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ONE HUNDRED TENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 13, 2007

Mr. Fred F. Fielding  
Counsel to the President  
The White House  
Washington, DC 20500

Dear Mr. Fielding:

We have had an opportunity to review the documents the White House produced in response to the Committee's April 27, 2007, request for information relating to the death of Army Corporal Patrick Tillman. We appreciate that you have sent 1,072 pages of documents to the Committee, but we have concerns about the documents that are missing, the documents that are being withheld, and the documents that appear never to have been searched.

The main focus of the Committee's investigation is to examine what the White House and the leadership of the Department of Defense knew about Corporal Tillman's death and when they knew it. Unfortunately, the document production from the White House sheds virtually no light on these matters.

We urge you to make a complete document production to the Committee without further delay.

### The Missing Documents

In the entire White House document production, there are only two communications between any officials in the White House and the Defense Department. The first is an e-mail exchange on April 23, 2004, the day after Corporal Tillman was killed in a friendly fire attack. It is between Lawrence Di Rita, the Defense Department spokesman, and Jeanie Mamo, a deputy assistant to the President and director of media affairs at the White House. Ms. Mamo asked Mr. Di Rita for details regarding Corporal Tillman's death, and Mr. Di Rita answered, "details are sketchy just now."<sup>1</sup>

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<sup>1</sup> E-mail from Lawrence Di Rita, Assistant Secretary of Defense for Public Affairs, to Jeanie Mamo, White House Communications Office (Apr. 23, 2004) (White House HOG004-00189).

Mr. Fred F. Fielding  
July 13, 2007  
Page 2

The second e-mail occurs 41 days later, on June 4, 2004. It is a transmission of a press packet from the Defense Department containing news clips. One of the “items of interest” is a May 29, 2004, article entitled “Investigation Concludes Friendly Fire Probably Killed Tillman.”<sup>2</sup>

It is difficult to believe that these are the only communications that White House officials had with the Department of Defense between April 22, 2004, the day Corporal Tillman died, and May 29, 2004, the day the Bush Administration publicly announced that Corporal Tillman’s death was a result of fratricide. Corporal Tillman’s death was a major national story. During this period, the President made public statements regarding Corporal Tillman and praised his service to the country during the annual White House Correspondents’ Dinner on May 1, 2004.<sup>3</sup>

In fact, there is compelling evidence that responsive documents were not produced to the Committee by the White House. In response to a similar document request from the Committee, the Defense Department produced an e-mail sent on April 28, 2004, from John Currin, the White House speechwriter who drafted the Correspondents’ Dinner speech, seeking additional information about Corporal Tillman from the Department of Defense.<sup>4</sup> This e-mail was not produced by the White House, and no explanation was provided for the omission.

Mr. Currin’s request appears to have generated a high-level military memo warning that the President should be informed that Corporal Tillman was killed by friendly fire. On April 29, 2004, one day after the request by Mr. Currin from the White House, Army Major General Stanley McChrystal, the commander of the Joint Task Force for Afghanistan, sent a “Personal For” (P4) memo to three of the highest ranking generals at the Department of Defense: the commanders of U.S. Central Command, U.S. Special Operations Command, and the

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<sup>2</sup> E-mail from George Hjar, Defense Information Systems Agency, to National Capital Region Army, Air Force, Marine Corps, and Navy Personnel (listserve) (June 2, 2004) (White House HOG004-00251-HOG004-00286).

<sup>3</sup> The White House, *Remarks by the President at the White House Correspondents Dinner* (May 3, 2004) (White House HOG004-0983-HOG004-0985). See also *Former Football Star Killed in Afghanistan*, American Forces Press Service (Apr. 23, 2007) (DOD 167-69) (stating that Corporal Tillman and his family were in the President’s “thoughts and prayers” and that Corporal Tillman was “an inspiration both on and off the football field”).

<sup>4</sup> E-mail from John Currin, White House Executive Office of the President, to Hedy Henderson, Office of Assistant Secretary Defense for Public Affairs (Apr. 28, 2004) (DOD 1399, 1400, 1404-05).

Mr. Fred F. Fielding  
July 13, 2007  
Page 3

U.S. Army Special Operations Command.<sup>5</sup> According to General McChrystal, he wrote this memo in response to reports that President Bush “might include comments about Corporal Tillman’s heroism and his approved Silver Star Medal in speeches currently being prepared, not knowing the specifics surrounding his death.”<sup>6</sup> The memo explained that “it is highly possible that Corporal Tillman was killed by friendly fire.”<sup>7</sup>

General McChrystal concluded the P4 memo by urging his superiors to warn the White House:

I felt that it was essential that you received this information as soon as we detected it in order to preclude any unknowing statements by our country’s leaders which might cause public embarrassment if the circumstances of Corporal Tillman’s death become public.<sup>8</sup>

Inexplicably, the White House production includes no copies of the P4 memo or any references to it. The production also does not include any response from the Defense Department to Mr. Currin’s e-mail.

Indeed, there is not a single document in the White House production that indicates how or when any White House officials, including the President, learned that Corporal Tillman was killed by his own unit.

We are sure you can understand our doubts about the completeness of your document production. It is not plausible that there were no communications between the Defense Department and the White House about Corporal Tillman’s death.

### **The Withheld and Redacted Documents**

According to the letter your office sent to the Committee on June 15, 2007, the White House is withholding “certain documents responsive to the Committee’s request because they

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<sup>5</sup> E-mail from Maj. Gen. Stanley McChrystal, Joint Task Force Commander, to General John P. Abizaid, Commander, U.S. Central Command, Gen. Bryan P. Brown, Commander, U.S. Special Operations Command, and Lt. Gen. Philip Kensinger, Commander, U.S. Army Special Operations Command (Apr. 29, 2004) (online at <http://oversight.house.gov/documents/20070424160511.pdf>).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Mr. Fred F. Fielding  
July 13, 2007  
Page 4

implicate Executive Branch confidentiality interests.”<sup>9</sup> The White House has also redacted over 30 pages of documents provided to the Committee. The letter states that you took this action because these documents contain “purely internal e-mails between White House personnel.”<sup>10</sup>

These are not appropriate reasons for withholding the documents from the Committee. During the Clinton Administration, the White House provided the Committee with thousands of pages of internal White House e-mails, including e-mails between the Vice President and his staff.<sup>11</sup> The White House also provided the Committee with handwritten notes of White House staff and internal White House memoranda, including memos to or from the White House Counsel, Deputy White House Counsel, Associate White House Counsel, the Assistant to the President and Deputy Chief of Staff, and the First Lady, among others.<sup>12</sup>

In your letter, you indicate that you are willing to discuss possible accommodations regarding the documents that the White House withheld and redacted. Under the precedents of the Committee, the Committee has the right to obtain these documents unless the President asserts a valid claim of executive privilege. No such privilege has been asserted in this case.

In similar circumstances, such as the Committee’s document request to the White House Council on Environment Quality, we have offered the White House the option of a staff review of the documents. Under this process, documents are brought to the Committee offices for review by the Committee staff. Only those documents that are determined after the review to be important to the investigation need to be produced.

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<sup>9</sup> Letter from Emmet T. Flood, Special Counsel to the President, to Rep. Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform (June 15, 2007).

<sup>10</sup> *Id.*

<sup>11</sup> House Committee on Government Reform Minority Staff Report, *Congressional Oversight of the Clinton Administration* (Jan. 17, 2006).

<sup>12</sup> *E.g.*, Handwritten notes of Brian Bailey, Assistant to Deputy Chief of Staff Erskine Bowles (undated) (Bates number M 033298); Memorandum from Marsha Scott to Harold Ickes and Bruce Lindsey (cc: the First Lady), “Recommendation for Design of New Database” (June 28, 1994) (Bates numbers M 32438-32439) (this document contained handwritten notes of the First Lady); Memorandum from Cheryl Mills to Marsha Scott (Jan. 17, 1994) (Bates numbers M 24918-24920); Memorandum from Bernard Nussbaum, Counsel to the President, and Cheryl Mills, Associate Counsel to the President, to White House Staff (July 12, 1993) (Bates numbers M 033320-033330). These documents are reprinted in the report by the House Committee on Government Reform and Oversight entitled *Investigation of the Conversion of the \$1.7 Million Centralized White House Computer System, Known as the White House Database, and Related Matters*, 105<sup>th</sup> Cong., 2d Sess. (H. Rept. 105-828) (Oct. 30, 1998).

Mr. Fred F. Fielding  
July 13, 2007  
Page 5

This process has worked well previously and helped to narrow the Committee's differences with the White House. We are prepared to offer this option to you in this case as an accommodation to your concerns, provided that the review can be arranged expeditiously.

### **The Documents That Apparently Were Not Searched**

We are also concerned that you have produced only e-mails to the Committee. The instructions sent with the Committee's document request specifically requested "all documents received or generated by" the White House that related to Corporal Tillman. The term "document" is defined in the attachment to the letter sent to you by the Committee on April 27, 2007. In addition to e-mails, it includes faxes, memos, drafts, working papers, and interoffice and intra-office communications. Yet no faxes, memos, drafts, working papers, and forms of communication other than e-mails were provided to the Committee.

We do not understand the omission of these types of responsive documents. It appears that despite the Committee's express instructions, no effort was made to search for these categories of responsive documents. Obviously, that would not be an appropriate response to the Committee's request.

### **Conclusion**

The hearing the Oversight Committee held on April 24, 2007, with members of Corporal Tillman's family and former Army Private Jessica Lynch, raised questions about whether the Administration has been providing accurate information to Congress and the American people about the ongoing war in Iraq and Afghanistan. These questions have implications for the credibility of the information coming from the battlefields in Iraq and Afghanistan and raise significant policy issues about how to prevent the future dissemination of untrue information. They also have a profound personal impact on the Tillman family. It is for these reasons that the Committee requested documents from the White House.

We would like to avoid a confrontation over these documents, if possible, but cannot accept the deficient production the White House has provided to the Committee. Moreover, with the Committee's next hearing on this issue scheduled for August 1, 2007, continued delay in providing the responsive documents would frustrate the Committee's on-going investigation.

The June 15, 2007, letter from your office says that you are "willing to discuss possible accommodations that meet the Committee's oversight interests while respecting separation of powers principles."<sup>13</sup> To enable the Committee to perform its oversight function, we ask that you produce the withheld and redacted documents, or bring them to the Committee for staff

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<sup>13</sup> Letter from Emmet T. Flood, Special Counsel to the President, to Rep. Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform (June 15, 2007).

Mr. Fred F. Fielding  
July 13, 2007  
Page 6

review, by July 18, 2007. In addition, we request that you produce the missing documents, as well as the responsive documents that apparently have not been searched, by July 25, 2007.

If you have any questions regarding this request, please contact one of us or ask your staff to contact the Committee staff.

Sincerely,



Henry A. Waxman  
Chairman



Tom Davis  
Ranking Minority Member