

ONE HUNDRED TWELFTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
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January 24, 2011

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

I am writing to ask that you reconsider the approach you intend to take regarding unilateral subpoenas and denying the minority access to Committee records. Although the Committee is scheduled to officially adopt its rules at tomorrow's business meeting, I will not be able to support the rules package unless these two issues are resolved. I believe your approach reverses the responsible, bipartisan practices followed by your predecessors and risks returning to an era of the Committee's history when it was criticized for abusive practices.

**Returning to Unilateral Subpoenas**

Under the House and Committee Rules, the Chairman of the Oversight and Government Reform Committee has the authority to issue unilateral subpoenas. The historical practice of all but one of your predecessors, however, has been to refrain from issuing subpoenas unilaterally. Recognizing that the subpoena power is one of the most coercive powers of Congress, the policy of both Republican and Democratic Chairmen alike has been to obtain (1) the concurrence of the Ranking Minority Member or (2) a Committee vote.

The major exception to this practice was Rep. Dan Burton, who served as Chairman from 1997 to 2002. He issued more than 1,000 subpoenas during the Clinton Administration without seeking minority concurrence or a Committee vote. These included unilateral subpoenas to dozens of high-level White House officials, including three former White House Chiefs of Staff and four former White House Counsels. They also included at least three unilateral subpoenas issued to the wrong individuals. As a result of these and other abuses, the Committee was criticized repeatedly, at one point being referred to as "its own cartoon, a joke, and a deserved embarrassment."<sup>1</sup>

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<sup>1</sup> *Mr. Burton Should Step Aside*, Washington Post (Mar. 20, 1997).

Prior to Rep. Burton's tenure, the policy had been to seek the concurrence of the Ranking Minority Member or a Committee vote. During the 104th Congress, for example, Chairman William Clinger wrote to Rep. Cardiss Collins to explain this policy. He stated:

I shall not authorize such subpoenas without your concurrence or a vote of the committee. I believe that this new rule memorializes the long-standing practice of this committee to seek a consensus on the issuance of a subpoena.<sup>2</sup>

This approach was also followed in the Iran-Contra investigation, the Senate Whitewater investigation, and the Senate campaign finance investigation.<sup>3</sup>

Rep. Tom Davis and Rep. Henry Waxman, who both served as Chair and Ranking Minority Member of our Committee, returned to the historical practice of seeking minority concurrence or a Committee vote. The best example of their bipartisan approach was a colloquy Rep. Davis and Rep. Waxman engaged in when they exchanged positions after the election in 2006. During the Committee's organizational meeting in 2007, Rep. Davis—transitioning from Chairman to Ranking Member—urged Rep. Waxman—transitioning from Ranking Member to Chairman—to adopt the same approach he employed. Rep. Davis stated:

[T]he rules package delegates the authority of the Chairman to issue subpoenas. I had that authority. I think I always consulted with you regarding the use of it. Again, concurrence or a vote of the Committee would ensure that the issues are fully aired, so that our members and the public can fully understand what the Committee is doing. And I think in some cases after discussion, we might want to have that option.<sup>4</sup>

In response, Rep. Waxman agreed. He stated:

Subpoena authority, whether for documents or for witnesses for a hearing or deposition is a significant power that should be exercised with restraint. But over 1,000 subpoenas were issued unilaterally by the Chairman during the Clinton Administration, and the Committee was widely criticized for failing to handle its powers the right way. I believe then, and I continue to believe, that in issuing subpoenas for witnesses or documents, the right practice is for the Chairman to consult with the Ranking Minority Member before acting, and the right goal is to seek bipartisanship and let the Committee decide disagreements when they arise.<sup>5</sup>

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<sup>2</sup> Letter from Chairman William Clinger to Rep. Cardiss Collins (Mar. 6, 1996).

<sup>3</sup> See House Select Committee to Investigate Covert Arms Transactions with Iran, Committee Rule 4, 100th Cong., 1st Sess. (1987); S. Res. 20 (May 17, 1995); Senate Committee on Governmental Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rpt. No. 167, 105th Cong., 2d Sess., v. 6, 8687 (1998).

<sup>4</sup> *Transcript*, Organizational Meeting, Committee on Oversight and Government Reform, U.S. House of Representatives (Jan. 18, 2007).

<sup>5</sup> *Id.* (Ranking Member Davis asked Committee Members “to join me in thanking Henry Waxman for the cooperative way he has handled the last four years,” and Chairman Waxman

Similarly, when Rep. Edolphus Towns served as Chairman during the last Congress, you praised him for working with you in a bipartisan manner before issuing subpoenas, as well as for your joint efforts to obtain information without subpoenas when possible. During a press appearance on September 13, 2010, you stated:

Ed Towns and I have worked really closely together. He's helped get me subpoenas and get me information time and time again. Our relationship—you haven't heard much about it, but for the most part, when we went into the details with Toyota, when we got the chairman himself, Akio Toyoda, to come here and make a promise to the American people that this was going to be fixed on his watch, I think we did something without a subpoena, without a lot of hoopla, but at the same time we got Secretary LaHood to commit and begin the process of fixing NHTSA, that's what we're supposed to do. We're supposed to do it together whenever possible.<sup>6</sup>

To continue this responsible, bipartisan approach, I asked you to engage in the same colloquy as Rep. Davis and Rep. Waxman did in 2007, but you declined to do so. In explaining your decision, you stated that you plan to exercise your authority more expansively by issuing subpoenas unilaterally, and you stated that you would not bring any subpoenas before the Committee for a vote. It is difficult to imagine any case in which you not have sufficient time to seek my concurrence. It is even more difficult to imagine why you would go forward with a subpoena without a Committee vote in cases of significant controversy or disagreement.

Your approach is particularly troubling given public statements you have made suggesting that you plan to issue a large number of subpoenas to Obama Administration officials. On August 19, 2010, for example, you stated that obtaining subpoena power would make a “big difference” in your approach. You warned:

Cabinet officers, assistant secretaries, directors—I will be able to take on everybody that the president hires and relies upon.<sup>7</sup>

This is a watershed moment in your chairmanship of this Committee. Your policy with regard to how you will wield the Committee's subpoena power will determine whether you continue the consultative, fair, and restrained approach of Reps. Davis, Waxman, and other Chairmen of our Committee, or whether you return the Committee to the approach followed by Rep. Burton. Given your position, you have left me no choice but to offer an amendment to the Committee rules at tomorrow's business meeting to codify the bipartisan, historical practice of your predecessors. I urge you to reconsider your approach so this amendment will not be necessary.

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asked Members “to join me in giving a standing ovation to Tom Davis for an outstanding job as Chairman”).

<sup>6</sup> *The Situation Room*, CNN (Sept. 13, 2010).

<sup>7</sup> *You'll Get Served*, National Review (Aug. 19, 2010).

### **Denying Access to Committee Records**

House rule XI clause 2(e) provides that Committee records are the property of the House and that each Member “shall have access thereto.” House rule X clause 9(g) provides that minority staff “shall be accorded equitable treatment with respect to ... the accessibility of committee records.” My staff consulted with the House Parliamentarians, and they informed us that “committee records” include both requests by the Chairman of the Committee and information received in response to such requests.

Despite these clear rules, my staff have been repeatedly denied access to Committee records. On January 14, 2011, for example, you sent a letter to Department of Homeland Security (DHS) Secretary Janet Napolitano requesting information about Freedom of Information Act procedures. You did not provide me with a courtesy copy of the letter. You did, however, provide it to the press. On January 16, 2011, a press account reported that your inquiry was based on other documents obtained by the Committee:

On Sunday, Oversight panel spokesman Frederick Hill said Issa sent the letter “because the committee has received documents that raise questions about the veracity of DHS officials” on the matter.<sup>8</sup>

After reading this press account, my staff requested copies of both your letter to DHS and the additional documents referred to by your spokesman. To date, your staff have failed to reply.

My staff have also been denied access to information provided in response to your requests for information. In December, for example, you sent letters asking approximately 160 companies and organizations to identify regulations that “have negatively impacted job growth.” My staff have repeatedly requested copies of the responses to your requests, but they have been ignored. Today, you sent me a letter explaining this refusal, as well as the Committee’s oversight plans with regard to these responses:

As these materials are part of an ongoing oversight effort, I have chosen to have my staff focus on receiving, organizing, and analyzing the responses to these letters. I expect to be able to make an initial analysis, as well as all responses received as of today, public no later than February 11, 2011.<sup>9</sup>

This is patently unfair and deprives the minority of the ability to analyze these documents. When I raised this issue with you directly, you explained that you sent your requests in December as Ranking Minority Member, not as Chairman. I do not believe this is a valid reason for denying my staff access to these documents now, especially since your letter today makes clear that the you are continuing this investigation as Chairman and that the majority Committee staff are currently reviewing these documents to prepare for an official report to be issued on February 11.

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<sup>8</sup> *House Panel Wants Homeland Security Documents*, Associated Press (Jan. 16, 2011).

<sup>9</sup> Letter from Chairman Darrell Issa to Ranking Democratic Member Elijah Cummings (Jan. 24, 2011) (emphasis added).

**Conclusion**

I urge you to reconsider your approach on both of these issues, and I hope we can come to a mutual resolution in advance of the Committee's organizational meeting tomorrow.

Sincerely,

A handwritten signature in blue ink that reads "Elijah E. Cummings". The signature is written in a cursive, flowing style with a large initial "E".

Elijah E. Cummings  
Ranking Democratic Member