

Lester, Loving & Davies

February 6, 2006

Ms. Harriet Miers
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500


(original will follow by mail)

Re: Testimony of Michael D. Brown

Dear Ms. Miers:

As you know, Michael D. Brown, former Under Secretary of Homeland Security for Emergency Preparedness and Response, is scheduled to testify before the Senate Homeland Security and Governmental Affairs Committee on Friday, February 10, 2006. I represent Mr. Brown with respect to his appearance at the hearing.

Mr. Brown, of course, testified on September 27, 2005, before the House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina. In preparation for this Friday's testimony, Mr. Brown was interviewed by Senate Committee staff on January 23, 2006. During both his testimony before the House and his interview by Senate Committee staff, Mr. Brown was asked several questions concerning his conversations with the President, the Vice President, and several top aides to the President, including Chief of Staff Andy Card, Deputy Chief of Staff Karl Rove, Deputy Chief of Staff Joe Hagin, Domestic Policy Advisor Claude Allen, and National Security Advisor Steve Hadley.

During the Senate interview, whenever Mr. Brown was asked such questions, David Trissell, General Counsel for the Federal Emergency Management Agency, raised an objection. Although Mr. Trissell was careful not to make a specific claim of, or use the words, "executive privilege," Mr. Trissell objected to testimony about what he called "executive level communications." By this, Mr. Trissell indicated he meant to cover in his objection any testimony concerning communications between Mr. Brown and the President or the Vice

Lester, Loving &
Davies, P.C.

1701 South Kelly Avenue
Edmond, OK 73013-3623

Phone: (405) 844-9900

Fax: (405) 844-9958

web: www.lldlaw.com

President, and the substance of any communications between Mr. Brown and the other mentioned individuals.

After Mr. Trissell made his objections, Mr. Brown generally tried to accommodate what he understood to be the desires of the White House as expressed by Mr. Trissell. Mr. Brown's questioners did not attempt to force him to disclose the material to which the Administration's objections were made.

It is my understanding that the Administration has made similar objections during the testimony and interviews of numerous FEMA and DHS officials over the last year. I understand that such objections were made not merely in connection with Congressional investigations into the response to Hurricane Katrina, but in connection with previous matters, as well.

Given the numerous questions on such points to Mr. Brown during his Committee staff interview, and given the widely publicized comments by both the Committee Chairman and the Ranking Member immediately after Mr. Brown's interview, I fully expect similar questions to arise during Friday's testimony.

As has been the situation since the outset of the various Congressional hearings regarding the response to Hurricane Katrina, Mr. Brown has been and is prepared to answer any and all questions. He intends to answer all questions fully, completely, and accurately. Specifically, unless there is specific direction otherwise by the President, including an assurance the President will provide a legal defense to Mr. Brown if he refuses to testify as to these matters, Mr. Brown will testify, if asked, about particular communications he had with the individuals named earlier in this letter. His desire is that all facts be made public.

During his press conference on Thursday, January 26, 2006, the President was asked the following question:

Why is it that this administration is not allowing the senior -- your senior staff that you conversated [sic] with prior to Hurricane Katrina, during and after, to testify, to interview or talk with congressional leaders? And why not push Michael Brown, who is now a private citizen, to go before them, as he is what many are calling a linchpin to the whole issue?

As the President indicated, the question was based on a mistaken premise. Mr. Brown has gone before Congress and has talked with, testified to, and been interviewed at length by Congress. However, in his response, President Bush stated:

And so we're fully cooperative with the members of the House in -
- of the Senate, and we'll do so without giving away my ability to get sound advice from people on my staff. You see, April, here's --

and this is an issue that comes up all the time, and you might -- we've had several discussions like this since I've been the President. If people give me advice and they're forced to disclose that advice, it means the next time an issue comes up I might not be able to get unvarnished advice from my advisors. And that's just the way it works.

When asked if "that include[s] Michael Brown," the President stated:

People who give me advice, it will have a chilling effect on future advisors if the precedent is such that when they give me advice that it's going to be subject to scrutiny.

See <http://www.whitehouse.gov/news/releases/2006/01/20060126.html>.

Given these statements, Mr. Brown is rightly concerned about how he should proceed this Friday when he appears before the Senate Committee on Homeland Security and Governmental Affairs. On the one hand, he desires to answer fully any and all questions the Committee may have. On the other hand, the President's statements indicate concern that the President be able to "get unvarnished advice from [his] advisors."

Mr. Brown greatly respects President Bush personally and the office of the President. He understands the centrality of the separation of powers in the Constitutional design of our government and the securing of liberty. As the United States Supreme Court has stated, "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." The Court has also noted that "the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.'" Of course, "[i]t is well established that 'a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any ordinary individual.'"

The right of claiming such a privilege belongs to the President, not Mr. Brown. It is, as the Supreme Court has stated, "the Executive's Article II prerogative[]." Because he is no longer a member of the Executive Branch, however, Mr. Brown is not in a position to assert such a prerogative. As Mr. Trissell noted on at least one occasion during the January 23, 2006, interview, Mr. Brown is a private citizen; he does not and cannot presume either to assert or to waive the President's rights.

Therefore, as counsel to Michael Brown, I am requesting that the President make clear to him whether the President will assert Executive or some other Privilege that would prevent Mr. Brown from testifying as to any of his communications with Executive Branch officials. If the President desires to claim

some sort of privilege, please provide specific direction as to which communications with which individuals will be covered. Also, please let me know who will be present at the hearing to claim the privilege on behalf of the President. Because of the timing of the hearing, the need to obtain a clear, direct answer in a timely manner, and the length of time it will take me to travel from Oklahoma to Washington to represent Mr. Brown at the February 10, 2006, hearing, it is imperative I receive an answer no later than 5:00 p.m. Eastern Standard Time on Wednesday, February 8, 2005.

I appreciate your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. W. Lester', with a stylized flourish at the end.

Andrew W. Lester