

**Testimony of John D. Podesta
Before the Subcommittee on Commercial and Administrative Law
U.S. House of Representatives**

Hearing on “Ensuring Executive Branch Accountability”

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Thank you, Madame Chair, and members of the subcommittee. I am John Podesta, President and Chief Executive Officer of the Center for American Progress. I am also a Visiting Professor of Law at the Georgetown University Law Center, where I teach a course on Congressional Investigations.

I served as Chief of Staff to President Bill Clinton from 1998 to 2001. I previously served in other roles in the White House, including Assistant to the President and Staff Secretary from 1993-1995, and Deputy Chief of Staff from 1997-1998.

Having appeared before congressional committees a number of times as a senior White House aide, let me say what a pleasure it is to be testifying today as a private citizen—albeit one with a deep respect for and intimate knowledge of the institution of the presidency and the important role that institution, regardless of occupant, plays in the leadership of our country and the world.

I also have some experience in back of the dais, Madame Chair, having served as Counselor to former Senate Democratic Leader Tom Daschle, Chief Counsel for the Senate Agriculture Committee, and Chief Minority Counsel for the Senate Judiciary

Subcommittees on Patents, Copyrights, and Trademarks; Security and Terrorism; and Regulatory Reform.

My service in both Congress and the White House gave me a healthy appreciation for the responsibility of each branch to defend its constitutional prerogatives.

The text of the Constitution says nothing about the right of Congress to demand information from the executive branch—or the right of the executive to withhold it. Yet the Supreme Court has long recognized that the power to investigate and the attendant use of compulsory process are inherent in the legislative function vested in the Congress by Article I of the Constitution.¹

Our system of checks and balances requires that Congress have the ability to obtain the information it needs to make the laws and to oversee and investigate the activities of the executive branch. And it also requires that the president have the ability to resist demands for disclosures of information that could threaten important national interests, particularly disclosures that would harm the national security or foreign relations of the United States, and including those that would jeopardize ongoing criminal investigations or interfere with his ability to obtain frank and candid advice.

¹ e.g. *McGrain v. Daugherty* 273 US 135 (1927); *Sinclair v. United States* 279 U.S. 263 (1929); *Watkins v. United States* 354 U.S. 178 (1957)

President Clinton from time to time invoked the privilege when he felt it was necessary to protect presidential communications and deliberations from overly broad and intrusive requests for information.

But he also understood that the privilege is not unqualified: that the public interests protected by the claim of privilege must be weighed against those that would be served by the disclosure. He appreciated that even where the privilege applies, it is not absolute. It can be overcome by a strong showing that the information request is focused, that there are not other practical means of obtaining the information, and that the information is genuinely needed by the Committee and is “demonstrably critical to the responsible fulfillment of the Committee’s functions.”²

Some in the present administration appear to believe that presidential advisers are immune from giving testimony on the theory that Congress does not have jurisdiction to oversee the Office of the President.

No president in our country’s history has attempted to make such an extraordinary claim and no precedent provides a legal justification to support that perspective. But I was not surprised by this justification for the White House’s refusal to cooperate in the Judiciary Committee’s legitimate inquiries into the recent sacking of the U.S. Attorneys. It is part and parcel of the larger campaign that has occupied the Bush administration from the

² See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C.Cir. 1974).

moment the president took office: to increase the power of the executive at the expense of the other branches of government.

The irony is that the greater the power that the White House accumulates, the greater is the need for congressional access to White House documents and personnel. Such scrutiny is especially needed to investigate allegations of misconduct by White House officials. Unlike executive branch agencies, the White House has no inspector general to investigate abuses and it is not subject to the Freedom of Information Act. Only Congress can provide appropriate oversight and accountability.

When the president unreasonably refuses to cooperate with its inquiries, Congress can prevail only if it musters the political will to do so.

In 1973, President Nixon attempted to block congressional testimony by members of the White House staff. He claimed, “Under the doctrine of separation of powers, the manner in which the president personally exercises his assigned powers is not subject to questioning by another branch of government. If the president is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the presidency.”³

³ Richard Nixon, *Remarks Announcing Procedures and Developments in Connection with the Watergate Investigations* (Apr 17, 1973), in *Public Papers of the Presidents of the United States: Richard Nixon, 1973*, at 299, quoted in Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 *Duke L.J.* 323 at 394-95 (2002).

Yet within months, Congress had summoned a parade of witnesses from the Nixon White House to testify in connection with the Watergate affair.

Post-Watergate presidents were more cooperative. President Ford agreed to testify in person on the circumstances leading to his decision to pardon President Nixon.

In 1980, President Carter instructed all members of the White House staff to cooperate fully with the Senate Judiciary Committee in its investigation of Billy Carter's connections with the Libyan government.

In 1987, President Ronald Reagan waived executive privilege for his entire staff during the Iran-Contra affair.

In 1994, I was one of numerous Clinton administration officials called to testify before congressional panels investigating the failed Madison Guaranty Savings and Loan and the White Water Development Corporation.

All in all, the Congressional Research Service reports that presidential advisers have testified before congressional committees at least 73 times since 1944—including individuals occupying the most senior positions in the White House from Chiefs of Staff to National Security Advisors to White House Counsels.⁴

⁴ Harold C. Relyea and Jay R. Shampansky, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, [CRS Report for Congress](#) (April 14, 2004).

For those interested in keeping an accurate count, I can add several more instances not covered by the CRS review.

In 1995, I testified before the Government Reform and Oversight Committee, during Chairman Clinger's tenure, concerning an internal White House review I had conducted concerning the firing of employees working in the White House travel office.

In 2001, I, together with Ms. Nolan and our colleague Bruce Lindsey testified before the Government Reform and Oversight Committee, chaired by Congressman Burton concerning pardons granted by President Clinton.

While I was no longer a White House employee at the time of those two appearances, the testimony I gave solely concerned actions, duties and advice I gave to the president while a senior White House employee and would clearly have been subject to claims of executive privilege.

On each of these occasions, I did so with the support of the president, who had authorized my testimony and made no claim of executive privilege. And on each of these occasions, I came into a public hearing room, in front of television cameras, with a full transcript being kept; I raised my right hand, I swore to tell the truth, the whole truth and nothing but the truth and I am proud of the fact that I did so and proud of the president for giving me the opportunity to do so.

Again, for the record, I also gave depositions, under oath, to committee counsel in both the House and the Senate. And in 1993, I appeared informally before separate partisan caucuses of this committee and took questions for several hours with respect to the travel office matter I previously mentioned.

Given that experience, I would like to comment on the current investigation of the circumstances surrounding the firing of the U.S. Attorneys.

At stake is a question of whether there was interference in the administration of justice for political ends. The history of Congressional oversight and investigations is replete with instances of Congressional Committees exercising their jurisdiction to ensure the fair administration of justice.

From Teapot Dome, to the ITT investigation, to Watergate, to Waco, Congress has a long history of investigating allegations of interference by the White House with the Department of Justice and other law enforcement agencies.

Indeed, the heart of the Whitewater investigation concerned whether the White House had improper contacts with the Treasury Department on whether or not to refer the Madison Guaranty case to the Justice Department for enforcement action. While one can question the excess of spending more than \$60 million in a series of investigations that two independent counsels concluded involved no criminal activity and outside reviews concluded involved no ethical transgressions, no one questioned the right of the

Congressional Committees to pursue their investigations or the need for the White House to cooperate.

Simply put, issues surrounding the administration of justice are paramount and constitute the heart of a legitimate legislative inquiry.

That is why we are here today.

This committee, and its Senate counterpart, have clear jurisdiction over the matter under investigation and a legitimate need to hear from key White House officials—on the record and under oath. No other means exists to ascertain what communication occurred inside the White House among White House aides and between White House Officials and Department of Justice officials concerning the true motivations for the firings.

It has been said many times in the course of this affair that U.S. Attorneys “serve at the pleasure of the president.” As a matter of law, this is a non-debatable proposition. Once confirmed, they can be removed for any reason, or for no reason at all.

But that cannot be the end of the story. The fact that the president has the power to remove them doesn’t make it proper for him to do so. Depending on the reason for his actions, it may be highly improper and even illegal.

Many different reasons have been suggested for these dismissals. Indeed, the Attorney General has offered quite a few different explanations himself. Obviously until your inquiry has been completed we will not know the truth of the matter. But we can try to separate out the legitimate reasons from illegitimate ones.

The first reason is “poor performance.” This was the reason originally given by the Department, and it is a perfectly appropriate reason to fire somebody. Unfortunately, it appears that was not the reason in any but perhaps one of these cases.

The second reason is to give the job to somebody else. It has been established that this was the reason for at least one dismissal, and perhaps others. For those who value loyalty and experience, this is not an attractive reason, and it certainly is a departure from long established practice. But it is not improper unless the replacement is unqualified to serve.

The third reason is that the U.S. Attorney has policy differences with Main Justice. There are indications that this may have been the reason for one or more of the dismissals. If so, it does not seem an improper reason to me. It is the prerogative of the president to set policy, and it is reasonable for him to expect that his appointees will carry it out.

The final reason is that the president and his allies in Congress were unhappy with the particular prosecutions a U.S. Attorney was bringing—or failing to bring. This is the crux of the matter. If the president fires a U.S. Attorney to obstruct or interfere with a pending prosecution or to influence the course of a prospective prosecution, he has crossed the

line. Such interference is not only improper but depending on the circumstances may be illegal as well.

In other words, while it is true that U.S. attorneys are “political appointees,” they are not ordinary political appointees. They wield extraordinary power in this country—the power to protect our families and communities from harm, and the power to destroy innocent lives and reputations. Attorney General Robert Jackson said in 1940, “The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.”⁵

Once they take their oath of office, the 93 U.S. Attorneys are the personification of the system of justice in this country. If that system is to command popular respect, they must be beyond reproach. That is why it is essential that they be seasoned professionals and not just political hacks who do the bidding of the president who appointed them in the prosecution of justice. And that is why it is essential that the Congress get to the bottom of why these U.S. Attorneys were fired.

Unfortunately, the inability or unwillingness of the White House to give the Congress and the American people a straight and complete answer on this matter means that we do not know exactly why the eight U.S. Attorneys were fired (and I would add one more, the firing of Frederick Black, the former interim U.S. Attorney for Guam and the Commonwealth of the Northern Mariana Islands).

⁵ Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of the United States Attorneys (April 1, 1940).

This is the concern which makes it imperative that this committee get the facts so it can determine precisely what happened in these cases.

Let me sum up. As a former senior White House advisor, I believe deeply in the independence of the executive branch and the need for presidents to receive candid, unvarnished advice from their advisors. These are important constitutional considerations that should be thoroughly weighed and seriously guarded. Yet they must also be balanced against the legitimate needs of Congress to oversee and, where necessary, investigate the actions of the White House. Congress should be cautious in its assertions a need for the testimony of presidential advisors, limiting such assertion to circumstances in which disclosure would clearly serve the national interest. This seems to me to be clearly one of those times.

This is not just a case about shifting explanations of underlying conduct that was legitimate; it is a case where the legitimacy of the conduct itself is seriously in doubt, and where the inconsistency of the explanations and the invocation of the 5th Amendment privilege by a senior Justice Department aide have deepened that doubt. Nor is this merely a political fishing expedition. There is more than enough evidence here to raise profound concerns—the smoke is rising and it needs to be investigated.

The underlying issue at stake—whether the executive branch illegitimately ordered the removal of independent U.S. attorneys to advance outside interests or partisan political

needs—is a serious matter related to a core element of our constitutional system—the administration of justice.

Cooperation and honesty by the White House could allay many doubts and start to restore some credibility for the executive branch. As I have previously noted, from Presidents Clinton, Reagan, Carter, and Ford, going all the way back to President Washington presidents have permitted senior aides to testify in Congressional investigations. It is time for President Bush to show some of the same kind of healthy flexibility.

If the White House will not adhere to these standards, then the Congress should intervene to ensure that justice is being served by in a fair and impartial manner. The American public must be confident that its courts and prosecutors are independent and unbiased in the administration of justice.

I thank you for inviting me today, and would be happy to answer any and all questions you may have.