ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
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March 6, 1998

The Honorable Henry Waxman
Ranking Minority Member
House Committee on Government
Reform and Oversight
Washington, D.C. 20515

Dear Mr. Waxman:

I write in response to your February 27, 1998, letter regarding the Committee's subpoena for certain tax related records in the possession of Donald Lam, Ted Sioeng's accountant.

In response to a letter from a third party interested in the subpoena, I went the extra mile in outlining the legal rationale for the validity of the subpoena and the legal reasons why Mr. Lam should comply. I was under no obligation to do so and could have told Mr. Lam that he was expected to comply with the subpoena. Furthermore, the legal opinions in that letter are consistent with similar opinions put forth by prominent Democratic Chairmen and House General Counsels who zealously advocated legal positions in support of congressional supremacy.

I must tell you that, while we disagree often, we should do so in an agreeable manner. I can assure you that all legal arguments made by the Committee have a substantial basis in law and fact. In your terse letter, in which you accuse me of "unilaterally compelling a private citizen to violate a federal law," you adopt an unnecessarily strident tone. If uttered on the floor of the House, the words in your letter would likely be unparliamentary as a violation of the rules of decorum during debate. I take seriously my oath to uphold the Constitution and the laws of the United States and would never urge anyone to do otherwise.

I suspect that you did not write a similar letter to Congressman John Dingell when he was the Chairman of the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce. That subcommittee, as you may recall, conducted an investigation of insider trading and related issues. As part of that investigation, the subcommittee obtained from Drexel Burnham, an eighteen page list of partnerships involved in what the subcommittee suspected was a criminal enterprise. That subcommittee subpoenaed tax preparer information for those partnerships and investment entities from Bergman, Knox and Green, an accounting firm that prepared federal tax returns for those entities. I would not ascribe an improper motive to the actions of the subcommittee or Mr. Dingell. In fact, I assume the subcommittee believed it had sufficient legal justification for issuing the subpoena. So do we.

I appreciate the fact that nowhere in your three page letter did you suggest that the subpoena called for anything other than relevant material. If you had relevancy concerns, I'm sure you would have raised an objection when the subpoena was shared with you prior to its issuance. While you take issue with the Committee's legal basis for its request for tax return and financial information relating to Ted Sioeng's family members and business entities, it is clear the information is relevant. Ted Sioeng, his family, and his business interests contributed $50,000 to the National Policy Forum and $400,000 to the DNC during the 1996 election cycle. Sioeng himself also contributed $100,000 to Matt Fong in 1995 and 1996. (I understand that your staff is vigorously investigating a number of these matters.) The Committee has determined that some of these contributions were made, at least in part, with foreign money. The Committee is also examining allegations of Sioeng's ties to the PRC government and his business ventures overseas in an effort to determine how and why the contributions were made.

Based on the records we have reviewed thus far, it seems that funds pass freely and often among various Sioeng-related accounts. The Federal Election Campaign Act makes it illegal for one person to make a campaign contribution in the name of another. It is also unlawful for a foreign national to make a contribution directly or through another person. See 2 U.S.C. §§ 441e and 441f. These are a few of the issues the Committee is investigating and the sources of various political contributions, on which the records we requested may well shine light, are integral to that inquiry.

You contend that Mr. Lam is prohibited from complying with the subpoena based on your analysis of 26 U.S.C. § 7216. The Committee's position is consistent with the long-standing precedents of the House of Representatives, judicial precedent, and accepted terms of statutory construction. Mr. Lam's compliance with the Committee's subpoena would not violate 26 U.S.C. § 7216. Both the House of Representatives and the courts have consistently taken the position that general confidentiality statutes cannot be used to withhold information from Congress, even though the statutes contain no express exemption for Congress. For example, in contempt proceedings brought against former Secretary of Commerce Rogers C.B. Morton, a House subcommittee rejected the contention that a general confidentiality provision of the Export Administration Act warranted withholding documents from Congress. See Contempt Proceedings against Secretary of Commerce Rogers C.B. Morton, Including Hearings and Related Documents before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94 Cong., 1st Sess. (1975). Similarly, the subcommittee rejected the assertion by former Secretary of HEW Joseph A. Califano, Jr. that a general confidentiality provision of the Food and Drug Administration Act applied to Congress, even though it contained an explicit exemption for disclosure to the courts, but no such explicit exemption with respect to Congress. See Contempt Proceedings Against Secretary of HEW Joseph A. Califano, Jr., Business Meeting of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess (1978). In both cases, after being cited by the subcommittee for contempt, the executive branch officials agreed

to produce responsive documents.[1]

The House's position is well supported by judicial decisions. The courts have long recognized that "the constitutional provisions which commit the legislative function to the two houses [of Congress]" inherently include "the power of inquiry— with enforcing process— . . . as a necessary and appropriate attribute of the power to legislate." McGrain v. Daugherty, 273 U.S. 135, 174-75 (1927). Serious constitutional questions would arise if general confidentiality statutes were interpreted to implicitly limit the House's constitutional power to obtain information by compulsory process punishable by contempt. In re Chapman, 166 U.S. 661, 671-72 (1897) ("We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended."); Jurney v. McCracken, 294 U.S. 125 (1935); Seymour v. United States, 77 F.2d 577, 579 (8th Cir. 1935). The courts have therefore consistently refused to interpret such general confidentiality statutes as prohibiting disclosure to Congress. See, e.g., FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 970 (D.C. Cir. 1980) (court held that the FTC cannot deny Congress access to trade secret information based upon statutory provision requiring such information be kept confidential, noting that "the judiciary must refrain from slowing or otherwise interfering with the legitimate investigatory functions of Congress.").

Moreover, it is simply not plausible that Congress intended by silence to limit its own constitutional power to obtain information needed for legislative purposes. When Congress has intended to limit or guide its own constitutional right of access to information, it has done so in a clear and explicit manner. See, e.g., 1 U.S.C. § 112b (providing for the manner in which Congress may have access to certain international treaties); 26 U.S.C. § 6103 (providing for manner in which Congress may obtain tax return information from the IRS). Congress's constitutional right to information may only be restricted by an explicit statutory limitation.

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[1] In the aftermath of the Morton controversy, Congress amended the confidentiality provision of the Export Administration Act to make explicit the availability of information to Congress. 91 Stat. 235, 241 (1977). The House report stated:

> The Committee finds it incomprehensible that Congress intended by section 7(c) to deny itself access to such information as it might later deem necessary for the effective exercise of its legislative and oversight responsibilities. . .
>
> This amendment should not be necessary. It is made necessary only by the decision of the executive branch to interpret section 7(c) in a manner inconsistent with the intent of Congress. The Committee presumes that the rights of Congress reaffirmed by this amendment already exist and would exist without this amendment. The addition of this language to this statute is not meant to imply that the absence of similar language in other statutes in any way limits the right of Congress to acquire information.

H.R. Rep. No. 95-190, 95th Cong., 1st Sess. 17 (1977).

There is no explicit restriction in § 7216.

The legislative history of 26 U.S.C. § 7216 is devoid of any indication it was intended to limit congressional access to information. The provision was designed to prohibit misuse of confidential information by tax preparers, not to prevent compliance with congressional subpoenas. Although the statute contains an explicit exemption for "court orders," there is no basis for concluding that the statute was intended to require that congressional committees seek a court order to enforce their subpoenas. Given the fact that § 7216 does not prevent a tax preparer from complying with a court order, administrative order, demand, summons or subpoena from "[a]ny Federal agency, or [a] State agency, body or commission charged under the laws of the State or a political subdivision of the State with the licencing, registration, or regulation of tax return preparers," 26 C.F.R. § 301.7216-2 (c)(3), it would be absurd to read the statute as preventing compliance with a congressional subpoena authorized by the Constitution as "an essential and appropriate auxiliary to the legislative function." McGrain v. Daugherty, 273 U.S. 135, 174-75 (1927).

In addition to your contentions concerning the reach of § 7216, you opine that the only way a congressional committee may lawfully obtain tax related information is under 26 U.S.C. § 6103. I see no support for your position in the text of § 6103. That provision only applies to obtaining tax returns from the Internal Revenue Service, not to subpoenas directed to other parties; therefore, it is inapplicable to this situation. See St. Regis Paper Co. v. United States, 368 U.S. 208, 219 (1961) ("[A]lthough tax returns . . . are made confidential within the government bureau . . . , copies in the hands of the taxpayer are held subject to discovery.")

Lastly, you requested that I schedule a business meeting so that the full Committee could consider your various concerns. I would point out that the attorney for Mr. Lam became aware of your position and wrote majority counsel that he was withholding any determination of whether to comply with the Committee's subpoena pending the outcome of the Committee meeting that you requested. As I suspect you know, the attorney's advice could subject Mr. Lam to criminal contempt.

There is no House or Committee rule necessitating calling a collegial meeting of the Committee on the issues you have raised. Any concerns, evidentiary or otherwise, are not ripe for consideration; therefore, there is no question for the Committee to decide. I understand that your staff has consulted the Committee's parliamentarian and the House parliamentarian and now agree with this position.

Please note that because counsel for Donald Lam became aware of your request for a Committee meeting, I will send him a copy of this letter.

Sincerely,

Dan Burton
Chairman

cc: John Walsh, Esq.