

THE WHITE HOUSE

WASHINGTON

July 24, 2014

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515

Dear Chairman Issa:

I write in response to your letter dated July 18, 2014, and in further response to the subpoena you issued to David Simas, Assistant to the President and Director of the White House Office of Political Strategy and Outreach (“OPSO”). As your latest correspondence reflects, my office has gone to great lengths to respond to the Committee’s stated oversight interests. These bona fide efforts reflect our commitment to engage with the Committee in a process of accommodation between two co-equal branches of government consistent with each branch’s constitutional obligations. Your rush to subpoena Mr. Simas illustrates the Committee’s refusal to pursue its oversight function in a responsible and deliberate manner. Moreover, the Committee has fallen far short of justifying its request that an immediate Presidential adviser testify at a Committee hearing.

Your most recent letter once again fails to provide any information about the specific questions concerning OPSO’s compliance with the Hatch Act that the Committee believes remain unanswered. Your unwillingness to specify the reasons for your continued pursuit of this matter frustrates our ability to offer appropriate accommodations, particularly in light of the substantial steps my office has already taken to respond to your previous requests. Your most recent letter also states that your “concern about OPSO was heightened” because Carolyn Lerner, Special Counsel for the Office of Special Counsel, stated that she did not consult with the White House before OPSO was created. You did not acknowledge, however, that based on her review of our correspondence with you, Ms. Lerner stated in written testimony to your Committee that “OPSO appears to be operating in a manner that is consistent with Hatch Act restrictions.”

On Tuesday, July 15, 2014, the same day the Committee staff received a 75 minute briefing from senior members of my staff, you wrote to me refusing to lift the subpoena for testimony from Mr. Simas. Your letter noted that the briefing did not “say whether or not the White House pursued corrections” to media characterizations of OPSO or which “officials were involved in the decision to reopen” the office. These two questions have no bearing on how OPSO complies with the Hatch Act – which is your stated oversight interest in this matter. Instead, the questions highlight the unfocused nature of your inquiry, the lack of any need for Mr. Simas’ testimony at a congressional hearing, and the need for you further to specify your interests in this matter so that we can effectively address them.

Notwithstanding the absence of any nexus between these two questions and your stated interests, we remain committed to accommodating the Committee's informational requests, where possible. Thus, as a further accommodation, I address here the questions raised in your letter.

With respect to media characterizations of OPSO, the Office of the Press Secretary issued a press release announcing the appointment of Mr. Simas as Assistant to the President and Director of OPSO on January 24, 2014. In addition, a White House spokesperson provided an on-the-record statement for media outlets concerning the office. There were no subsequent discussions that we are aware of concerning characterizations in the specific article raised in your letter. With respect to the decision to create OPSO, senior advisers in the Chief of Staff's Office and the White House Counsel's Office engaged in discussions about the creation and constitution of the new office before it was formally created. These discussions included how to create the office so that it operates consistent with the obligations of the Hatch Act and the Office of Special Counsel's most recent guidance as reflected in its 2011 report.¹ Indeed, the documents we provided to the Committee on July 10, 2014 demonstrate our focus on ensuring that the staff of OPSO was familiar with that report.

Lastly, your letter dated July 15, 2014, also raises questions about the Committee's request for documents. As you know, we have already provided certain documents to you addressing your areas of inquiry. As a further accommodation, and as my staff stated in the briefing to your staff, we are willing to discuss whether other documents may address any unanswered questions you may have consistent with your stated investigative interests.

Your letter asserts that "[t]he question of whether Mr. Simas is immune from being compelled to testify before Congress . . . already has been resolved by the federal judiciary," and specifically that *Miers*, in which the District Court for the District of Columbia held that the former Counsel to President Bush was not immune from a congressional testimonial subpoena, "is the controlling authority on the matter of whether the President's advisers can be subpoenaed" to testify before Congress. On the contrary, *Miers* is not binding with respect to the Committee's testimonial subpoena to Mr. Simas or in any case other than itself. As the Supreme Court has explained, a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p.134-26 (3d ed. 2011)). In applying this well-established rule in an earlier White House case, the United States Court of Appeals for the District of Columbia Circuit explained that although the district court had rejected the White House's legal position in the case, "the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to [its prior legal] position" "[i]n activities unrelated to the . . . case" decided by the district court. *In re Executive Office of the President*, 215 F.3d 20, 24-25 (D.C. Cir. 2000). That is just what we have done here.

¹ *Investigation of Political Activities by White House and Federal Agency Officials During the 2006 Midterm Elections*.

Thus, it is not correct that we have “ignored the *Miers* precedent.” Rather, I was advised by the Department of Justice that, after thoroughly considering the District Court’s reasoning in *Miers*, the Department continues to believe that the Executive Branch’s longstanding position on the immunity of immediate presidential advisers applies in the circumstances here and is correct as a matter of constitutional law. See Memorandum to W. Neil Eggleston, Counsel to the President, from Karl R. Thompson, Acting Assistant Attorney General (July 15, 2014). As the Department explained, “a congressional power to compel the testimony of the President’s immediate advisers would interfere with the President’s discharge of his constitutional functions and damage the separation of powers” by threatening the President’s “independence and autonomy from Congress,” and by “threaten[ing] executive branch confidentiality, which is necessary (among other things) to ensure that the President can obtain the type of sound and candid advice that is essential to the effective discharge of his constitutional duties.” *Id.* at 3 (citations omitted). Accordingly, and consistent with *Camreta* and *In re Executive Office of the President*, the White House is adhering to that position with respect to your subpoena of Mr. Simas.

In sum, we have delivered to you several substantive letters detailing the operation of OPSO and the robust measures we have implemented to ensure compliance with the Hatch Act. We have produced internal White House materials that document the same. We arranged in short order a briefing attended by your staff that concluded only when all questions had been asked and answered. And we write again to provide yet additional information and to offer further discussions regarding accommodating your interest in certain documents. These accommodations and offers of further accommodations should suffice to satisfy the Committee’s legitimate oversight interests while balancing the needs of the Executive Branch contemplated by the Constitution.

This Committee during your predecessor’s Hatch Act investigation never attempted to force the appearance at a public hearing of an immediate adviser to the President even though, in that case, there was a predicate Hatch Act violation – a political briefing of GSA officials by a White House official that included urging them to volunteer for certain campaigns – that prompted the investigation. By contrast, the subpoena here is an exceptionally aggressive action that is not based on any predicate of wrongdoing. I therefore hope you will reconsider your continued efforts to demand testimony from Mr. Simas.

If you have outstanding, unanswered questions about OPSO, or would like to discuss our latest offer of accommodation, please ask your staff to contact my staff to discuss how we might meet your informational needs.

Sincerely,



W. Neil Eggleston
Counsel to the President

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
The Honorable Carolyn Lerner, Special Counsel
U.S. Office of Special Counsel