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April 4, 2007

VIA FACSIMILE AND OVERNIGHT DELIVERY

Hon. John Conyers, Jr.
Chairman, Committee on the Judiciary
Hon. Linda T. Sanchez
Chairwoman, Subcommittee on Commercial and Administrative Law
United States House of Representatives
2426 Rayburn Building
Washington, DC 20515

Re: Request for an Interview with Monica M. Goodling

Dear Chairman Conyers and Chairwoman Sanchez:

We received your letter of April 3, 2007 threatening to call Ms. Monica M. Goodling for a public hearing if Ms. Goodling persists in her assertion of her Fifth Amendment privilege and refuses to submit to an interview with your staff concerning the firings of certain U.S. Attorneys.

As we informed you in our letter dated March 30, 2007, Ms. Goodling asserts her Fifth Amendment right not to answer any questions on this subject. We have advised Ms. Goodling that it would be inconsistent with her assertion of the privilege to speak with your staff regarding the U.S. Attorney firings or her decision to invoke the Fifth Amendment. This is why Ms. Goodling filed a sworn declaration with your Committee demonstrating that her assertion of the privilege is sincere, in good faith, and based upon the exercise of her Sixth Amendment right to obtain and follow the advice of counsel. We respectfully request that you accept her declaration in lieu of an appearance.

As explained in our March 30 letter, we advised Ms. Goodling to assert her Fifth Amendment rights after learning that Deputy Attorney General McNulty had privately told Senator Schumer that Mr. McNulty had not been entirely candid in his testimony before the Senate Judiciary Committee and had blamed Ms. Goodling and others for failing to inform him of pertinent facts prior to his testimony. Mr. McNulty's allegation that Ms. Goodling and others caused him to give inaccurate testimony before the Senate Judiciary Committee is a sufficient predicate for Ms. Goodling's invocation of her Fifth Amendment privilege, regardless of whether Mr. McNulty's allegation is factually correct—which it is not. See, e.g., United States v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989) (indictment alleging conspiracy to make false statements to House Intelligence Committee and conspiracy to obstruct a congressional

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investigation); United States v. North, 716 F. Supp. 644 (D.D.C. 1989) (indictment alleging aiding and abetting obstruction of a congressional investigation). The prudence of Ms. Goodling's decision is further confirmed by the fact that certain members of the House Judiciary Committee have already reached conclusions about the matter under investigation and the veracity of testimony provided by the Department of Justice to date, examples of which we cited in our March 30 letter to you.

Contrary to what your April 3 letter suggests, Ms. Goodling's exercise of her Fifth Amendment rights can in no way be interpreted to suggest that Ms. Goodling herself participated in any criminal activity. Your and Senator Leahy's recent suggestions to the contrary are unfortunately reminiscent of Senator Joseph McCarthy, who infamously labeled those who asserted their constitutional right to remain silent before his committee "Fifth Amendment Communists." Indeed, you, Mr. Chairman, stated less than ten years ago:

People use the Fifth Amendment who are totally innocent and have reasons for not wanting to bring forward information. So I do not think that the test of whether someone is telling the truth or not or is guilty or innocent can be arrived by whether or not they invoke the Fifth Amendment. I hope everybody in the Congress will agree on this elementary point of constitutional understanding.

144 Cong. Rec. H3646-02 (May 21, 1998).

Ms. Goodling has simply chosen, upon advice of counsel, to assert the right of any innocent person not to testify in the circumstances described by the Supreme Court in Ohio v. Reiner. In that case, the United States Supreme Court re-affirmed that one of the basic functions of the Fifth Amendment is to protect the "innocent[,] ... who otherwise might be ensnared by ambiguous circumstances." See Ohio v Reiner, 532 U.S. 17, 21 (2001) (emphasis added). In the present circumstances, members of your Committee have already reached conclusions about the matter under investigation and the Deputy Attorney General has pointed the finger of blame at our client. These are precisely the kinds of circumstances in which even innocent persons are well advised to assert their right not to respond to questions. After all, when counseling our client, we must consider how others (be they Members of Congress, a potential Grand Jury, or a special prosecutor at some future point) may perceive the facts to be, notwithstanding that such perceptions may not be accurate.

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Although Ms. Goodling has plainly stated a valid predicate for her invocation of the Fifth Amendment, your April 3 letter warns that “the Fifth Amendment privilege, under long-standing Supreme Court precedents, does not provide a reason to fail to appear to testify; the privilege must be invoked by the witness on a question-by-question basis.” While this may be a correct statement of the law, Ms. Goodling has not failed, nor has she even refused, to appear at any hearing. Instead, she has furnished you with a sworn declaration of her intention to invoke her Fifth Amendment privilege in response to any and all questions about the firings of U.S. Attorneys, and we have respectfully requested that you not issue a subpoena compelling her appearance at a public hearing in light of her sworn intention.

Your letter also states that if Ms. Goodling were to appear for an interview with your staff, it “could obviate the need to subpoena [her] and require her to appear at a public hearing and require her to invoke the privilege to specific questions.” Our advice—to which Ms. Goodling is constitutionally entitled and which she has chosen to follow—is to consistently assert her Fifth Amendment privilege, whether in a private interview or a public hearing. Your letter essentially encourages Ms. Goodling to ignore her lawyers’ advice and sacrifice her Fifth and Sixth Amendment rights—or face being hauled to a public hearing merely to repeatedly assert her privilege to question after question. This is a choice that the Constitution does not require Ms. Goodling to make.

It would be contrary to Ms. Goodling’s Fifth and Sixth Amendment rights, inconsistent with prior Congressional practice, and outside this Committee’s legitimate investigative powers to compel her appearance at a hearing. The sole legitimate purpose of this Committee’s investigation is to gather facts, not to humiliate witnesses who choose to exercise their constitutional rights. As the Supreme Court has stated, there is “no congressional power to expose for the sake of exposure.” See Watkins v. United States, 354 U.S. 178, 187 (1957).

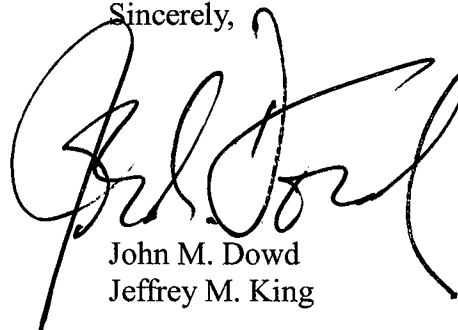
Indeed, it would be difficult to imagine a more fundamental abrogation of this Committee’s duty to uphold the Constitution than to punish those who seek its protection. As counsel for your Committee is surely aware, these considerations led the District of Columbia Bar Legal Ethics Committee to conclude that it would “be in conflict with at least the spirit of one Disciplinary Rule and the language of several Ethical considerations” for an attorney assisting a congressional committee to summon a witness to appear at public hearings when the committee has been notified in advance that the witness will invoke the Fifth Amendment privilege against self-incrimination. See D.C. Legal Ethics Opinion No. 31 (March 29, 1977).

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The importance of this principle is reflected in Congress's venerable tradition of allowing witnesses to assert the Fifth Amendment either by affidavit or through counsel. For instance, during the Watergate Hearings, the Senate Select Committee permitted witnesses to assert their Fifth Amendment privilege either by affidavit or through counsel. In June 1996, Senator Hatch allowed FBI "Filegate" target Anthony Marceca to assert his privilege through counsel. During the Iran-Contra investigation, a joint committee of the Senate and House respected witnesses' assertion of the Fifth Amendment privileged and in many instances immunized these witnesses for their testimony.

Accordingly, we again request that the Committee not seek to call Ms. Goodling to appear at a hearing. We thank you for your courteous attention to this request. If you have any further questions, we are prepared to meet with the majority and minority counsel to discuss them.

Sincerely,

A handwritten signature in black ink, appearing to be "John M. Dowd" and "Jeffrey M. King" written together in a cursive style.

John M. Dowd
Jeffrey M. King

cc: Hon. Lamar S. Smith
Ranking Member
Elliot Minberg
Chief Oversight Counsel
Daniel M. Flores
Chief Minority Counsel
Ms. Monica M. Goodling