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Congress of the United States

House of Representatives

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September 10, 2012

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

Dear Mr. Chairman:

Last week, the Committee issued twelve unilateral subpoenas to current and former employees and contractors with the Department of Energy. Two of these subpoenas—ordering depositions on Wednesday and Thursday of this week—violated Committee Rules that require the Chairman to consult with the Ranking Member prior to ordering depositions. I believe these subpoenas are invalid and that no depositions may go forward unless Committee Rules are followed and deficiencies in these orders are remedied.

In addition, all of the subpoenas issued last week—including ten document subpoenas—were inconsistent with the commitment you made at the Committee's first organizing meeting last year to consult with me prior to issuing subpoenas. As you stated at that time: "it is my intention to consult prior to a subpoena being issued."

Had you consulted me, I would have raised serious concerns with your approach. First, I would have strongly opposed sending four armed U.S. Marshals into the Department of Energy to physically serve the subpoenas. There was absolutely no reason for this type of intimidation since the Department would have accepted the subpoenas by email, as it has done routinely in the past, including with our Committee.

I also would have recommended against targeting individual employees and contractors with threatening telephone calls, emails, and letters. The Department has been tremendously cooperative, has produced more than 600,000 pages of documents regarding the loan guarantee program, and has made the Secretary of Energy and other officials available for multiple hearings this year. Attempting to circumvent the Department's General Counsel's Office by pursuing employees directly has increased the sense of intimidation among these employees and forced them to hire private counsel at considerable expense.

The subpoenas issued last week were particularly unnecessary and unwarranted given that the Committee has identified no evidence of improper political favoritism in the Department's loan guarantee program. I am deeply concerned that some may view these latest actions by the Committee as abusive, or as an effort to escalate tensions and generate press before the November election, rather than a legitimate attempt to conduct responsible oversight.

As we go forward, I hope that we will consult more closely and in a manner that is consistent with the Rules and the effective functioning of the Committee.

Orders for Depositions Violate Committee Rules

Last week, you issued two subpoenas ordering depositions of Brandon Hurlbut, the Chief of Staff to the Secretary of Energy, and Morgan Wright, the Director of Strategic Initiatives at the Department's Loan Program Office.¹ According to the subpoenas, these depositions were ordered for Wednesday and Thursday of this week. Your decision to order these depositions without first consulting with me violates the Committee's Rules.

The Rules adopted unanimously by Committee Members at the beginning of this Congress set forth the procedure the Chairman must follow when ordering depositions. Under Rule 15(a), "The chairman of the full committee, **upon consultation with the ranking minority member of the full committee**, may order the taking of depositions, under oath and pursuant to notice or subpoena."² Rule 15(c) provides that all Members, including the Ranking Member, "shall also receive three business days notice that a deposition has been scheduled."³

You did not consult with me before ordering these depositions, and your staff failed to respond to a request from my staff to do so. Instead, I was notified only after-the-fact that these subpoenas had been signed and depositions had been ordered.⁴ Although notice is one prerequisite, the Rules also require an actual consultation with the Ranking Member prior to issuing an order for a deposition. The purpose of this Rule is to allow me to raise any suggestions or concerns you may not have considered and to provide you with an opportunity to incorporate those suggestions or concerns as you proceed.

¹ Subpoena to Brandon Hurlbut, Chief of Staff to the Secretary of Energy, House Committee on Oversight and Government Reform (Sept. 5, 2012); Subpoena to Morgan Wright, Director of Strategic Initiatives, Loan Program Office, House Committee on Oversight and Government Reform (Sept. 5, 2012).

² House Committee on Oversight and Government Reform Rule 15(a) (emphasis added).

³ House Committee on Oversight and Government Reform Rule 15(c).

⁴ *Deposition Notice*, Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Members of the House Committee on Oversight and Government Reform (Sept. 6, 2012).

Since I was not consulted prior to these subpoenas being issued, the orders for these two depositions are invalid, and the depositions may not proceed. You may comply with the Rules by consulting with me in the future with respect to any deposition you continue to believe is necessary to conduct the Committee's oversight work.

Concerns with Intimidating and Threatening Actions

Had you consulted with me about any of these subpoenas, I would have raised serious concerns about the manner in which you proposed to proceed. For example, last week, you directed four armed U.S. Marshals to enter the Department of Energy to physically serve subpoenas on the individual employees the Committee is targeting.

Using federal Marshals to serve subpoenas is typically reserved for cases in which individuals pose some danger to the public, are fleeing service, or have refused service by any other means. None of these circumstances exists in this case. To the contrary, the Department would have accepted service of these subpoenas through email, just as it did when it accepted a previous subpoena issued by the Committee on October 5, 2011.⁵

I believe most people would agree that, in addition to being an unnecessary expense of taxpayer funds, sending four U.S. Marshals to serve subpoenas on individual employees could have an intimidating effect that should be avoided if less overbearing methods are readily available, which they were in this case.

This perception has been aggravated further by other actions the Committee has taken. For example, on August 31, 2012, the Department's Deputy General Counsel wrote to express concern regarding telephone calls from Republican Committee staff "with threatening references to U.S. Marshals coming to their homes to serve subpoenas."⁶

Targeting Individual Employees and Refusing to Work With the Department

Had you consulted with me, I also would have advised against targeting individual employees with threatening letters, emails, and telephone calls instead of working with the Department's General Counsel's Office and its Office of Legislative Affairs, which have demonstrated tremendous cooperation with the Committee and coordinated the production of hundreds of thousands of pages of documents.

⁵ Subpoena to the Honorable Steven Chu, Secretary, Department of Energy (served to Sean Lev, Acting General Counsel, Department of Energy) (Oct. 5, 2011).

⁶ Letter from Deputy General Counsel, Department of Energy, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Aug. 31, 2012).

To date, the Department has produced more than 600,000 pages of documents in response to 16 Committee letters regarding the Department's loan guarantee program.⁷ In its latest request, the Committee sought copies of emails sent from nongovernmental accounts. It requested these documents from six current and former employees and four contractors. Although the Department previously produced emails sent to and from government accounts, it immediately coordinated a new document search to identify additional emails sent to and from nongovernmental accounts.⁸

On August 24, 2012—prior to the issuance of the subpoenas—the Department produced to the Committee “all responsive email communications from the named six current and former DOE employees that had not been captured by official government email archiving systems.”⁹ Despite this production, the Committee issued subpoenas to all six current and former employees demanding emails relating not only to the loan guarantee program, but to “any other official business of the U.S. Department of Energy.”¹⁰

Despite the fact that these employees are entitled to and requested assistance from the Department's General Counsel's Office in responding to the Committee's request, the Committee has refused to work with the General Counsel's Office on this matter and has insisted on targeting employees directly. As a result, employees have been forced to retain their own private counsels at considerable personal expense.

In one case, the individual targeted had already provided the documents demanded by the Committee. On August 31, 2012, a former Senior Advisor at the Department produced hundreds of pages of documents, including emails to and from his nongovernmental account, as well as responsive communications that had not been captured by government email archiving systems.¹¹ Despite his demonstrated cooperation, the Committee issued a subpoena when a telephone call potentially could have resolved any questions.

⁷ *Id.*

⁸ Letter from Deputy General Counsel, Department of Energy, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Aug. 24, 2012) (explaining that the Department wrote to all ten individuals stating: “In light of these documents' potential character as agency records of the Department of Energy, we request that you: (1) immediately conduct a thorough search of your personal email accounts and other personal electronic storage devices for any emails related to Department business and any other agency records; and (2) provide all such emails and other records to me by August 22, 2012.”).

⁹ Letter from Deputy General Counsel, Department of Energy, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Aug. 31, 2012).

¹⁰ *See, e.g.*, Subpoena to Brandon Hurlbut, Chief of Staff to the Secretary of Energy, House Committee on Oversight and Government Reform (Sept. 5, 2012).

¹¹ Letter from William W. Taylor, III, Counsel for former Senior Advisor, Department of Energy, to Majority Staff, House Committee on Oversight and Government Reform (Aug. 31, 2012).

With respect to the four remaining individuals, the Department informed the Committee that they are not federal employees, but current and former government contractors. As a result, the Department explained that it is “entirely predictable and entirely expected for such privately engaged individuals to maintain corporate or private, nongovernmental email accounts or to conduct business with the Department on those accounts.”¹²

Since the Committee demanded all emails relating to any Department business, the number of responsive emails from these contractors could be enormous and of no value whatsoever to the Committee’s investigation. After receiving this information, I believe the appropriate course was not to subpoena these four individuals, but to consult further with the Department about whether it could produce a subset of emails that would assist the Committee’s efforts.

Conclusion

The Committee’s year-long investigation has produced no evidence to support your claims of a “broad scandal” of political favoritism in the Department’s loan guarantee program. Nevertheless, it appears that the Committee is expanding and escalating its efforts directly ahead of the November election. As Subcommittee Chairman Jim Jordan has stated: “Ultimately, we’ll stop it on Election Day, hopefully.”¹³

Although I strongly support the Committee’s authority and respect your prerogatives as Chairman, I believe it is my responsibility to make my concerns known when Committee Rules are not honored, and when the exercise of the Committee’s authority is intimidating, excessive, or abusive to federal employees and contractors serving their country.

I believe these negative results can be avoided in the future by instituting a process of real consultation that involves true inquiry and feedback, rather than one that relies on unilateral action. I hope we can move in that direction going forward.

Sincerely,


Elijah E. Cummings
Ranking Member

¹² Letter from Deputy General Counsel, Department of Energy, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Aug. 24, 2012).

¹³ *Jim Jordan Continues Charge Against Solyndra, Department Of Energy Loan Program*, Huffington Post (May 10, 2012).