel to the President Harriet Miers to testify before that Committee. The Court made absolutely clear that senior Presidential advisors "do not have absolute immunity from compelled congressional process,"[4] and it went on say that subpoenaed advisors are legally required to appear and testify in response to a congressional committee's subpoena, though they remain free to invoke legitimate testimonial privileges in response to specific questions.[5] When the decision

[1] Letter from W. Neil Eggleston, Counsel to the President, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform at 1 (July 15, 2014) [hereinafter Eggleston].
[2] *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 55 (D.D.C. 2008).
[3] 558 F. Supp. 2d 53 (D.D.C. 2008).
[4] *Id.* at 105-06.
[5] *See id.* at 106.

was published, Republicans and Democrats alike hailed it as a "victory" for Congress,[6] and said it "should send a clear signal to the Bush administration that it must cooperate fully with Congress."[7]

To justify its decision to defy a congressional subpoena here, the White House has trotted out the identical arguments that the Bush White House unsuccessfully used to claim Ms. Miers was immune from being compelled to testify. Those arguments were rejected both by the Democratically-controlled House Judiciary Committee,[8] and by the District Court in *Miers*. The *Miers* Court expressly noted that the "Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context."[9] The same thing is true today. Your July 15 letter, and the July 15 Office of Legal Counsel (OLC) opinion upon which it relies, does not cite any case law to support the notion that the President's advisors are immune from being compelled to testify before Congress, because there is none.

In fact, OLC expressly acknowledged that its "opinion" was not based on any Supreme Court precedent because "[t]he Court has not yet considered whether Congress may secure the testimony of an immediate presidential adviser through compulsory process."[10] In other words, the *Miers* opinion is the controlling authority on the matter of whether the President's advisers can be subpoenaed. Unable to cite any case law to the contrary, OLC merely states that it "respectfully disagree[s] with the *Miers* court's analysis and conclusion, and adhere[s] to the Executive Branch's longstanding view that the President's immediate advisers have absolute immunity from congressional compulsion to testify."[11]

Mr. Simas is the first witness under subpoena during my tenure as Chairman who has refused to appear at a hearing. The decision to keep Mr. Simas out of the hearing room altogether showed disdain for the Committee's legitimate and long-standing interest in the White House Office of Political Affairs, which dates back to Chairman Henry Waxman. Chairman Waxman interviewed or deposed 18 political appointees, including President Bush's political directors, and, after a nearly two-year investigation, Chairman Waxman released a staff report that advised, "American taxpayers should not pay the salaries of White House officials when they are engaged in helping members of the President's political party."[12]

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[6] Laurie Kellman, *US judge: White House aides can be subpoenaed*, USA TODAY, July 31, 2008 6:44 PM (quoting Hon. Lamar Smith, then-Ranking Republican Member, H. Comm. on the Judiciary).
[7] *Id.* (quoting Hon. Nancy Pelosi, then-Speaker of the House).
[8] *See* Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, & Linda T. Sanchez, Chairwoman, Subcomm. on Commercial & Admin. Law, to George Manning, Esq., Jones Day (July 11, 2007) (rejecting the White House's claim of absolute immunity for senior presidential advisors).
[9] *Miers*, 558 F. Supp. 2d at 99.
[10] Memorandum from Karl. R. Thompson, Acting Ass't Att'y Gen., U.S. Dep't of Justice Office of Legal Counsel, to W. Neil Eggleston, Counsel to the President at 4 (July 15, 2014).
[11] *Id.* at 8.
[12] H. Comm. on Oversight & Gov't Reform, Staff Report, *The Activities of the White House Office of Political Affairs*, 110th Cong. at 23 (Oct. 2008).

During his first campaign for president, then-Senator Obama seemed to agree. He often criticized the political focus of the Bush White House.[13] In 2007, he said "The Bush-Cheney administration has perfected the perpetual campaign."[14] Still, the Office of Political Affairs remained open for two years under President Obama, until he closed it in January 2011, just days before the Office of Special Counsel (OSC) released a report warning against using an official government office as a partisan political operation.[15]

Against this backdrop, it should have come as no surprise to the White House that the Committee had questions when the President re-opened the Office of Political Affairs under a different name in January 2014, especially in light of the way that the office was described in the press. According to the *New York Times*, the White House re-opened the office because it "seems eager to send a new message: that it is serious about defending Democratic control of the Senate and taking back the House from Republicans"[16] and to "focus attention on candidate needs, including fund-raising."[17] According to *Politico*, the White House advertised Mr. Simas "as a one-stop shop for all things midterms . . . he'll be the point of contact on requests for presidential visits, fundraiser appearances and sign-offs on direct mail and email blasts."[18] According to the *Washington Post*, Mr. Simas takes part in biweekly strategy meetings with the Democratic Senatorial Campaign Committee's executive director and Senate Majority Leader Harry Reid's chief of staff for the purpose of aligning the legislative calendar with the Administration's efforts to help Senators facing difficult reelections.[19]

My concern about OPSO was heightened when U.S. Special Counsel Carolyn Lerner told the Committee that the White House did not consult OSC before opening the office.[20] In response to this information, I wrote to the White House on March 18, 2014, to request documents and a briefing that would shed light on whether OPSO was complying with the Hatch Act.[21] Then-Counsel to the President Kathryn Ruemmler responded with a ten-sentence letter that contained no documents and made no mention of the requested briefing and concluded by stating that "I trust that this addresses your interest in the new office."[22]

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[13] Michael D. Shear, *White House Comeback for Political Affairs Office,* N.Y. TIMES, Jan. 24, 2014.
[14] *Id.*
[15] U.S. Office of Special Counsel, *Investigation of Political Activities By White House and Federal Agency Officials During the 2006 Midterm Elections,* (Jan. 2011) at 74.
[16] Michael D. Shear, *White House Comeback for Political Affairs Office*, N.Y. TIMES, Jan. 24, 2014.
[17] *Id.*
[18] Edward-Isaac Devore, *White House to launch new political office*, POLITICO, Jan. 24, 2014.
[19] Philip Rucker & Paul Kane, *In 2014 midterms, parties see different issues and states as path to Senate majority*, WASH. POST, Feb. 20, 2014.
[20] Letter from Hon. Carolyn N. Lerner, U.S. Special Counsel, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Feb. 11, 2014); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Carolyn Lerner, U.S. Office of Special Counsel (Feb. 10, 2014).
[21] Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Denis McDonough, Chief of Staff, White House (Mar. 18, 2014).
[22] Letter from Kathryn H. Ruemmler, Counsel to the President, White House, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Mar. 26, 2014).

Finding Ms. Ruemmler's response insufficient, I wrote on May 27, 2014, to reiterate my request for documents and information that would show whether OPSO's staff were complying with the Hatch Act—the same documents and information I requested initially on March 18. On June 13, you provided a more substantive description of OPSO's function, but again ignored my requests for documents and a briefing.[23] Because there was no indication that the White House would comply with the requests I made in March and May, I invited Mr. Simas to testify at a Committee hearing in which our Members—and the public—could hear him explain how OPSO uses taxpayer dollars.[24] It was not until one week after I invited Mr. Simas to testify that the White House finally acknowledged my outstanding request for documents and a briefing.[25] It was immediately clear, however, that the White House's document production was not made in good faith because the production consisted primarily of the 2008 Waxman report and the 2011 OSC report.[26] The White House also refused to make Mr. Simas available to answer the Committee's questions about the office he directs and stated that the invitation for him to testify was "not appropriate."[27]

I was left with no choice but to issue a subpoena to Mr. Simas to compel him to answer the Committee's questions at a hearing on July 16, 2014, with the understanding that a briefing might obviate the need for Mr. Simas to appear.[28] An attorney from the White House Counsel's Office briefed Committee staff on July 15, 2014. Mr. Simas did not attend the briefing, nor did any other staff from the Office of Political and Strategic Outreach. The briefer—for the first time—provided non-public information about the structure and purpose of the office, but he did not provide any documents, or even discuss them, despite the fact that the Committee first requested them in March. It was clear that to get the answers the Committee needs and the American people deserve, it was necessary to hear directly from Mr. Simas in a public forum.

The next day, Mr. Simas did not appear; even to announce that the President had asserted privilege over his testimony. Rather than allow Mr. Simas to comply with the subpoena, the White House chose to ignore the *Miers* precedent in favor of an extreme position that would expand the concept of separation of powers to the point that one of Congress' most important oversight tools—the subpoena—would be severely diminished.

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[23] Letter from W. Neil Eggleston, Counsel to the President, White House, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (June 13, 2014).
[24] Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to David Simas, Dir., Office of Political Strategy & Outreach, White House (July 3, 2014).
[25] Letter from W. Neil Eggleston, Counsel to the President, White House, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (July 10, 2014).
[26] *Id.*
[27] *Id.* at 3.
[28] Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to W. Neil Eggleston, Counsel to the President, White House (July 11, 2014).

Mr. Simas' failure to appear, despite having been compelled to do so by a lawfully issued subpoena, was contumacious, and the Committee is prepared to enforce its subpoena. In light of the White House's apparent need to further consider the *Miers* opinion, and in recognition of our mutual interest in resolving this matter in a manner consistent with the guidance contained therein, I am prepared to give Mr. Simas a second chance to appear. The Committee will reconvene the hearing that began on July 16, 2014, one week from today, on July 25, 2014, at 9:00 a.m. in room 2154 of the Rayburn House Office Building. I urge the President to reconsider and to act in a manner consistent with the Constitution and the Court's ruling in *Miers* by directing Mr. Simas to appear before the Committee pursuant to the subpoena that remains in effect. If the President has a legitimate concern that Mr. Simas' responses to specific Committee questions will implicate matters protected by the presidential communications privilege, he may instruct Mr. Simas to assert that or another valid testimonial privilege, in response to specific questions, consistent with the *Miers* opinion.

Sincerely,

Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member