



February 19, 2008

Mr. Jeffrey A. Taylor
United States Attorney for the District of Columbia
United States Department of Justice
555 4th Street, NW
Washington, D.C. 20530

Dear Mr. Taylor,

The American Civil Liberties Union is writing to express our concern about Attorney General Michael Mukasey's recent testimony before the U.S. House of Representatives, in which he claimed the Department of Justice is not obliged to pursue a prosecution of criminal contempt against members of the Executive Branch who invoke executive privilege in refusing to provide testimony or documents to Congress.¹ As you know, the House last week voted to approve contempt citations against White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers for refusing to comply with congressional subpoenas regarding the firing of several United States attorneys.²

We write to call your attention to the fact that, despite the Attorney General's assertions, your office previously established a legal precedent recognizing the obligation to convene a grand jury to consider a contempt citation issued by Congress under similar circumstances.³ In 1983, your office, under the leadership of U.S. Attorney Stanley Harris, brought a contempt citation against then Environmental Protection Agency Administrator Anne Gorsuch Burford to a grand jury, as required under the law.⁴ The U.S. House of Representatives cited Ms. Burford for contempt after she invoked executive privilege in refusing to provide documents relating to a congressional investigation of the EPA.⁵ Mr. Harris initially delayed convening a grand jury to address Ms. Burford's contempt citation,

¹ *Oversight of the U.S. Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (Feb., 7 2008) (Testimony of Hon. Michael Mukasey, Attorney General of the United States).

² H. Res. 982, 110th Cong. (as passed by the House of Representatives Feb. 14, 2008). Recorded vote for H. Res. 982 is available at <http://clerk.house.gov/evs/2008/roll060.xml>.

See also H. Res. 979, 110th Cong. (as adopted by the House of Representatives Feb. 14, 2008); H. Res. 980, 110th Cong. (as adopted by the House of Representatives Feb. 14, 2008).

³ U.S. Department of Justice, Office of Legal Counsel, PROSECUTION FOR CONTEMPT OF CONGRESS OF AN EXECUTIVE BRANCH OFFICIAL WHO HAS ASSERTED A CLAIM OF EXECUTIVE PRIVILEGE, May 30, 1984, 8 U.S. Op. Off. Legal Counsel, 1984 WL 178358 (O.L.C.), at 6 http://media.washingtonpost.com/wp-srv/politics/documents/doj_opinion_executive_privilege_072007.pdf

⁴ *Id.* *See also*, 2 U.S.C. §192-194.

⁵ *Id.*

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pending the resolution of litigation initiated by the Department of Justice contesting the legality of the House's contempt action. This suit was eventually dismissed and a negotiated settlement was reached through which the withheld documents were made available to Congress. Nevertheless, Mr. Harris ultimately performed his duty under the law and the Constitution, and convened a grand jury to determine whether the entirety of the facts surrounding Ms. Burford's contempt citation warranted an indictment.⁶

During a congressional hearing investigating the delay in bringing the contempt citation to the grand jury, U.S. Attorney Harris described his situation as "unique," and denied that this prosecutorial discretion gave a U.S. attorney the right to thwart the will of Congress: "When you are talking about purely a matter of power, that is quite different from having someone arbitrarily minimize the significance of a contempt citation. I think that in 9,999 cases out of 10,000, it would be routinely presented to the grand jury."⁷ Harris went so far as to suggest Congress had a remedy for a prosecutor's abuse of discretion: "If something were to be presented to the U.S. attorney who so abused his discretion in not presenting it to a grand jury, there would always be impeachment or mandamus remedies that could be initiated against him."⁸

If a citation for contempt against an Executive Branch official under 2 U.S.C. §192-194 is received by your office we expect that you will follow the precedent established by Mr. Harris in 1983, and faithfully discharge your duty as a U.S. Attorney by bringing that contempt citation to a grand jury for their consideration.⁹

Sincerely,



Caroline Fredrickson
Director
Washington Legislative Office

cc: Members of the House of Representatives Committee on the Judiciary

⁶ *Id.*

⁷ *Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation that was Voted by the Full House of Representatives Against the Then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford: Hearing Before the House Comm. on Public Works and Transp.*, 98th Cong. 31 (1984) (testimony of Stanley S. Harris, United States Attorney) at 50.

⁸ *Id.*, at 45.

⁹ 2 U.S.C. §194 states that, "[i]t shall be the duty of the said President of the Senate or Speaker of the House to certify...to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."