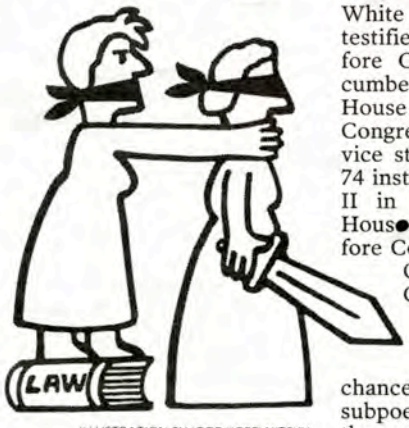
No right to ignore subpoena

■ Former White House counsel must appear before committee

BY HARLAN J. PROTASS



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The subpoena is the great democratizer of the American judicial system. Everyone must respond in some way to a lawfully issued subpoena.

Everyone, that is, apparently, except for those whom the White House unilaterally declares to be exempt from that legal duty — like Harriet Miers, the former White House counsel and Supreme Court nominee.

Miers received a subpoena from the House Judiciary Committee seeking her testimony on July 12 in connection with its probe into the dismissal of U.S. attorneys. According to what was described by her attorneys as specific direction by the president "not to appear" and "not to provide testimony," Miers took the extraordinary step of defying Congress and skipping the hearing.

If she had appeared, she could have — and most certainly would have — refused to answer questions based on an assertion of executive privilege. Executive privilege allows presidents to protect senior administration officials from having to testify, in order to allow for the unrestricted flow of advice to them.

The House Judiciary Committee ruled that Miers' claim of executive privilege was "not legally valid" because she no longer works for the White House. It also found that the subpoena required her "to be here now." It noted that both past and present White House officials have testified numerous times before Congress, including incumbent and former White House counsel, and that a Congressional Research Service study documented some 74 instances since World War II in which serving White House advisers testified before Congress.

On Friday, Rep. John Conyers Jr. (D-Mich.), chairman of the House Judiciary Committee, gave Miers one last chance to comply with the subpoena and appear before the committee. He raised the stakes on the brewing conflict, threatening potential contempt proceedings for continued noncompliance. But late Tuesday afternoon, Miers once again flouted her legal obligation, telling lawmakers that she wouldn't appear.

As a former public official and onetime potential justice of the Supreme Court, Miers should know better. She should be especially aware of the need to respect legal process. Even if she intends to assert executive privilege in response to lawmakers' questions, and even if that intention is at the specific direction of the president himself, Miers still has an obligation to appear before the House Judiciary Committee and actually assert that privilege. Indeed, Sara Taylor, another former White House adviser who also received a subpoena, did just that. She appeared and asserted executive privilege in response to numerous questions by lawmakers.

When it comes to subpoenas, former White House officials should be treated like everyone else. No special treatment, like that granted to Lewis "Scooter" Libby. As Conyers pointed out, "no court decision . . . supports the notion that a former White House official has the option of refusing to even appear in response to a congressional subpoena."

If it would be appropriate to hold in contempt a nameless recipient of a congressional subpoena who refused to appear for testimony, then such a finding is also appropriate for Miers. Any different response would undermine the rule of law. And, as it was the president who placed Miers in the middle of this battle between the executive and legislative branches, any lesser response to Miers' ill-advised conduct would also make Congress appear toothless in the face of White House resistance and encourage this administration to defy congressional directives at will.

No one — including Harriet Miers — is above the law and can simply disregard a subpoena. And no administration should encourage or direct that type of conduct.

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