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PRIVILEGED AND CONFIDENTIAL

February 15, 2011

BY FEDERAL EXPRESS

The Honorable Tony West, Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: *Winsome Packer v. The United States Commission on Security
and Cooperation in Europe, et al.*, No. ____ (D.D.C.)

Dear Mr. West:

Pursuant to 28 C.F.R. §§ 50.15, 50.16, we write to request that the Department of Justice provide representation to, or authorize representation by private counsel for, the Honorable Alcee L. Hastings, U.S. Representative for the 23rd congressional district of Florida -- and also Co-Chairman of the United States Commission on Security and Cooperation in Europe ("Helsinki Commission") during the 111th Congress -- and Fred L. Turner, Chief of Staff to the Helsinki Commission.¹

Congressman Hastings and Mr. Turner have been identified as putative individual-capacity defendants in two counts of a draft Complaint prepared by attorneys for Winsome Packer, a Policy Advisor to the Helsinki Commission. See Draft Complaint for Declaratory and Monetary Relief and Jury Demand (Jan. __, 2011) (Counts Three and Four), attached as Exhibit 1. Count Three alleges sexual harassment in violation of the Fifth Amendment as against Congressman Hastings, *id.* ¶¶ 90-94, and Count Four alleges

¹ The Helsinki Commission is an independent government entity, created by statute enacted in 1976, which consists of nine Members of the House of Representatives, nine Members of the Senate, and three representatives of the executive branch. See 22 U.S.C. § 3003(a), *et seq.* It is responsible for, among other things, monitoring the activities of the signatories to, and encouraging their compliance with, the Final Act of the Conference on Security and Cooperation in Europe, 22 U.S.C. § 3002, and reporting to Congress on matters covered by the statute. *Id.* § 3006.

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retaliation in violation of the First and Fifth Amendments as against the Congressman and Mr. Turner. *Id.* ¶¶ 95-100. The draft Complaint purports to seek compensatory damages in an amount not less than \$300,000, and punitive damages in an amount not less than \$1,000,000. *Id.* at 33.

For the reasons set forth below, we believe Congressman Hastings and Mr. Turner were acting within the scope of their employment at all pertinent times and that the provision of representation is in the interest of the United States, within the meaning of 28 C.F.R. § 50.15(a)(1), (2). Accordingly, we recommend that representation be provided.

We understand that the Complaint, at present, is only in draft form, and that the Department cannot make a final determination until a complaint is actually filed with the district court. However, we expect that a complaint will in fact be filed within the next several weeks in substantially the form in which it now appears, and we will promptly advise you when that happens. Pending that occurrence, we urge the Department to begin the review process now so that a final determination as to representation can be made as quickly as possible.

PROCEDURAL BACKGROUND

The Congressional Accountability Act

In 1995, Congress enacted the Congressional Accountability Act, 2 U.S.C. §§ 1301, *et seq.* ("CAA"), a comprehensive remedial and procedural statute which makes Title VII and eleven other labor and employment laws applicable to the legislative branch. *Id.* § 1302(a); 42 U.S.C. § 2000ff-6(c). Under the CAA, a "covered employee" may — after exhausting specified counseling and mediation requirements — proceed against her "employing office" for violations of the applicable law(s), *either* in federal district court or in an administrative proceeding before the Office of Compliance. 2 U.S.C. § 1404. The Office of Compliance is an independent office within the legislative branch that performs a variety of functions under the CAA. *Id.* § 1381.

Cases initiated under the CAA proceed against the "employing office," not against an individual Member or legislative branch employee. *Id.* §§ 1301(9), 1405(a), 1408(b). The CAA created the concept of an "employing office" to mirror the fact that Congressional offices operate as separate employers in practice and for the purpose of shielding Members and legislative branch employees from personal monetary liability. *See* H.R. Rep. No. 103-650, pt. 2, at 8, 15, 24 (1994).

Office of Compliance Proceedings

In August 2010, pursuant to § 1402(a) of the CAA, Ms. Packer filed a request for counseling with the Office of Compliance, asserting claims of sexual harassment and retaliation against the Helsinki Commission. See Draft Complaint ¶ 74. The counseling period ends after 30 days, 2 U.S.C. § 1402(b), which, in this case, was on September 8, 2010. Draft Complaint ¶ 75. Ms. Packer then requested mediation pursuant to § 1403 of the CAA. The mediation period also ends after 30 days, 2 U.S.C. § 1403(c).² In this case, because the parties jointly requested several extensions, the mediation period ended on December 8, 2010. Draft Complaint ¶ 76. Ms. Packer has 90 days from the date on which she received notice of the end of the mediation period, or until approximately March 8, 2011,³ to elect to proceed against the Helsinki Commission, in federal district court or before the Office of Compliance, *id.* § 1404, if she wishes to assert a claim(s) under the CAA.⁴

THE DRAFT COMPLAINT

The Draft Complaint indicates that Ms. Packer *does* intend to assert CAA claims against the Helsinki Commission. See Draft Complaint ¶¶ 77-82 (Count One – discrimination on basis of sex in violation of CAA as against Commission), ¶¶ 73-89 (Count Two – retaliation in violation of CAA as against Commission). However, the question of whether the CAA even applies to Ms. Packer and/or the Helsinki Commission is unsettled. Compare 2 U.S.C. § 1301(3), (9) with 22 U.S.C. § 3008(d). Ms. Packer's

² Information regarding statements and representations made during Office of Compliance mediation sessions is provided solely for the purpose of providing the Department of Justice with necessary background information. The CAA mandates that all such information is "strictly confidential." 2 U.S.C. § 1416. Accordingly, this information is provided under the "common interest" privilege and its confidentiality must be maintained.

³ At present, we do not know the exact date Ms. Packer received the notice; accordingly the deadline for filing may be slightly earlier or later than March 8, 2011.

⁴ At the mediation, the Commission asserted that Ms. Packer was not a "covered employee" under 2 U.S.C. § 1301(3) and that the Commission was not an "employing office" under 2 U.S.C. § 1301(9). However, because the statute authorizing the Commission, 22 U.S.C. § 3008(d), creates some ambiguity regarding how the CAA definition of a "covered employee" applies in the context of a claim brought against the Commission, and because the mediation was an opportunity to assess Ms. Packer's allegations and ascertain whether a negotiated resolution was possible, the Commission voluntarily participated in the mediation.

attorneys were made aware of this uncertainty at the mediation sessions, and we suspect it is for that reason that they plan to assert constitutional tort claims against Congressman Hastings and Mr. Turner in Counts Three and Four.

According to the Draft Complaint, Congressman Hastings offered Ms. Packer a position at the Commission in April 2007, and she has worked as a Policy Advisor for the Commission since May 7, 2007. Draft Complaint ¶¶ 13, 14.⁵ Within a year of her hire, Ms. Packer was appointed to be the Commission's representative to the U.S. Mission to the Organization for Security and Cooperation in Europe ("OSCE") in Vienna, Austria. *Id.* ¶ 15. Ms. Packer moved to Vienna on February 15, 2008, *id.* ¶ 19, and remained there until July 31, 2010, when she returned to Washington, D.C. to resume her duties as a Policy Advisor to the Commission. *Id.* ¶ 73. As a Policy Advisor, Ms. Packer's annual salary was \$80,000. While serving in Vienna, Ms. Packer's annual income was \$165,000. *Id.* ¶ 19.

The following allegations in the Draft Complaint relate to, and appear intended to support, Ms. Packer's sexual harassment and retaliation claims against Congressman Hastings. We have divided these allegations between those that are alleged to have occurred in and around Washington, D.C., and those that are alleged to have occurred in Europe.

In and Around Washington, D.C. – Hastings

- Congressman Hastings allegedly invited himself to visit Ms. Packer in her apartment in Vienna. *Id.* ¶¶ 16, 18.
- Congressman Hastings allegedly said he would come to Ms. Packer's home in Alexandria, Virginia to "check up on her." *Id.* ¶ 18.
- Congressman Hastings allegedly called Ms. Packer in Vienna frequently. According to Ms. Packer, these calls were "under the auspices of work-related matters . . . Mr. Hastings would deviate to personal matters or try to arrange a time for them to see each other." *Id.* ¶ 23. *See also id.* ¶¶ 32, 38.
- The Congressman allegedly hugged Ms. Packer on occasion when greeting her. *Id.* ¶¶ 39, 46.

⁵ Notwithstanding the implication that Congressman Hastings hired Ms. Packer himself, the statute provides that all Commission hiring decisions are made by a majority vote of a four-person Personnel Committee consisting of the Chair, the Co-Chair and the ranking minority Members from the House and Senate. *See* 22 U.S.C. § 3008(a), (b). In 2007, Congressman Hastings was the Chairman of the Commission.

Europe -- Hastings

- Congressman Hastings gave Ms. Packer a music box from the Czech Republic as a gift in front of work colleagues. *Id.* ¶ 20.
- Congressman Hastings allegedly invited himself to visit Ms. Packer in her apartment in Vienna. *Id.* ¶¶ 21, 30.
- Congressman Hastings allegedly frequently called Ms. Packer. According to Ms. Packer, these calls were “under the auspices of work-related matters . . . Mr. Hastings would deviate to personal matters or try to arrange a time for them to see each other.” *Id.* ¶ 23. *See also id.* ¶¶ 32, 38.
- The Congressman hugged Ms. Packer. *Id.* ¶ 25 (Vienna at a meeting), ¶ 28 (Vienna), ¶ 35 (Kazakhstan in delegation hospitality room), ¶ 47 (Vilnius, Lithuania), ¶¶ 65-66 (Vienna).
- Congressman Hastings allegedly made sexual comments to and around Ms. Packer. *Id.* ¶¶ 26-27, 29.
- Congressman Hastings allegedly linked Ms. Packer’s career progress to a personal relationship with him. *Id.* ¶¶ 35, 38, 42-44.
- Congressman Hastings allegedly complained to Ms. Packer that “she was not ‘a sport’ because she knew that he ‘liked’ her and that he had helped her professionally . . . [and] explained to her that he had ‘come to [her] as a man does to a woman.’” *Id.* ¶ 43.
- Congressman Hastings allegedly asked Ms. Packer if she would like to come to his hotel room when they were attending a Parliamentary Assembly Bureau meeting in Lisbon, Portugal. *Id.* ¶ 44.

The following allegations in the Draft Complaint relate to, and appear intended to support, Ms. Packer’s retaliation claim against Mr. Turner. Again, we have divided these allegations between those that are alleged to have occurred in and around Washington, D.C., and those that are alleged to have occurred in Europe.

In and Around Washington, D.C. – Turner

- Mr. Turner allegedly “refused to take any action to protect her.” *Id.* ¶ 38.
- Mr. Turner allegedly denied Ms. Packer’s request to return to Washington, D.C. after she had worked overseas for one year. *Id.* ¶ 41.
- Mr. Turner allegedly assigned work from Ms. Packer’s portfolio to her colleagues and withheld from her important information that was pertinent to the performance of her job duties. *Id.* ¶ 50.
- In response to Ms. Packer’s request to return to Washington, D.C., Mr. Turner allegedly informed her “that Mr. Hastings would be coming to Vienna in February 2010 and would speak to her at that time about her future.” *Id.* ¶ 52.
- When Ms. Packer submitted travel requests for meetings, Mr. Turner allegedly responded that “she would have to work very hard to convince Senator Cardin [then Commission Chairman] that she should be able to travel since she had decided to return to Washington, D.C. in July.” *Id.* ¶ 70.

Europe – Turner

- Mr. Turner allegedly told Ms. Packer there was nothing he could do about Congressman Hastings’ alleged inappropriate conduct. *Id.* ¶ 45.⁶

THE FACTS AS HOUSE EMPLOYMENT COUNSEL UNDERSTANDS THEM

In preparing to participate in the Office of Compliance mediation process on behalf of the Helsinki Commission, the Office of House Employment Counsel (“OHEC”) investigated the substantive allegations Ms. Packer presented at that time.⁷ Among other things, OHEC interviewed Congressman Hastings, Mr. Turner and several other individuals. OHEC also reviewed relevant emails and other documents provided by the

⁶ There are a number of allegations in the Draft Complaint that run contrary to Ms. Packer’s claim that Congressman Hastings and Mr. Turner retaliated against her. See, e.g., Draft Complaint ¶¶ 15, 22, 38, 44, 57, 58, 61-63.

⁷ As part of the mediation process, Ms. Packer, through her first attorney, submitted a narrative that detailed her factual allegations. OHEC’s investigation was based on this narrative. After the first mediation session, Ms. Packer retained new counsel and the Draft Complaint was prepared by this new counsel. The allegations in the Draft Complaint are substantially similar, although not identical, to the allegations in the initial narrative.

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Commission. The information OHEC has reviewed to date supports the conclusion that Ms. Packer did not experience conduct that rises to the level of sexual harassment or retaliation under applicable federal law. Furthermore, a number of Ms. Packer's substantive allegations have been strongly refuted by some of the very individuals she identified as witnesses to the alleged harassment and/or retaliation. OHEC's interviews and document review have not yielded any indication of a personal relationship between Ms. Packer and Congressman Hastings, nor has OHEC's investigation resulted in the identification of any witness who corroborates Ms. Packer's substantive allegations that she experienced legally-actionable harassing or retaliatory conduct. In short, OHEC is not aware of any readily available information which indicates that the claims for sexual harassment or retaliation have merit, or that Congressman Hastings and/or Mr. Turner have been untruthful in their denial of the allegations.

It is important to note that many of the underlying allegations regarding events, trips, dinners, etc., are factually accurate and it does appear that Ms. Packer did make statements to others while in Vienna about what she claimed was inappropriate conduct on the part of Congressman Hastings. Ms. Packer also makes a number of assertions that are factually accurate, but are taken out of context. For instance, Congressman Hastings readily admits that he hugged Ms. Packer. Individuals OHEC interviewed confirmed this, but also that Congressman Hastings hugs most everyone. Similarly, Congressman Hastings did give a music box as a gift to Ms. Packer; however, Congressman Hastings and the witnesses OHEC spoke with stated that Congressman Hastings regularly bought gifts for his staff - male and female. OHEC's investigation shows that while some of Ms. Packer's allegations begin with a kernel of truth, when looked at in context, Ms. Packer grossly distorts the events and circumstances in order to support a fiction that she experienced unlawful sexual harassment and retaliation. Based on OHEC's review to date, we do not believe that Ms. Packer experienced sexual harassment. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (in order to establish a prima facie case of a hostile work environment, a plaintiff must produce evidence that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of the victim's employment and create an abusive working environment").

Rather, OHEC's interviews and review of documents indicate that Ms. Packer's view of reality is skewed. Indeed, there are communications over the course of Ms. Packer's employment with the Helsinki Commission that contradict a number of her allegations and clearly indicate that she has difficulty developing and maintaining productive and cooperative relationships with colleagues and superiors. Given the diplomatic element of the Commission's purpose and Ms. Packer's role in advancing that purpose, it is little wonder that her inability to foster cooperative relationships has been an ongoing issue.

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OHEC's view of the falsity of Ms. Packer's substantive allegations, as discussed above, is strongly influenced by OHEC's assessment of Ms. Packer's true motivation. Her self-serving and distorted interpretation of events and conversations during her tenure with the Commission can be best summed up in the title of her recently self-published novel: *A Personal Agenda*. Indeed, it appears that Ms. Packer began publicizing her book in June 2010, shortly before she initiated proceedings against the Commission under the CAA. Furthermore, in a press release she appears to have written at the time, Ms. Packer states that her book was "inspired by her own experiences" and "seeks to provoke its readers by examining . . . sexual harassment in Congress."⁸ Furthermore, in two recent television interviews available on the Internet, Ms. Packer acknowledges that she is working aggressively to seek publicity to promote her novel.⁹

OHEC also believes that Congressman Hastings and Mr. Turner are the subject of Ms. Packer's claims in large part because of their respective official positions as her superiors, *i.e.*, the Congressman as Chairman and Co-Chairman of the Commission (during the 110th and 111th Congresses, respectively), and Mr. Turner as Ms. Packer's immediate supervisor.

DISCUSSION

Scope of Employment

Because 28 C.F.R. § 50.15(a) does not define the elements of an employee's scope of employment, we look by analogy to the scope certification conducted under the Federal Tort Claims Act ("FTCA"), as amended by the Westfall Act, 28 U.S.C. §§ 2671 *et seq.* In the FTCA context, the question of whether a federal officer is acting within the scope of his employment is determined by the law of the state where the alleged tort occurred. 28 U.S.C. § 1346(b)(1); *Williams v. United States*, 350 U.S. 857, 857 (1955); *Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995). In this case, the alleged tortious conduct of Congressman Hastings and Mr. Turner occurred in Washington, D.C. and Europe. Since the FTCA does not apply to claims arising in a foreign country, 28 U.S.C. § 2680(k), we look to the law of the District of Columbia.¹⁰

⁸ A copy of this June 2010 press release can be found at <http://www.mmdnewswire.com/winsome-packer-8783.html>.

⁹ These interviews are available at <http://televisionjamaica.com/vd-1000-WINSOMEPACKER.aspx> and <http://televisionjamaica.com/vd-1303-PROFILE-WinsomeAPacker.aspx>.

¹⁰ For purposes of this letter of recommendation, we assume that actions of Congressman Hastings and Mr. Turner that allegedly occurred abroad may be considered for purposes of determining whether they acted within the scope of their employment.

According to District of Columbia law, an individual is acting within the scope of his employment if the conduct: (1) is of a kind he is employed to perform; (2) occurs substantially within authorized time and space limits; and (3) is actuated, at least in part, by a purpose to serve the master. *Haddon*, 68 F.3d at 1423-24 (citing Restatement (Second) of Agency § 228). The District takes a very broad view of "the scope of employment." See, e.g., *Lyon v. Carey*, 533 F.2d 649, 654 (D.C. Cir. 1976); *Johnson v. Weinberg*, 434 A.2d 404, 408-09 (D.C. 1981).

A. Congressman Hastings

Nature of Activities. The official duties of Members of Congress include an extremely broad range of legislative and representational activities, and plainly include activities such as service on official governmental entities such as the Helsinki Commission. See, e.g., *U.S. v. Brewster*, 408 U.S. 501, 512 (1972); *U.S. v. Rostenkowski*, 59 F.3d 1291, 1309-12 (D.C. Cir. 1995). It is clear, under the statute, that Members of Congress are appointed to the Commission because they are Members of Congress, and that they serve in that capacity. See 22 U.S.C. § 3003.

Time/Place. The Draft Complaint suggests that all, or virtually all, of the activities in which Congressman Hastings is alleged to have engaged occurred at or during official Commission functions, meetings, hearings or travel while he was acting in his official capacity as Chair or Co-Chair of the Commission. Accordingly, the authorized time/space element described in *Haddon*, 68 F.3d at 1423-24, has been satisfied.

Purpose or Motivation. Leaving aside the many self-serving characterizations that populate the Draft Complaint, it is transparently clear that Congressman Hastings's many interactions with Ms. Packer, as described in the Complaint, were motivated at least in part by a desire to carry out his official and supervisory responsibilities as Chair or Co-Chair of the Commission. And so long as at least one purpose of Congressman Hastings's activities was official in nature, the courts – quite appropriately – have refused to try to determine whether there may have been other motivations or even a "predominant" motive. See, e.g., *Council on Am. Islamic Relations, Inc. v. Ballenger*, 366 F. Supp. 2d 31-32 (D.D.C. 2005), *aff'd*, 444 F.3d 659 (D.C. Cir. 2006); *Operation Rescue Nat'l v. U.S.*, 975 F. Supp. 92, 107 (D. Mass 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998).

In the *Operation Rescue* case, for example, Senator Kennedy, in the course of speaking to the press after participating in an event to raise funds for an upcoming re-election campaign, stated that certain legislation was needed because "we have a national organization like Operation Rescue that has as a matter of national policy firebombing and even murder." 975 F. Supp. at 94-95. Senator Kennedy, who was then

sued for defamation by Operation Rescue, took the position that he was acting within the scope of his employment when he uttered those remarks. The district court held that, even if Senator Kennedy were motivated in part by a personal desire to advance his re-election prospects, it was not appropriate for the court, in making the scope of employment determination, to attempt to determine a "predominant" motive for an elected official's remarks. "In our electoral system . . . such public and personal motives are essentially inseparable because it is natural for public officials to believe that their own success . . . [is] inextricably linked to the public interest." *Id.* at 95. Rather, the court said, only when an official acts from "purely personal motives that were in no way connected to his official duties" would the official be held to have acted outside the scope of his employment. *Id.* See also W. Prosser & W. Keeton, *Torts* 506 (5th ed. 1984) (only if an employee "acts from purely personal motives in no way connected with the employer's interests, [is he] considered in the ordinary case to have departed from his employment.").

Absence of Bad Faith. As described above, as a result of OHEC's factual investigation, we are not aware of any readily available information to indicate that the claims for sexual harassment or retaliation have merit, or that Congressman Hastings has not been truthful in his denial of the allegations.

Accordingly, we believe that, as a matter of D.C. law, Congressman Hastings was acting within the scope of his official responsibilities.

B. Fred Turner

Nature of Activities. Mr. Turner's responsibilities as Commission Chief of Staff include managing the day-to-day operations of the Commission, and directing and supervising a staff of approximately 18 employees in the areas of public policy, media affairs, correspondence, scheduling, and communications. The allegations in the Draft Complaint leave little doubt that Mr. Turner was acting in his official capacity as Commission Chief of Staff at the time of his various interactions with Ms. Packer.

Time/Place. The Draft Complaint suggests that most of the activities in which Mr. Turner is alleged to have engaged occurred while he was working in the Commission's offices in Washington, D.C. during normal business hours, and that the balance occurred during official Commission functions, meetings, hearings or travel while he was acting in his official capacity as Chief of Staff. Accordingly, the authorized time/space element described in *Hacklon*, 68 F.3d at 1423-24, has been satisfied.

Purpose or Motivation. Once again leaving aside the many self-serving characterizations that populate the Draft Complaint, it is abundantly clear that Mr. Turner's interactions with Ms. Packer, as described in the Draft Complaint, were

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certainly motivated at least in part by a desire to carry out his official responsibilities as Chief of Staff. *See supra* at 8.

Absence of Bad Faith. As described above, as a result of OHEC's factual investigation, we are not aware of any readily available information to indicate that the claim for retaliation has any merit, or that Mr. Turner has not been truthful in his denial of the allegations.

Accordingly, we believe that, as a matter of D.C. law, Mr. Turner was acting within the scope of his official responsibilities.

The Interests of the United States

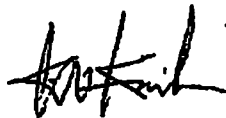
For the reasons described more fully above in the section entitled "The Facts as House Employment Counsel Understands Them," we believe it is in the interest of the United States that the Department provide representation to Congressman Hastings and Mr. Turner in their individual capacities in this matter.

CONCLUSION

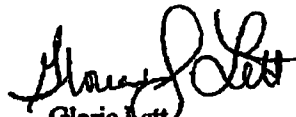
For all the foregoing reasons, we respectfully request that the Department determine that Congressman Hastings and Mr. Turner were acting within the scope of their employment at all relevant times, and that it is in the interest of the United States to provide representation to them in this action.

Thank you for your attention. We look forward to hearing from you, and please contact us if there is anything further we can do to assist in this matter.

Sincerely,



Kerry W. Kircher
General Counsel
202-225-████ (phone)



Gloria Nett
House Employment Counsel
202-225-████ (phone)

Attachment

cc: Timothy P. Garren, Director
Torts Branch, Civil Division
U.S. Department of Justice

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