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DEWEY & LEBOEUF

December 8, 2009

VIA OVERNIGHT DELIVERY

Hon. Bennie Thompson
Chairman
Committee on Homeland Security
United States House of Representatives
2432 Rayburn, House Office Building
Washington, D.C. 20515

Hon. Peter King
Ranking Member
Committee on Homeland Security
United States House of Representatives
339 Cannon, House Office Building
Washington, D.C. 20515

Re: House Committee on Homeland Security's Inquiry Concerning White House Security Protocols

Dear Mr. Chairman:

We represent Michaele and Tareq Salahi with respect to the various inquiries into the November 24, 2009 White House State Dinner. On December 2, 2009, we were advised that the Committee on Homeland Security seeks the Salahis' testimony in connection with the Committee's inquiry into White House security protocols. Upon our advice, the Salahis will assert their Fifth Amendment privilege under the United States Constitution as to any and all questions regarding the November 24, 2009 State Dinner, as well as any and all questions related to that subject matter.

The Salahis' assertion of their Fifth Amendment privilege is based on a pending federal criminal investigation by the U.S. Attorney's Office for the District of Columbia, and a public record demonstrating that certain members of the Committee and their staffs have drawn premature conclusions about this matter. Congresswoman Eleanor Holmes Norton, for example, recently stated that "Michaele and Tareq . . . are practiced con-artists who bamboozled the Secret Service and perhaps others as they conned their way past all required gate keepers . . . . Clearly,

they were outlaws before they crashed the White House." (Press Release, November 30, 2009, Office of Congresswoman Norton). On December 2, 2009, the Chief Oversight Counsel for the Chairman's Office advised us that should the Salahis decide to not testify at the December 3, 2009 hearing, they would be viewed as modern-day versions of "Bonnie and Clyde."

At the Committee's December 3, 2009 hearing on this matter, Congresswoman Sheila Jackson Lee referred to the Salahis as "the perpetrators" and elicited factual testimony from United States Secret Service Director Mark Sullivan about the Salahis' interactions with Secret Service agents on November 24, 2009. During the course of her questions, Congresswoman Lee appeared to tie these factual allegations to the specific criminal elements under Title 18, United States Code, Section 1001. In sum, the Salahis must contend not only with vilification by the press, but also with a treacherous legal environment that threatens criminal exposure. The case law is replete with instances of indictments returned on the basis of witness testimony before congressional committees. *See, e.g., United States v. Safavian*, 429 F. Supp. 2d 156 (D.D.C. 2006); *United States v. Poindexter*, 725 F. Supp. 13 (D.D.C. 1989); and *United States v. North*, 716 F. Supp. 644 (D.D.C. 1989).

It is circumstances such as these for which the Fifth Amendment of the United States Constitution was designed to provide safe harbor — to ensure that "no person . . . shall be compelled in any criminal case to be a witness against himself." Indeed, this bedrock protection extends to any response demanded of the accused that may provide a "link in a chain" that is self-incriminating. *See, Hoffman v. United States*, 341 U.S. 479 (1951). The statements concerning the Salahis referenced in this letter constitute legal hazards that are "substantial and real, and not merely trifling or imaginary." *Marchetti v. United States*, 390 U.S. 39, 53 (1968). Accordingly, the Salahis will decline to answer any and all questions posed by the Committee or its staff related to this subject matter.

The Supreme Court has repeatedly upheld the assertion of the Fifth Amendment before congressional committees. *See, Quinn v. United States*, 349 U.S. 155, 162-64, (1955), *Emspak v. United States*, 349 U.S. 190, 202 (1955), and *Bart v. United States*, 349 U.S. 219, 221-22 (1955). Moreover, the District of Columbia Bar Legal Ethics Committee has concluded that it would be "in conflict with at least the spirit of one Disciplinary Rule and the language of several Ethical considerations" to demand a witness to appear before a congressional hearing for the sole purpose of invoking the Fifth Amendment privilege when the committee has been notified in advance that the witness intends to do so. *See, District of Columbia Legal Ethics Opinion,* No. 31 (March 29, 1977). Indeed, in an August 12, 1999 letter, enclosed herein and authored by the Honorable Henry A. Waxman to the Chairman of the Committee on Government Reform, this fundamental tenet of fairness was emphasized:

> "Although you knew in advance that [the Witness] would refuse to answer questions, you proceeded to call him as a witness, required him to sit before the Committee for over an hour with television cameras and other media present, and forced him to assert his Fifth

> Amendment right 38 separate times. You called his invocation of his constitutional right 'more than unseemly' and drew unfair inferences from his assertion of privilege, such as remarking '[ ] if you haven't done anything wrong, why not speak up today' . . . . You may not like [the Witness]. You may even believe that he has violated U.S. laws. But he is an American citizen, and your powers as Chairman do not give you the right to violate his fundamental constitutional rights."

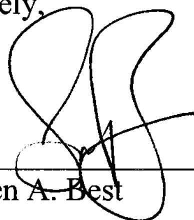
From the outset, the Salahis have fully cooperated with the United States Secret Service. They have provided documentation, including telephone records and copies of emails with a White House official, to the investigating agents. They have also voluntarily met with Secret Service agents on several occasions and provided written statements (a copy of which your Office was provided) concerning the details of their admittance to the White House on November 24, 2009. In that vein, through counsel, the Salahis remain committed to assisting the Committee in determining the facts relevant to its inquiry.

We have enclosed the Salahis' notarized declarations invoking their Fifth Amendment privilege and to not answer any questions about this matter. We respectfully request that the Committee on Homeland Security accept the Salahis' declarations in lieu of summoning them to appear at a public hearing or any other setting. Requiring the Salahis to personally appear for the sole purpose of invoking their Fifth Amendment privilege will result in an unnecessary media spectacle from which no facts relevant to the Committee's inquiry will be determined.

Should the Committee have any questions concerning the Salahis' invocation of their Fifth Amendment privilege, we are available to meet privately with you and at your convenience. We further urge the Committee's counsel to follow the District of Columbia Bar's Legal Ethics Opinion, which we enclose, as well as Congress's longstanding tradition of allowing a witness to assert the Fifth Amendment privilege by declaration or through counsel.

Please do not hesitate to contact us at your convenience should you, or any Committee member, wish to speak with us directly.

Sincerely,



Stephen A. Best

Enclosures

Declaration of Michaele Salahi
Declaration of Tareq Salahi
District of Columbia Bar, Legal Ethics Committee Opinion No. 31
August 12, 1999 Letter from the Honorable Henry A. Waxman to the Committee on Government Reform

cc: Ms. Michaele Salahi
Mr. Tareq Salahi

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON HOMELAND SECURITY

In the matter of the :
Inquiry into White House :
Security Protocols :

Declaration of Tareq Salahi

1. My name is Tareq Salahi and I reside in Linden, Virginia.

2. I understand that the Committee on Homeland Security is conducting an inquiry regarding White House security protocols and has sought my testimony in connection with that inquiry. I have directed my counsel to submit this Declaration to the Committee on my behalf.

3. I am aware of statements made by certain members on the Committee on Homeland Security in which premature conclusions concerning my criminal liability have been made. I am also aware of a pending federal criminal investigation into my conduct at the White House State Dinner on November 24, 2009.

4. I have been advised by my counsel, Stephen A. Best of Dewey & LeBoeuf LLP, that the current circumstances warrant invocation of my Fifth Amendment privilege against self-incrimination and that I should decline to answer any and all questions posed by the Committee or its staff about my admittance to the White House on November 24, 2009 and all related questions.

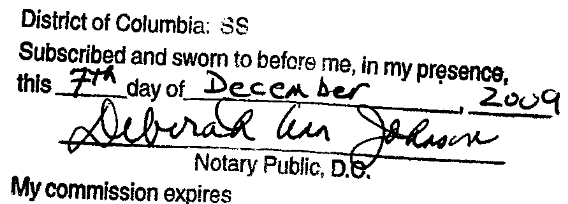
5. I have decided to follow my attorney's advice and I hereby respectfully invoke my constitutional right given the legally hazardous environment before me.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 7, 2009, in Washington, D.C.

Executed:

Tareq Salahi



District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 7th day of December, 2009
Deborah Ann Johnson
Notary Public, D.C.
My commission expires

DEBORAH ANN JOHNSON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires September 30, 2012

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON HOMELAND SECURITY

In the matter of the :
Inquiry into White House :
Security Protocols :

Declaration of Michaele Salahi

1. My name is Michaele Salahi and I reside in Linden, Virginia.

2. I understand that the Committee on Homeland Security is conducting an inquiry regarding White House security protocols and has sought my testimony in connection with that inquiry. I have directed my counsel to submit this Declaration to the Committee on my behalf.

3. I am aware of statements made by certain members on the Committee on Homeland Security in which premature conclusions concerning my criminal liability have been made. I am also aware of a pending federal criminal investigation into my conduct at the White House State Dinner on November 24, 2009.

4. I have been advised by my counsel, Stephen A. Best of Dewey & LeBoeuf LLP, that the current circumstances warrant invocation of my Fifth Amendment privilege against self-incrimination and that I should decline to answer any and all questions posed by the Committee or its staff about my admittance to the White House on November 24, 2009 and all related questions.

5. I have decided to follow my attorney's advice and I hereby respectfully invoke my constitutional right given the legally hazardous environment before me.

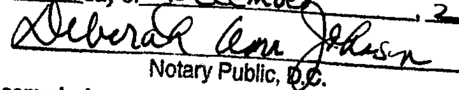
I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 7, 2009, in Washington, D.C.

Executed:

Michaele Salahi

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 7th day of December, 2009



Notary Public, D.C.
My commission expires

DEBORAH ANN JOHNSON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires September 30, 2012

to predict the proper fee for a particular legal representation. This uncertainty, even regarding matters of the same general type, indicates that a prudent lawyer who may be willing to enter into an agreement for a fixed-fee contract to render a variety of legal services to the members of a labor union, or to propose on a contractual basis the fees he will charge for particular kinds of matters will find it difficult to define precisely what a reasonable fee will be in all such circumstances.

For example, even the most common kinds of legal services, including drafting wills, handling divorce proceedings, and real estate closings, can involve widely disparate amounts, of time, complexity, and responsibility. On the one hand, EC 2-16 states that, in order for the legal profession to remain a viable force in fulfilling its role, a lawyer is entitled to receive adequate compensation for his services. At the other extreme, as DR 2-106(A) states, the lawyer may not collect an excessive fee. Before entering into any arrangement for a package of prepaid legal services or promulgating a general fee schedule, a lawyer should take adequate precautions to gauge the likely effect of the various factors that may influence the extent and value of the services he will be expected to render. This analysis is necessary if the lawyer is to avoid either rendering sharply discounted services throughout the course of the arrangement, and thus possibly jeopardizing his ability to discharge his professional commitments, or charging excessive fees to individual members calling upon him for representation.

February 22, 1977
76-2-12 and 76-7-24

Opinion No. 31

DR 7-106(C)(2); EC 7-10, 7-14, 7-25 — Lawyer for Congressional Committee—Summoning Witness Who It Is Known Will Decline To Answer Any Questions on a Claim of Privilege

We have been asked to advise whether it is proper for a congressional committee whose chairman, staff and several members are attorneys to require a witness who is a "target" of a pending grand jury investigation to appear at televised hearings to be questioned when the committee has been notified in advance that the witness will exercise his constitutional privilege not to answer any questions. At the outset, we note that whatever follows applies only to staff attorneys acting in their capacities as attorneys. It is not within our province to pass upon the propriety of conduct by congressmen, who may or may not be lawyers, but are acting in any event as congressmen.

It is not per se improper for an attorney acting as counsel for a congressional committee to cause a witness to be summoned in furtherance of a legitimate legislative function of Congress, even though the resultant attending publicity will be damaging to the witness' reputation and possibly prejudicial to him in a future criminal trial. On the other hand the inquiring power of a congressional committee is limited to obtaining information in aid of Congress' legislative function. *McGrain* v. *Daugherty*, 273 U.S. 135 (1929); *Sinclair* v. *United States*, 279 U.S. 263 (1929). There is no congressional power to expose for the sake of exposure. "Investigations conducted solely for the personal aggrandizement of the investigator or to 'punish' those investigated are indefensible." *Watkins* v. *United States*, 354 U.S. 178, 187, 200 (1957). See also EC 7-16, which states that "The primary business of a legislative body is to enact laws rather than to adjudicate controversies."

Since the only legitimate function of a congressional investigating committee is to obtain information for the use of Congress in its legislative capacity, the inquiry before us poses the issue whether it is ethical to summon a witness when it is known in advance that no information will be obtained and the sole effect of the summons will be to pillory the witness. In dealing with an analogous situation, the American Bar Association Project on Standards for Criminal Justice stated (par. 5.7(c)) that "It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege."[1] The courts have held that summoning a witness in such circumstances constitutes prosecutorial misconduct that may require a reversal of a criminal conviction. *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973); *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *Tucker*, 267 F.2d 212, 215, (3rd Cir. 1959). And in the case of a grand jury, the American Bar Standards provide (par. 3.6(e)) that "The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law."[2]

We see no reason in principle why this standard should not govern the conduct of an attorney acting for a congressional committee. Insofar as the attorney has some question whether the witness will in fact claim his privilege if called, this question can be resolved by calling the witness in an executive session. There is certainly no need to have the test of claim of privilege take place in a televised open hearing with the resultant inevitable prejudicial publicity for the witness. Cf. *San Fratello* v. *United States*, *supra* at 565, where the court stated that, if the government insisted in a criminal trial that the claim of privilege be made on the witness stand under oath, this should be done out of the presence of the jury.

Although it appears clear that the conduct described in the inquiry is improper, our jurisdiction is confined to rendering opinions on the applicability of the Code of Professional Responsibility to the conduct in question. Not surprisingly, the Code is directed to the conduct of attorneys in its usual manifestations and is not specifically oriented to the conduct of attorneys acting as counsel for congressional committees. Nonetheless, in our view, the conduct described here appears to be in conflict with at the least the spirit of one Disciplinary Rule and the language of several Ethical Considerations. DR 7-106(C)(2) dealing with a lawyer's trial conduct provides: "In appearing in his professional capacity before a tribunal, a lawyer shall not ... [a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness. ..." Although, arguably, a congressional committee is not a "tribunal," we believe that the principle that an attorney should not ask a witness questions that are "intended to degrade" him is applicable here. DR 7-106(C)(2) prohibits only questions that the lawyer has no reasonable basis to believe are relevant and that are "intended to degrade" as well. When the lawyer knows in advance that he will not receive an answer to his question because of a claim of constitutional privilege, we believe that the question is fairly characterized as irrelevant to the case and such irrelevance is to the lawyer's knowledge.

Further, we believe that the conduct conflicts with the following ethical considerations: EC 7-10 ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm"); EC 7-14 ("A government lawyer ... should not use his position ... to harass parties"); and EC 7-25 ("[A] lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him").[3]

March 29, 1977
Inq. No. 21

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[1] A committee of the District of Columbia Judicial Conference in a report entitled Comparative Analysis of American Bar Association Standards for Criminal Justice with District of Columbia Law, Rules and Legal Practice (September 1973) commented (pp. 55-56) that the District of Columbia is in accord with this Standard.

[2] The Report cited *supra*, fn. 1, stated (pp. 42-43) that the Committee was divided regarding the applicability of this standard in the District of Columbia.

[3] The conduct might also be taken to violate DR 1-102(A)(5), which provides that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice." The Judicial Conference Committee (*supra* note 1) expressed that view at p. 56 of its report. However, a majority of this Committee are of the view that the language of this standard is too vague to permit its application as a disciplinary rule.

DAN BURTON, INDIANA,
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HELEN CHENOWETH, IDAHO

ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

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BERNARD SANDERS, VERMONT,
INDEPENDENT

August 12, 1999

The Honorable Dan Burton
Chairman
Committee on Government Reform
House of Representatives
Washington, DC 20515

Dear Chairman Burton:

I am writing to convey my thoughts about your treatment of Mark Middleton, a former White House aide, during the Committee's August 5, 1999, hearing. Our Constitution gives every American citizen a privilege against self-incrimination. Yet regrettably, your conduct at the hearing -- and the conduct of certain other members -- appeared to be intended to punish Mr. Middleton for exercising his Fifth Amendment rights.

The Fifth Amendment gives witnesses not only a right to refuse to answer incriminating questions. It also prevents government officials from harassing or humiliating witnesses by publicly forcing them to invoke their Fifth Amendment privilege over and over again. Unfortunately, this is exactly the spectacle that was staged at the hearing.

Although you knew in advance that Mr. Middleton would refuse to answer questions, you proceeded to call him as a witness, required him to sit before the Committee for over an hour with television cameras and other media present, and forced him to assert his Fifth Amendment right 38 separate times. You called his invocation of his constitutional right "more than unseemly" and drew unfair inferences from his assertion of privilege, such as remarking "Mr. Middleton, if you haven't done anything wrong, why not speak up today." One member even asked Mr. Middleton to admit that he was a "bag man" for foreign individuals.

You may not like Mr. Middleton. You may even believe that he has violated U.S. laws. But he is an American citizen, and your powers as Chairman do not give you the right to violate his fundamental constitutional rights.

<u>Judicial Requirements</u>

The Fifth Amendment privilege against self-incrimination is one of our most fundamental constitutional rights. As the Supreme Court has recognized, the privilege "registers an important

advance in the development of our liberty -- one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1955). It "reflects a complex of our fundamental values and aspirations, and . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

The courts have long recognized that the protections of the Fifth Amendment would be meaningless if prosecutors could require criminal defendants to repeatedly assert their privilege in the face of incriminating questions. Thus, the courts recognize that "a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury." *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970). This conduct is prohibited because the Constitution requires that "guilt may not be inferred from the exercise of the Fifth Amendment privilege." *Id.* In fact, the courts have held that "an interrogating official himself gravely abuses the privilege against self-incrimination when . . . he nevertheless insists on asking the incriminating question with a view to eliciting a claim of privilege against the witness." *United States v. Tucker*, 267 F.2d 212, 215 (3d Cir. 1959).

For this reason, it is considered prosecutorial misconduct when the government calls witnesses in a "conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege." *United States v. Namet*, 373 U.S. 179, 186 (1963). As recently as last month, a federal appeals court affirmed this rule once again, writing that "[m]isconduct may yet arise if the prosecution continues to question a witness once her consistent refusal (legitimate or otherwise) to testify has become apparent." *United States v. Torrez-Ortega*, 1999 Westlaw 4460008 (10th Cir. 1999).

Congressional Requirements

These requirements apply to Congress. This point was conclusively established during the McCarthy hearings, when the Supreme Court held that the House Committee on Un-American Activities could not force a witness to answer questions about whether certain people had been members of the Communist Party in the past. As the Supreme Court stated, "the Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves." *Watkins v. United States*, 354 U.S. 178, 188 (1957).

The American Bar Association guidelines directly address the circumstances that we confronted during the Middleton hearing. These guidelines, adopted in 1988, expressly state:

Witnesses in Congressional proceedings shall have the privileges in connection with their

> appearance which are recognized by the courts of the United States in Administrative and Judicial Proceedings, including the fifth amendment privilege against self-incrimination. ... A witness shall not be compelled to exercise his or her fifth amendment privilege against self-incrimination in a public proceeding where the witness has provided notice to the committee.

The District of Columbia Bar Association's Legal Ethics Committee has also ruled that congressional attorneys should respect the Fifth Amendment privilege in the same ways required of federal prosecutors. Opinion No. 31 (Mar. 29, 1997). The Legal Ethics Committee addressed the question that arose during the Middleton hearing as follows:

> We have been asked to advise whether it is proper for a congressional committee whose chairman, staff and several members are attorneys to require a witness who is a "target" of a pending grand jury investigation to appear at televised hearings to be questioned when the committee has been notified in advance that the witness will exercise his constitutional privilege not to answer any questions. ...
>
> The courts have held that summoning a witness in such circumstances constitutes prosecutorial misconduct. ... We see no reason in principle why this standard should not govern the conduct of an attorney acting for a congressional committee. ...
>
> [I]t appears clear that the conduct described in the inquiry is improper. ... [I]n our view, the conduct described herein appears to conflict with at least the spirit of one Disciplinary Rule and the language of several Ethical Considerations.

A copies of these ethics opinions are enclosed as exhibits A and B.

The Treatment of Mr. Middleton

Unfortunately, your conduct during the Middleton hearing violated these clear legal requirements. In the words of the *Tucker* court, your conduct "gravely abuse[d] the privilege against self-incrimination" by "insist[ing] on asking the incriminating question with a view to eliciting a claim of privilege against the witness." 267 F.2d at 215.

There is no defense of ignorance possible here. You knew before the hearing started that Mr. Middleton would assert his Fifth Amendment privilege. Mr. Middleton's attorney wrote you two days before the hearing to inform you of Mr. Middleton's intentions, stating: "We ... wish to advise you that Mr. Middleton will continue to assert his Fifth Amendment privilege at the Committee's hearing scheduled for August 5." Letter from Robert D. Luskin to Chairman Burton (August 3, 1999). This letter also advised you of the controlling legal precedent that forbids repeatedly questioning witnesses who have asserted their constitutional privilege.

You nevertheless called Mr. Middleton to appear at a public hearing -- with television cameras, press photographers, and other media present -- and forced him to repeatedly invoke his Fifth Amendment privilege. On his second invocation of the privilege, Mr. Middleton clearly stated that he "will continue to do so with respect to any further questions." Nevertheless, you and other Republican members of the Committee continued to question him. In total, he was compelled to assert his privilege a total of 38 times. A copy of the transcript of the hearing is enclosed as exhibit C.

The questions that you and other members asked Mr. Middleton were deliberately designed to humiliate and incriminate him. For example, Mr. Barr asked Mr. Middleton the following question, knowing he would assert his privilege and be unable to answer: "This is kind of ludicrous, Mr. Middleton. Are you a bag man for Ng Lap Seng or any other foreign individual?"

Not only was Mr. Middleton forced to repeatedly reassert his privilege, you tried to use his invocation of the privilege to imply that Mr. Middleton was guilty of particular crimes. You stated, "Mr. Middleton, if you haven't done anything wrong, why not speak up today and say so?" and "If you're being unfairly maligned, then I hope you'll defend yourself." You also called his assertion of his constitutional right "more than unseemly."

These actions obviously violated Mr. Middleton's rights. If you were a prosecutor, they would amount to prosecutorial misconduct -- a "conscious and flagrant attempt to build [a] case out of inferences arising from the use of the testimonial privilege." *Namet*, 373 U.S. at 186. As a Committee Chairman sworn to uphold the Constitution, they are simply inexcusable.

Congressional Precedent

I protested your actions during the Committee hearing, pointing out that they violated judicial and bar association opinions and were without precedent. As I said at the hearing, "our Committee has now ... establish[ed] procedures that are unheard of in the history of the Congress."

You took issue with my remarks and claimed that there was precedent for your treatment of Mr. Middleton. In particular, you cited hearings held by Rep. Tom Lantos and Rep. John Dingell as precedent for your conduct. You said:

> First of all, it is not unprecedented for extended questioning when someone asserts their Fifth Amendment privilege before a Committee. ... If this is a low, then it was established by the Democrats when they were in charge because Mr. Lantos did and so did Mr. Dingell. And I'll be glad to give you that information for the record.

I have examined the record established by Mr. Lantos and Mr. Dingell and have enclosed copies of the relevant portions as exhibits D and E. There is simply no similarity with what you did last week.

In the 101st Congress, Rep. Lantos chaired the Employment and Housing Subcommittee of the Committee on Government Operations, one of the predecessors to our Committee. In 1989, the Subcommittee investigated the work of the Department of Housing and Urban Development during the eight years that it was headed by Samuel R. Pierce, Jr. On May 25, 1989, unaccompanied by counsel, Secretary Pierce testified extensively about his stewardship of HUD, but in the following months, certain aspects of his testimony were contradicted by others.

The Subcommittee then called Mr. Pierce to reappear, which he finally did on September 26. House Committee on Government Operations, Employment and Housing Subcommittee, *Hearings on Abuses, Favoritism and Mismanagement in HUD Programs (Part 4)*, 101st Cong., 23 (Sept. 26, 1989). At this hearing, the committee room was closed to television, radio, and photographic coverage, pursuant to the witness's request and House rules. *Id.* (Unfortunately, this right was unavailable to Mr. Middleton due to a change in House rules adopted last Congress.)

Rep. Lantos afforded Mr. Pierce an opportunity to make an opening statement. During his statement, Mr. Pierce announced for the first time that he would be invoking his Fifth Amendment privilege, largely because his counsel had had insufficient time to review materials from HUD related to Mr. Pierce's testimony. Mr. Pierce also stated that he hoped he would be able to testify in the near future. *Id.* at 42-43.

After Mr. Pierce's statement, Rep. Lantos asked him eight narrow questions. After Mr. Pierce invoked the Fifth Amendment as to each, Mr. Lantos determined that it would be improper to continue questioning Mr. Pierce. Mr. Lantos stated: "<u>It would be the request of the Chair to all his colleagues not to propound any further questions to the witness, since it is obvious that the witness is determined, which is his full right and privilege, to invoke his Fifth Amendment prerogative</u>." *Id.* at 51.

Mr. Lantos also stated: "I feel very deeply, as several of my colleagues have also indicated, that the Bill of Rights is one of our most precious possessions; that it is a shield that is there for protection of the innocent; and <u>no inference is to be made whatsoever with respect to your invoking the Fifth Amendment</u>." *Id.* at 56.

Because Mr. Pierce stated in his opening statement that he hoped to be able to testify in the future after reviewing the relevant materials with his lawyer, the Subcommittee recalled Mr. Pierce on October 27. This hearing was also closed to radio, television, and photographers. At this hearing, Mr. Lantos asked Mr. Pierce two questions. After Mr. Pierce asserted the Fifth

Amendment privilege to both questions, and Mr. Lantos determined that Mr. Pierce intended to assert the privilege as to all other questions, Mr. Lantos ceased questioning Mr. Pierce. *Id.* at 705-06. Mr. Lantos also twice restated his view that "the Fifth Amendment privilege is a shield to the innocent and no inference whatsoever should be drawn from a witness taking the Fifth Amendment." *Id.* at 696, 704.

I hope this review of Mr. Lantos's conduct is instructive. It certainly makes clear that you have no basis for citing his actions as a precedent for your treatment of Mr. Middleton.

If anything, Mr. Dingell's conduct as Chairman of the Committee on Energy and Commerce provides an even starker contrast to your actions. In the 100th Congress, Mr. Dingell held a hearing at which he called Michael R. Milken, the "junk bond" trader from Drexel Burnham Lambert. House Committee on Energy and Commerce, *Hearings on Securities Market Oversight and Drexel Burnham Lambert*, 100th Cong. (April 17, 1988). At this hearing, Mr. Dingell asked Mr. Milken only two questions, and he asserted his Fifth Amendment privilege to each. *Id.* at 15-16. Mr. Dingell then determined that Mr. Milken would invoke the privilege as to all other questions. *Id.* at 16. Mr. Dingell then excused Mr. Milken from further questioning, stating:

> Mr. Milken, the committee at this time will excuse you from further testimony. ... Your assertion of your rights under the Constitution is the assertion of an absolute right. It is one which is held in the highest esteem and respect by this committee.

Id. at 16.

The Treatment of Robert Luskin

I must also object to the treatment of Robert Luskin, Mr. Middleton's attorney. At the hearing, you repeatedly refused to allow Mr. Luskin to address the Committee, ruling that only a sworn witness may address the Committee. In fact, you did not even permit him to respond to technical legal questions about the Fifth Amendment that had nothing to do with the factual issues under investigation. While I recognize that you have the power to silence Mr. Luskin, you have no right to unfairly impugn his character, as Mr. Luskin alleges occurred. In an August 6 letter to you, Mr. Luskin states that your chief counsel distributed to the press table copies of articles describing an acrimonious fee dispute between Mr. Luskin and his firm and the Department of Justice in a completely unrelated criminal case. According to Mr. Luskin, when he questioned your chief counsel about her conduct, he was informed that "because the articles were in the 'public domain,' the issue -- and my personal and professional reputation -- was, therefore, 'fair game.'"

I do not know if Mr. Luskin's allegations are accurate. To date, I have not seen any

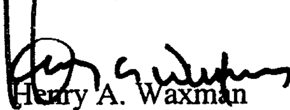
response from you to Mr. Luskin. If what he says is true, however, you certainly owe him an apology. There is simply no justification for these sorts of smear tactics.

Conclusion

In the last Congress, our Committee repeatedly abused many of Congress' investigative powers, including the subpoena power, the deposition power, the immunity power, and the power of contempt. These unfortunate incidents are thoroughly documented in volume four of the Committee's interim report on the campaign finance investigation, which contains the views of the minority members of the Committee. Last week's hearing adds a new -- and especially grave -- abuse to this embarrassing litany.

Our investigation has become far better known for its abuses than for its results. Regrettably, your conduct last week will only cast us further into disrepute.

Sincerely,



Henry A. Waxman
Ranking Minority Member

cc: Members of the Committee on Government Reform