ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

August 2, 2007

BY E-MAIL AND U.S. MAIL

Mr. Robert Kelner
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004

Dear Mr. Kelner:

I was very disappointed to receive your letter on July 31 concerning the subpoena for documents served on Mr. Duncan on July 13. On July 17, I granted your request and provided a two-week extension of time to respond to the subpoena until July 31, because you requested additional time so that "specific determinations" could be made with respect to executive privilege claims. My July 17 letter made clear that by the revised deadline, the Committee was to receive all the documents requested or, with respect to any withheld, a document-by-document privilege log reflecting such "specific determinations." Although a small number of additional documents were provided late yesterday, most continue to be withheld based on "instructions" from the White House, many without even a formal claim of privilege, and with no privilege log or other detailed explanation of the reasons for the RNC's refusal to comply with the subpoena.

According to White House letters to you, two categories of documents are at issue. The first category, which the Committee informally understands to consist of thousands of pages, includes documents also within the scope of our June 13 subpoena to the White House. You have chosen to follow the White House "instructions" to refuse to produce these documents, or even to produce a privilege log or any other description of the documents or the basis for withholding them, as the Committee requested and as case law requires. This is despite the fact that, as explained in my July 17 letter, the White House does not have legal possession of, or the legal right to object to, the production of these documents.

Before the Committee takes any specific enforcement action, however, I am hopeful that we can make substantial progress towards resolving the pending disagreement concerning the second category of documents at issue. The White House describes these documents, which the

Committee understands to include hundreds of pages, as relating to communications with or among White House officials concerning candidates for U.S. Attorney positions in the Central District of California, the Middle District of Tennessee, and the District of Montana. The White House does not claim executive privilege over these documents, but instead maintains that they "fall outside the Committee's investigative authority" because they relate to the President's purportedly "constitutional prerogative" to nominate U.S. Attorneys, and directs you not to disclose them without a further demonstration of relevance by the Committee.

In some respects, the refusal to produce these documents without even a claim of privilege is more troubling than the withholding discussed above. The Constitution makes clear that the President has no inviolable "constitutional prerogative" to nominate U.S. Attorneys. Instead, U.S. Attorneys are "inferior officers" under Article II, section 2 of the Constitution and are nominated by the President because Congress has provided for that authority.[1] The U.S. Attorney investigation has already produced one statutory change in this area, relating specifically to the interim appointment of U.S. Attorneys, and other legislation on this subject is under consideration as well.[2] Congress' legislative as well as oversight authority in this area is clear.

More specifically, the documents in category two are included among those that RNC personnel determined to be relevant to our original April 12 request for documents. That request concerned e-mails in RNC possession relating to "the recent termination of U.S. Attorneys," as well as the related subjects of "the performance of any U.S. Attorney; any consideration of whether to retain, dismiss, or seek the resignation of any U.S. Attorney; any candidate for possible appointment as a U.S. Attorney to replace anyone considered for termination; and any process for considering any of these subjects." No one has asserted that this request was "outside

---

[1] See U.S. Const. Art. II, sec. 2, cl. 2; 28 U.S.C. 541; U.S. v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000).

[2] See Memorandum to Members of the Committee on the Judiciary from John Conyers, Jr., Chairman, concerning Full Committee Consideration of Report on the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten to Comply with Subpoenas By the House Judiciary Committee (July 24, 2007) at 31-36. This memorandum, as well as the Report approved by the Committee on July 25, further explains the Committee's jurisdiction and authority to conduct its investigation, pursuant to which the subpoena was issued to Mr. Duncan.

the Committee's authority." Although the White House now claims that the category two documents do not concern some of these subjects, the subpoena was to the RNC, not the White House, and the Committee thus cannot simply withdraw its request for these materials without more information, in light of the RNC's own determination that they are responsive to our requests.

There is an available mechanism that has already been used to resolve similar concerns. As your letter notes, we have already agreed that the RNC need not produce certain documents reflecting communications between Scott Jennings and his personal counsel and family members based on informal Judiciary Committee staff review of those documents without prejudice to the possible assertion of privilege claims. We are proceeding in a similar fashion concerning several other White House personnel who have used RNC accounts. A similar process has been used concerning certain documents withheld by the Department of Justice in response to a Committee subpoena, and the White House itself used a similar procedure relating to documents requested by another House committee in the Pat Tillman matter. As Committee staff suggested when Mr. Flood of the White House was in the Committee's offices earlier this week, we would be willing to use such a process in this instance, which should substantially narrow if not eliminate the differences between us concerning these documents. We are also open to other alternatives, such as the use of a log of withheld documents, which was also used with the Justice Department. I encourage further informal discussions with Committee staff on this matter, but must insist on hearing from you by August 10 on whether you are willing to pursue this course, and the process must be completed no later than August 31. Otherwise, the Committee will have no choice but to assume that Mr. Duncan refuses to produce any of the category two documents, or to provide a log or any further basis for their withholding, without even an assertion of privilege by the RNC or the White House.

Finally, I want to emphasize again that the Committee has directed this subpoena not to the White House, but to Mr. Duncan of the RNC. The White House does not have legal control of the RNC. Moreover, if the White House objects to your production of documents in your possession, it should raise a legal claim in court as in the AT&T case, rather than simply "directing" a private party to refuse to comply with a subpoena. Although we are willing to talk with the White House or anyone you designate to help resolve this matter, it is Mr. Duncan and the RNC who will bear responsibility for the legal consequences of refusing to comply with the Committee's subpoena. I hope you will take all steps possible to resolve this matter without further legal process.

Sincerely,

John Conyers, Jr.
Chairman

cc: The Honorable Lamar S. Smith
The Honorable Linda T. Sánchez
The Honorable Chris Cannon
Emmet T. Flood, Esq.