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Congress of the United States

House of Representatives

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February 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:

Over the past eight days, you have issued three unilateral subpoenas, including one document subpoena to the Bank of America Corporation on behalf of Countrywide Financial, and two deposition subpoenas to employees at the Department of Homeland Security regarding the Department's policies and practices under the Freedom of Information Act (FOIA). Based on your public statements and the underlying facts, all three subpoenas appear unnecessary at this time and could have been avoided if you had adequately consulted with me and other Members of the Committee.

At the beginning of this Congress, I requested that you provide your assurance that you would obtain my concurrence prior to issuing a subpoena or that you would seek a vote of the Committee.¹ As I pointed out, this has been the historical practice of all but one of your predecessors.² You declined to provide that assurance. Instead you asserted that "it is my intention to consult prior to a subpoena being issued." You added:

I am going to take your thoughts on why you object seriously. To be honest, I will ask other members of my committee, am I doing the right thing, and seek their guidance. ... I will also undoubtedly talk to other members on your side and say, am I nuts? Am I

¹ Letter from Rep. Elijah E. Cummings, Ranking Member, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (Jan. 24, 2011) (online at http://democrats.oversight.house.gov/images/stories/2011_0124_Cummings_to_Issa_access_to_records.pdf).

² *Id.* (referring to Rep. Dan Burton, who served as Chairman from 1997 to 2002 and issued more than 1,000 subpoenas during the Clinton Administration without seeking minority concurrence or a Committee vote).

wrong? Is this somehow a subpoena that is outside the mainstream? So I don't intend on simply writing subpoenas endlessly.³

The abrupt manner in which you issued all three subpoenas over the past week has been inconsistent with this commitment. The coercive power of this Committee should be used only when the purpose of the subpoena is clear and reasonable efforts to obtain the information have been exhausted. Subpoenas should not be issued in a rushed and confused manner that leaves Members of the Committee wondering whether they serve legitimate interests.

I raised my concerns with you last Wednesday when you issued the first subpoena for Countrywide documents. At that time, you said you would consult with me more closely in the future. I raised my concerns again with you this past Tuesday after you issued the two deposition subpoenas to the Department of Homeland Security. At that time, you assured me that you would not issue subpoenas without first discussing them with me and giving me a reasonable opportunity to develop and share my views.

I am writing this letter to request that we work together to develop a better process of meaningful consultation in order to ensure that the Committee exercises its subpoena authority responsibly.

The Countrywide Subpoena

As part of the Committee's ongoing investigation of mortgages provided by Countrywide Financial, you have stated publicly that the Committee is not targeting Members of Congress. If this is accurate, the unilateral subpoena you issued last Wednesday appears to be unnecessary. If you had adequately consulted with me before issuing it, perhaps some of the subsequent confusion surrounding this subpoena could have been avoided.

On February 16, you issued a subpoena to the Bank of America Corporation, which purchased Countrywide Financial in 2008, demanding a wide range of documents, emails, and other communications relating to mortgages offered through the "VIP and/or Friends of Angelo program." The subpoena requires that these documents be delivered by March 7, 2011.

Your subpoena is nearly identical to a subpoena issued by Chairman Towns during the last Congress on October 23, 2009. The most significant change is your demand for documents relating to Members of Congress. Under the 2009 subpoena, Countrywide was required to produce documents relating to Members of Congress directly to the Committee on Standards of Official Conduct, which is responsible for investigating allegations relating to Members of the House. The 2009 subpoena stated:

Documents containing identifying information about current Members of the United States Congress, and their spouses, shall be segregated from other records and delivered to the Committee on Standards of Official Conduct.⁴

³ Transcript of Organizational Meeting, House Committee on Oversight and Government Reform (Jan. 25, 2011).

Your subpoena eliminates this language from the 2009 subpoena, requiring these documents to be delivered now to the Oversight Committee instead of the Committee on Standards of Official Conduct. Your subpoena also expands the scope of the 2009 subpoena to include former Members of Congress, as well as current Members. Finally, your subpoena extends to Senators and their staff, while the 2009 subpoena left these issues to the Senate.⁵

When you first issued this subpoena, you stated that the “American people have a right to know the totality of who participated in the Countrywide VIP program.”⁶ That evening, multiple news outlets reported that your objective in issuing this subpoena was to obtain information regarding Members of Congress that you could publicize.⁷

By the following day, however, you had clarified your intentions. You stated that you were “not targeting any members” and that the Oversight Committee “is not a committee that would determine ethical or legal limitations on a member of Congress.”⁸ You also stated that “the Senate Ethics Committee has spoken and it’s the final word on what’s ethical for Senators.”⁹

If you do not intend to investigate Members of Congress, it appears that the changes in your subpoena were unnecessary. In other words, if you are not “targeting any members,” there was no need to expand the subpoena in this way. Unfortunately, you issued this subpoena before adequately consulting with me or other Members of the Committee. Although you contacted me to inform me of your decision to issue the subpoena, you did not give me an opportunity to review the text of the subpoena or share my views with you.

As of today, you have not explained why you felt so rushed to issue this particular subpoena. Based on your public statements, it remains unclear whether you plan to insist that Countrywide produce to the Oversight Committee documents relating to current or former

⁴ Subpoena from House Committee on Oversight and Government Reform to Bank of America Corporation (Oct. 23, 2009).

⁵ Subpoena from House Committee on Oversight and Government Reform to Bank of America Corporation (Feb. 16, 2011) (expanding to any “current or former Member, officer, or employee of the U.S. Congress”).

⁶ *Issa Demands Details on Countrywide’s VIP Loan Program*, The Hill (Feb. 16, 2011) (online at <http://thehill.com/blogs/on-the-money/banking-financial-institutions/144629-issa-demanding-details-on-countrywides-vip-program>).

⁷ *See. e.g., Countrywide Subpoena Could Make a Few Powerful People Nervous*, CBS News (Feb. 16, 2011) (online at www.cbsnews.com/8301-503544_162-20032331-503544.html).

⁸ *Issa Says Countrywide Subpoena Not Aimed at Lawmakers*, Politico (Feb. 17, 2011) (online at www.politico.com/blogs/glennthrush/0211/Issa_says_Countrywide_subpoena_not_aimed_at_lawmakers.html).

⁹ *Interview with Congressman Darrell Issa*, Real Clear Politics (Feb. 18, 2011) (online at www.realclearpolitics.com/news/ap/politics/2011/Feb/18/interview_with_congressman_darrell_iss.html).

Members of Congress, or whether you believe the House and Senate ethics committees are appropriately handling these issues.

The DHS Subpoenas

On Tuesday, February 22, 2011, you abruptly served two additional unilateral subpoenas without consulting with me or other Members of the Committee. These subpoenas require that two employees from the Department of Homeland Security appear at depositions on March 7 and 8 to testify about the Department's FOIA policies and practices. These subpoenas also appear to be premature and unnecessary.

Last Friday, you and I met to discuss the status of the Department's production of documents in response to requests you sent on January 14 and February 1. At our meeting, you stated that you were considering issuing a subpoena to require the Department to produce these documents. I appreciate that you seriously consulted with me about this draft subpoena. You provided a copy for my review, entertained legitimate discussions about how to proceed, and ultimately decided that a document subpoena was unnecessary.

As we discussed last Friday, the Department has devoted significant resources to responding to your document requests. Specifically, on January 14, 2011, you requested a wide range of documents about the Department FOIA guidelines and procedures, as well as communications between "the Office of the Secretary and the Office of General Counsel relating to specific FOIA requests that were reviewed by any person outside of the DHS FOIA office."¹⁰

On January 28, 2011, the Department responded that agency officials were working "expeditiously" to comply with the Committee's document request and described the steps they had taken to date.¹¹ On February 1, 2011, you wrote back to commend Department officials for their efforts. You stated:

I was encouraged by your letter and by the Department's stated willingness to cooperate with the Committee. ... It is indeed a sign of good faith that the Department offered to produce documents created outside the date range specified in my request.¹²

¹⁰ Letter from Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to the Honorable Janet Napolitano, Secretary, Department of Homeland Security (Jan. 14, 2011).

¹¹ Letter from Nelson Peacock, Assistant Secretary, Office of Legislative Affairs, Department of Homeland Security, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (Jan. 28, 2011).

¹² Letter from Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to the Honorable Janet Napolitano, Secretary, Department of Homeland Security (Feb. 1, 2011).

In your February 1 letter, you also requested a new set of documents from the Department that included “[e]-mail between DHS personnel and the White House.”¹³ In addition, you added a new request for transcribed interviews of six Department employees, including the Chief of Staff to the Secretary, the Deputy Chief of Staff, and the Chief of Staff to the General Counsel.¹⁴

During our conversation last Friday, I offered to work with you and the Department to develop a feasible document production schedule. I also expressed my view that, to understand the origination of the Department’s policies, which were established in 2006, the Committee should also obtain documents relating to the previous Administration’s FOIA policies. You agreed to this request. Following our conversation, you spoke directly with Secretary Janet Napolitano by telephone, and by all accounts, that call went well.

By Friday evening, however, you had reversed course. Rather than developing a schedule to produce the documents we discussed, your staff sent an e-mail to Department officials directing them to “temporarily suspend efforts to get us documents.”¹⁵ Instead, your staff explained that you now wanted to focus solely on your demand for transcribed interviews of Department officials. By the next business day, Tuesday, February 22, your staff hurriedly e-mailed subpoenas to the Department for depositions of two officials listed in your February 1 letter.

As with the document subpoena to Countrywide, you issued these deposition subpoenas without adequately consulting with me or other Members of the Committee. You failed to contact me before issuing these subpoenas. At our meeting last Friday, we discussed your desire to schedule transcribed interviews, but at no time did you mention issuing subpoenas to depose Department officials. In fact, I was dismayed to learn that you had signed both of these deposition subpoenas on Thursday, February 17—the day before our meeting and before your call with Secretary Napolitano. Your actions create the impression that your decision had already been made.

If you had consulted with me, I would have expressed my concern that proceeding directly to depositions is hasty and ill-advised at this stage, especially while document production is just beginning. Obviously, it is more difficult to conduct depositions without the benefit of relevant documents. I also would have reiterated my request for documents from the previous Administration that may shed light on how the current FOIA policies were developed and implemented.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Email from Chief Counsel for Investigations, House Committee on Oversight and Government Reform, to Nelson Peacock, Assistant Secretary, Office of Legislative Affairs, Department of Homeland Security, *et al.* (Feb. 18, 2011).

Conclusion

At our Committee's first organizational meeting on January 25, you pledged to consult with me and other Members of the Committee "prior to a subpoena being issued." Despite this promise, your record is now 0 for 3, and this has resulted in confused, rushed, and unnecessary subpoenas. As I mentioned last Friday, I will stand by you when the Committee is being denied information to which it is legitimately entitled, but I cannot support your actions without the consultation you promised.

I share your interest in conducting effective and efficient oversight that will benefit the American taxpayers, and I hope we can work together more collaboratively going forward.

Sincerely,



Elijah E. Cummings
Ranking Member